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FCC Further Extends Exclusivity Rules – Releases Order Banning Exclusive Contracts Between Telecommunications Providers and Residential Building Owners

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On March 21, 2008, the Federal Communications Commission released the full text of a **Report and Order** adopted on March 19, 2008 which summarily prohibits telecommunications providers from entering into exclusive contracts to provide service in Multitenant Environments (“MTEs”). Previously, the Commission had only banned such exclusive deals for service in commercial, or predominantly commercial MTEs.

The **Order** piggybacks a similar order adopted by the Commission on November 13, 2007, which banned such deals between multichannel video programming distributors and owners of Multiple Dwelling Units. Both orders take the unprecedented action of voiding existing exclusive contracts between providers and owners of MTEs as the order applies retrospectively to existing contracts as well as any future agreements. The highlights of the **Order** are as follows:

- The **Order** bans exclusive contract provisions in agreements between telecommunications providers and MTEs which serve exclusively or predominantly residential customers. Thus, any conceivable type of MTE is now addressed by the Commission’s rules.
- The **Order** applies retrospectively, and prohibits the use and enforcement of existing exclusive contracts, declaring such contracts null and void 60 days after publication of the **Report and Order** in the *Federal Register*.
- The **Order** discusses both the policy basis and legal authority to prohibit such exclusive agreements. Specifically, the Commission found such practices “unreasonable” under Section 201 of the Communications Act of 1934, as amended, and noted that the D.C. Circuit has held the Commission to have the authority to regulate in this manner.

Interestingly, the Commission also utilized one paragraph of its **Order** to entertain a Fifth Amendment analysis that its action did not constitute an unconstitutional regulatory taking. Similar to the actions taken in the November 13, 2007 order, the FCC relied on its “ancillary jurisdiction” to take sweeping regulatory action. However, its limited analysis may not be sufficient to withstand challenge by telecommunications providers and MTE owners.

This **Report and Order**, along with the November 13, 2007 **Order** mark a dramatic shift in Commission policy as the Commission concluded that the harms of exclusive contracts between MTE owners and providers outweighed any potential benefits to consumers and that the new rules will increase choice and competition for consumers residing in MTEs and other real estate

developments. The *Report and Order* similarly rejected the potential benefits of exclusivity clauses as insignificant.

If you have any questions or need additional information, please contact Mark Palchick (mpalchick@wcsr.com), Pam Rothenberg (prothenberg@wcsr.com) or Danielle Benoit (dbenoit@wcsr.com).

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