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Exclusivity Agreements between Cable Companies, Multi-Unit Developments Banned

***National Cable & Telecommunications Association* v. *Federal Communications Commission*, No. 08-1016, 08-1017, U.S. App. Ct., Columbia Circuit, May 26, 2009**

Federal Law and Legislation: A U.S. appeals court upheld the FCC's order banning exclusive contracts for video services in multiple dwelling units.

Finding that exclusivity agreements between cable companies and owners of apartment buildings and other multi-unit developments ("MUDs") have an anti-competitive effect on the cable market pursuant to Sec. 628(b) of the Communications Act ("Act"), the Federal Communications Commission ("FCC") banned them. The FCC not only forbade cable operators from entering into new exclusivity contracts, but also from enforcing old ones.

The FCC believes that these contracts, which involve a cable company exchanging a valuable service, like wiring a building for the exclusive right to provide service to the residents, may be regulated under Sec. 628 of the Act as cable company practices that significantly impair the ability of their competitors to deliver programming to consumers.

The National Cable & Telecommunication Association, representing cable operators and apartment building owners, petitioned the U.S. Court of Appeals for review of the FCC's order and argued that the FCC exceeded its statutory authority, arbitrarily departed from precedent, and otherwise violated the Administrative Procedure Act ("APA"). The association claimed that the FCC failed to justify its change in policy and to consider the retroactive effects of its action.

After careful consideration, the court concluded that the FCC acted well within the bounds of the Act and general administrative law.

The association argued that Congress was not concerned with barriers to service, but with practices that prevent cable competitors from obtaining certain kinds of programming desired by the public when it enacted Sec. 628. The FCC asserted that statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws, rather than the principal concerns of our legislators, by which we are governed.

Mindful of the broad language of the statute and the fact that its express purpose is to promote the public interest by increasing competition and diversity in the multichannel video programming market, the court concluded that, although the primary purpose for Sec. 628 was to expand competition for programming, nothing in Sec. 628(b) unambiguously foreclosed the FCC's interpretation to permit regulation of exclusive service agreements.

The court further found that the FCC was broadly authorized, pursuant to 47 U.S.C. Sec. 548, to "prescribe regulations to specify particular conduct that is prohibited by subsection (b)," "prescribe regulations to implement the statute" and to "order appropriate remedies." The court's view of Sec. 628's structure was that Congress had a particular manifestation of the problem, but in no way expressed an intent to limit the FCC's power solely to that interpretation of the problem. Although the association pointed to considerable evidence that Congress was specifically concerned with unfair dealing over programming, it offered no evidence from the legislative record to show that Congress chose its language so as to limit the FCC solely to that particular abuse of market power.

For its primary APA claim, the association argued that in deciding to bar exclusivity contracts, after affirmatively permitting them in 2003, the FCC failed to explain its change of heart and, thus, acted arbitrarily and capriciously. The court agreed that a government agency must either be consistent with prior action or offer a reasoned basis for its departure from precedent. Yet, the court reasoned it is equally true that an agency is free to change its mind when a showing is made that "prior policies and standards are being deliberately changed, not casually ignored." *Greater Boston Television Corp. v. FCC,* 444 F.2d 841, 852 (D.C. Cir. 1970).

The court believed that the association failed to give the FCC credit for its extensive analysis of the issue. The court noted that rather than merely observing that exclusivity contracts could theoretically have both pro-competitive and anti-competitive effects, in 2007 the FCC extensively analyzed the question and concluded that the damages caused by exclusivity contracts significantly outweighed the benefits, and that these kinds of agreements would likely, "raise prices, limit access to certain programming, and delay deployment of fiber optic and broadband technologies." Its analysis indicated that, "triple-play competition between phone and cable providers lowers prices, spurs deployment of advanced technology, and facilitates

efficiency and simplicity in the market." *Order,* 22 F.C.C.R. at 20,243-51.

Moreover, the court noted that the FCC fully considered contrary comments. Specifically, it acknowledged the view that exclusivity contracts might spur investment by allowing cable operators some certainty that they could recoup their costs or might enable MUD residents to pool their bargaining power and, thus, extract cable company concessions. In the end, however, it rejected these arguments because the MUD owners' interests would not always be the same as those of the residents, and exclusivity contracts might have existed before competition even existed. It reasoned that the practical reality would not substantiate the theoretical benefits.

The court determined that the FCC clearly articulated the concerns driving its change in policy, as well as the basis for the new, reasonable inferences the FCC drew from a significantly updated record, and this marked the limits of its review.

The final issue presented by the association in its petition concerned the FCC's decision to apply its rule to existing contracts. The association argued that this amounts to, "directly retroactive" action barred by the APA's requirement that, "legislative rules . . . be given future effect only." First, the court thought it readily apparent that the FCC's action has only "future effect" as that term is used in the APA. It found that, here, the FCC, "had impaired the future value of past bargains, but had not rendered past actions illegal or otherwise sanctionable." The fact that a company might conduct its business in accordance with the current law and be frustrated when the law changes, is not a legitimate basis for forbidding retroactive rules.

In the court's opinion, the FCC balanced the benefits against the harms and expressly determined that applying the rule to existing contracts was worth the costs of upsetting prior expectations or existing investments.

In sum, the court found that the challenged order was fully authorized by Sec. 628 and was the product of careful agency consideration. The petitions for review were denied.

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