May 26, 2009

MEMORANDUM TO CLIENTS

Re: D.C. Circuit Upholds FCC Order Banning Exclusivity Provisions in Contracts for the Provision of Video Services to MDUs

The United States Court of Appeals for the District of Columbia Circuit has upheld the Federal Communications Commission's 2007 *Report and Order* ("*R&O*") banning exclusivity provisions in both existing and future contracts for the provision of video services to multiple dwelling units ("MDUs") and other real estate developments. The *R&O* had specifically prohibited both the creation and enforcement of "building exclusivity" clauses that would deny another multichannel video programming distributor ("MVPD") from accessing the premises of the MDU.

In an unprecedented analysis, the Commission had cited Section 628 of the Cable Act as the primary source of its authority to adopt the ban. That section bars cable operators from engaging in "unfair methods of competition or unfair or deceptive acts or practices" that have the purpose or effect of preventing or significantly hindering competing MVPDs from providing satellite programming to subscribers. Although this provision generally has been viewed as directed towards MVPD access to *programming*, the Commission adopted a much more expansive reading of the provision to conclude that Section 628 also applies to MVPD access to *consumers*.

In rejecting a challenge to the decision by the National Cable & Telecommunications Association and a coalition of real estate interests, the Court held that the Commission's adoption of the order was consistent with both the statutory language as well as general principles of administrative law. With regard to Section 628, the Court held that the Commission's *R&O* fell within the bounds of the statutory language. The Court explained that the statutory language of Section 628 is broadly written, permitting the Commission wide latitude to craft regulatory proscriptions of anticompetitive behavior. The Court explained that the broad statutory language allows the Commission to prohibit exclusive contracts in the MDU context, even though the statutory text, structure and legislative history indicate that Section 628 was adopted with entirely different behavior in mind.

The Court also held that the adoption of the exclusivity ban was consistent with administrative law principles generally. The Court explained that the Commission was entitled

to adopt the ban in 2007, even after refusing to do so in 2003, because the agency articulated "the concerns driving its change in policy," provided sufficient reasoning and supplied adequate evidence on the record to support its actions.

Finally, the Court upheld the Commission's retroactive application of the ban to contracts entered into prior to the ban's adoption. The Court explained that the ban actually only has "future effects" as it only alters present and future situations, and does not render past actions illegal or otherwise legally sanctionable. The Court further dismissed any concern that some parties will have their expectations (as expressed in their prior contracts) upset by the ban, explaining that those expectations were already minimal in that the Commission has been publicly considering adopting such a ban for almost a decade.

This decision should cause concern on many levels. First, the Court's sanctioning of the Commission's broad reading of Section 628 leaves the Commission with potentially unlimited power and freedom to adopt regulations to proscribe actions by cable operators found to have the "purpose or effect" of hindering competition. Further, the decision suggests that the Commission will have wide latitude to apply new regulations retroactively to abrogate contracts and other business arrangements that were lawful when executed.

The petitioners will now have the option of appealing the decision to the entire D.C. Circuit *en banc* or to the Supreme Court, neither of which will necessarily be obliged to hear such an appeal. It is unclear at this time whether the petitioners intend to do so.

We would be pleased to respond to any questions regarding this matter.

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