

Federal Communications Commission Issues Order Prohibiting Execution and Enforcement of Exclusive Access Contracts for Telecommunications Service in Primarily Residential Multiple Tenant Environments

By Report and Order (“*Order*”) dated March 21, 2008, the Federal Communications Commission (“FCC” or “Commission”) adopted rules prohibiting common carriers from entering into new contracts or enforcing existing contracts which give carriers exclusive access to primarily residential multiple tenant environments (“MTEs”) for the provision of telecommunications service. “Exclusivity contracts” between common carriers and owners of primarily residential MTEs are those that restrict, or essentially restrict, the owners from permitting other common carriers to access the MTE to provide telecommunications service to the tenants. The prohibitions apply to all common carriers and become effective 60 days after the *Order* is published in the Federal Register. This decision complements a similar Order of the Commission in 2000 to prohibit common carriers from entering into or enforcing “exclusivity contracts” with owners of *commercial* MTEs.

The Commission defines MTEs as “any contiguous premises under common ownership or control that contains two or more distinct units occupied by different tenants.” Consequently, MTEs include, but are not limited to, “apartment buildings (rental, condominium, or co-op), office buildings, office parks, shopping centers, and manufactured housing communities.” The *Order* excluded hotels and other similar establishments from the residential MTEs to which the prohibition applies, because the tenants tend to be transient and a prohibition would not bring the same competitive benefits that permanent MTE residents are expected to receive as a result of the ban.

Whether or not an MTE is primarily residential is determined by the MTE’s predominant use. The Commission acknowledged that some MTEs are used for both commercial and residential use, but as a result of the prior prohibition on the use of exclusivity contracts in commercial MTEs, the combined effect of the previous Order and the current *Order* is to prohibit the use of exclusivity contracts in virtually all MTEs.

The FCC emphasized that its *Order* applies only to carriers that are seeking to execute or enforce exclusivity contracts and does not require owners to provide access to residential or other MTEs.

THE COMMISSION FOUND THAT THE COMPETITIVE HARMS RESULTING FROM EXCLUSIVITY CONTRACTS OUTWEIGH THEIR BENEFITS

The Commission was concerned that exclusive contracts harmed competition in the telecommunications market. In particular, the FCC found that exclusive contracts negatively impact the provision of competitive “triple play” services – the provision of telecommunications, video, and broadband services – by reducing the ability of multiple providers to compete for MTE tenants, resulting in high prices and fewer competitive choices. For these reasons, the exclusivity contracts were found to be unjust and unreasonable practices under Section 201(b) of the Act. The Commission also noted that the *Order’s* ban furthers the Section 706 mandate of increasing the availability of advanced services.

THERE WILL BE NO PHASE-OUT PERIOD FOR THE EXCLUSIVE CONTRACT PROHIBITION

The Commission explicitly rejected calls that it either establish a phase out period or wait for existing contracts to expire before enforcing the new ban. The Commission concluded that delaying the effective date would allow competitive harms to continue, that exclusivity contracts could interfere with a carrier's "carrier of last resort" obligations, and that there was an absence of evidence that a ban would especially disadvantage small carriers. Further the Commission found that, in light of its 2000 ruling that exclusive contracts are unreasonable in the context of commercial MTEs and the regulatory debates regarding residential MTEs in the intervening years, carriers have been on notice that exclusive contracts might be found unreasonable and prohibited with respect to residential MTEs.

POLICY AND LEGAL AUTHORITY FOR THE COMMISSION'S ORDER

Citing findings in its year 2000 *Competitive Networks Order and Further Notice*, which preceded the instant *Order*, the Commission found it has "ample authority" to prohibit exclusivity contracts for telecommunications services in residential MTEs, relying principally on two grounds.

First, the Commission found that exclusivity contracts hinder the goals of "facilitating competitive entry, lower prices, and more broadband deployment" and relied on its authority under Section 201(b) of the Act to declare the execution and enforcement of the contracts to be unreasonable practices. The Commission recognized that residential MTE owners themselves are not subject to FCC regulation but cited a federal appellate decision for the authority to regulate contracts between common carriers and other entities, despite the jurisdictional limits.

Second, the Commission noted that it has authority to modify private contracts when necessary to serve the public interest, consistent with its mandates, and had used this authority on previous occasions when it found contracts violated Sections 201 through 205 of the Act. The Commission explained that exclusivity contracts contravened the public interest by perpetuating competitive barriers that the Act was designed to eliminate.

The Commission dismissed concerns that prohibiting the enforcement of existing contracts would constitute a taking under the Fifth Amendment to the Constitution. The FCC noted that the prohibition allows carriers that had entered into exclusive agreements to use their equipment to provide services to MTEs and maintain other types of arrangements such as preferred or exclusive marketing arrangements.

Please be advised that attorneys in Kelley Drey & Warren's Telecommunications Practice Group are experienced in assisting clients before the Commission on almost all issues, including contracts relating to MTE access. We are available to assist clients with developing strategies to address issues contained in this advisory.

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