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FCC DECISION SIGNALS THE END OF EXCLUSIVITY CLAUSES IN CABLE CONTRACTS

On November 13, 2007, the Federal Communications Commission (“FCC”) issued a Report and Order (“Order”) that declared “building exclusivity” clauses between cable operators and owners of multiple dwelling units (MDUs) null and void. MDUs include condominium projects, apartments, and other “centrally managed real estate developments,” which may include planned unit developments.

The Order only applies to cable operators (as opposed to satellite providers) and only applies to a certain types of exclusivity clauses, “building exclusivity” clauses, which prohibit any other multichannel video programming distributor (“MVPD”) from “any access whatsoever to the premises of the MDU building or real estate development.” The FCC determined that any agreement between a common interest development and a cable company (such as Comcast or Astound) that purports to give the cable company the exclusive and sole right to provide cable services in the company is unenforceable.

While the Order raises more questions than it answers, it does signal a potentially significant shift in FCC policy towards ensuring that all consumers have an opportunity to choose their own television service provider. The Order also includes a Further Notice of Proposed Rulemaking (“FNPRM”) seeking comment on whether the FCC should take action to address exclusivity clauses entered into by direct broadcast satellite providers, private cable operators, and other MVPDs, other than cable operators. Additionally, the FNPRM seeks comment on whether other types of exclusivity agreements, such as “wire exclusivity” clauses (which prohibit other MVPDs from using existing wires installed pursuant to an exclusivity agreement, usually with the developer) and “marketing exclusivity” clauses (which prohibit the owner of the MDU from marketing the services of another MVPD within the development). An order addressing these issues is expected soon. We will continue to keep our clients advised of any additional orders issued by the FCC on this topic.

We have had some success in negotiating with cable companies in terminating exclusivity agreements, even those for “wire exclusivity,” in light of the trend prohibiting exclusivity clauses. We have also had success in negotiating with satellite providers to terminate exclusivity agreements. Satellite providers have expressed to us that they believe it is only a matter of time before the FCC prohibits all exclusivity clauses between MVPDs (of any type) and MDUs (of any type). If your association is party to an exclusivity agreement that it wishes to terminate, please feel free to contact us for assistance.