

FCC ORDER BANS “EXCLUSIVE” VIDEO SERVICE CONTRACTS

On November 13, 2007, the Federal Communications Commission (FCC) issued an order confirming an October announcement that the agency would ban the enforcement of exclusivity clauses in existing video service contracts. An exclusivity clause is a contract term giving a provider, usually a cable company, the exclusive right of access or the exclusive right to provide video service in a community. As written, the order may affect community associations across the country.

This alert provides you with basic information about the order, how it may impact your community, and what further developments to expect in the months ahead. The order is the result of a request for comments solicited by the FCC earlier in 2007. CAI submitted [comments](#) opposing this action. We argued that community associations are democratically governed organizations, capable of making their own judgments about the benefits provided by exclusive agreements (such as lower rates and commitments for service upgrades).

Under the order, certain video service providers¹ are prevented from enforcing exclusivity provisions found in contracts with Multiple Dwelling Units² (MDUs). This applies to both existing and future contracts. The prohibition on enforcing exclusivity agreements applies to the provision of video programming services only, and is not contingent on whether the services are provided alone or as part of a bundled contract with other services.

CAI is currently examining the legal basis of the ruling and, in consultation with other affected organizations, will analyze options in this matter in the weeks ahead. For more information, please see the attached Q&A; background on the October 31, 2007 order can be found on CAI's [Heads-Up](#) page.

We will have more to report in the weeks ahead.

¹ The order applies to entities subject to 47 U.S.C. section 548. That statute applies to cable operators, telephone common carriers, and open video system operators. Providers of Direct Broadcast Satellite services and “private cable operators,” which are companies that provide video service without using local rights-of-way, are not covered by the statute or by the new FCC order.

²For purposes of the order, the term MDU includes any multiple dwelling unit building (such as an apartment building, condominium building or cooperative) and any other centrally managed residential real estate development (such as a gated community, mobile home park, or garden apartment). The term does not include time share units, academic campuses and dormitories, military bases, hotels, rooming houses, prisons, jails, halfway houses, hospitals, nursing homes or other assisted living facilities.

QUESTIONS AND ANSWERS ON THE FCC ORDER

November, 2007

What is the FCC Order on “Exclusive Service Contracts”?

The “Exclusive Service Contracts Order,” FC-07-189, issued by the Federal Communications Commission (FCC) on Nov. 13, 2007, bans cable operators and certain other multi-channel video programming distributors from enforcing exclusivity clauses contained in agreements with multiple dwelling units (MDUs). The definition of MDU includes condominiums, co-ops, gated communities, and other centrally managed residential real estate developments. Providers of Direct Broadcast Satellite service and so-called “private cable operators” (which do not use local rights-of-way) are not covered by the order.

The order does not apply to telephone or Internet services, exclusive marketing agreements, bulk billing arrangements, or agreements granting the exclusive right to use wiring inside a property. The FCC has announced, however, that it intends to consider whether exclusive marketing agreements or bulk billing arrangements should be covered, as well as whether additional classes of providers should be subject to the order as well.

Does an MDU include homeowners associations and communities of single-family homes?

Yes. The order applies to contracts with any “centrally managed residential real estate development.” If a homeowner’s association has entered into an agreement for the provision of video service on behalf of its residents, that agreement could be affected, even if the community consists only of single-family homes. If a community is not governed by a homeowners association or other type of central management, it is not affected.

What is a video programming service?

“Video programming” means programming provided by, or generally considered comparable to programming provided by, a television broadcast station. The service most commonly provided by a cable operator is a video programming service.

How does the FCC order impact my community?

The order prevents video service providers from enforcing exclusivity clauses in agreements with community associations. The order will not become effective until 30 days after it has appeared in the *Federal Register*, which has not yet occurred. Once it becomes effective, the order will render unenforceable any provision giving a cable operator, a telephone company that provides video service, or an open video system operator the exclusive right to provide video services to a community, condominium, or co-operative. The order will apply even if the provision of video services is part of a bundle of services offered, such as phone, cable, and internet.

This does not mean your association's current contract is terminated because the order applies only to specific clauses. If a contract includes a severability clause that keeps the contract in place even if certain provisions are struck down by changes in the law, the remaining terms of the contract will most likely remain enforceable. If the contract does not contain a severability clause, the enforceability of the rest of the contract may be in question.

As a board member or manager, what are my obligations related to this order?

If your association's contract for video services is covered by the FCC's order, your service provider may no longer enforce any exclusivity provisions found in the contract. This may mean that the association can seek additional providers or alternative sources for such services. As contract obligations will vary, it is important to review the provisions on your contract with qualified counsel for an accurate and legally reliable assessment of your rights and obligations.

What, if anything, should my association do while we await the official publication of the FCC order? Should we take any initial steps to be prepared?

Associations with contracts that contain exclusive service provisions may want to review the contract provisions contained in their agreement and seek advice of counsel on how the order, if implemented, would affect their contractual obligations. As mentioned, the order only affects the enforceability of exclusivity clauses and does not necessarily void the service contract as a whole. Again, as contract provisions will vary, qualified counsel can provide a legally reliable assessment of your rights and obligations.

Should we be communicating with our owners at this point?

The issues related to the FCC order can be confusing and technical. Association boards, after assessing the impact (if any) to existing contracts, may want to begin planning an announcement to release when the order is published and an effective date is known.

Does this order require our community to allow installation of other types of communications infrastructure?

The order does not impose any obligations on community associations, nor does it grant any kind of right of entry to a competing video provider. Associations remain free to negotiate with potential competitive providers. They are, however, precluded from granting exclusive access for other benefits. It is also worth noting that the FCC does not claim to be regulating property owners or community associations themselves, but instead, states that it has merely banned a practice common in the cable industry.

In general, is this order helpful or harmful to community associations?

That remains to be seen. CAI believes - and data suggests - that a community's ability to enter into exclusive contracts with video service providers allows communities to bargain for and negotiate bulk rates for members. Additionally, since many community associations are developed at the edge of urban areas, such contracts provide an incentive for video service operators to extend expensive infrastructure into newly developed areas. The full impact on competition and pricing in community associations will emerge in time if this order is fully implemented.

What are the next steps?

CAI is meeting with other affected organizations to review and assess the best and most effective options related to this order. Further alerts and reports will follow in the weeks ahead, and will be posted on [Heads-Up](#) under the Government Affairs section of the CAI website.