

Home-Run Wiring and Cable or Satellite Service in Multi-Family Dwellings — Recent FCC Interpretations Seek Greater Competition

By Todd Sinkins, ESQ.

In 1992, Congress adopted the Cable Television Consumer Protection and Competition Act, which required the Federal Communications Commission (FCC) to write rules to foster competition among cable television and other multi-channel video programming distributors (MVPD). As a result of this legislation, the FCC promulgated regulations governing the rights of MVPD's to any "home-run wiring" that is owned by a MVPD in a multi-family building such as a condominium, cooperative, or apartment building. Home-run wiring is the cable or other similar wiring that runs from the "cable wiring" demarcation point outside a unit to the junction box or pedestal inside the multi-family building. The demarcation point is typically a point located 12 inches outside where the cable wire enters the individual dwelling unit (if the demarcation point is physically inaccessible due to structural components of the building, the demarcation point can be a further than 12 inches from the unit).

Historical Rules

Under the FCC regulations, a cable or satellite television provider traditionally has an exclusive right to provide video programming to a condominium or cooperative

building. Similarly, a cable or satellite television provider has possessed a right to exclusively use any home-run wiring that is installed or otherwise owned by the cable or satellite television provider. Installation agreements with a cable or satellite dish provider typically would provide that the home-run wiring installed by the cable or satellite television provider is owned by such provider. The actual ownership of this wiring, however, may vary depending upon the language of such agreements.

The FCC rules have been important to community associations when the association has had to make a decision to terminate an existing agreement with a satellite or cable television provider that has been providing video programming service to a building. In those circumstances, if the satellite or cable television provider owns the home-run wiring, the provisions of 47 C.F.R. § 76.804(b) will govern the subsequent disposition of wiring at the termination of the agreement with the satellite or cable television provider.

In short, the FCC rules provide the owners or operators of multi-unit dwellings with the power to force outgoing cable or satellite dish providers to either: (1) allow third party providers to use certain wiring

(the home-run wiring); or (2) to establish their ownership rights of the same wiring. Specifically, the rules provide the following procedures:

First, the owner or operator of the multi-unit building provides a notice to the incumbent cable provider demanding that the incumbent provider elect to sell, abandon, or remove the home-run wiring. The community association can make the request on a unit-by-unit basis or on a building-by-building basis, if the board of directors so desires.

Second, within 30 days of such notice, the incumbent provider must elect how it will dispose of the wiring (i.e., sale, abandonment, or removal) whenever an owner informs the incumbent provider of their intent to allow a third-party service provider to use the wiring. Since the cable television provider would typically incur great costs to remove the equipment, this election is rarely made. It is more likely that the incumbent provider will typically either abandon the wiring or sell it to the association or a third party provider.

If the outgoing video provider does not elect to sell, abandon, or remove the wiring within the 45 day period provided for under the FCC rules, it would have an additional

15 days to seek a court order to reaffirm its interest in the wiring. If the outgoing video provider fails to take any action with respect to the wiring within 45 days of the notification date, it would be deemed to have waived any ownership interest in the home-run wiring and the community association could contract with a third party to provide alternate video services to the association using the existing home-run wiring.

Recent Liberalization of Rules

Earlier this year, the FCC, in a ruling dated May 31, 2007, interpreted its existing rules in a manner that now permits competing video providers to have access to existing, installed wiring if the demarcation point is inaccessible. In its ruling, the FCC concluded "...that wiring installed by incumbent video providers behind sheetrock is physically inaccessible under our rules for determining the demarcation point between home wiring and home-run wiring. Our ruling will help spur competition among video distributors in [multi-dwelling units] by making existing cable wiring available

to alternative providers at a point that is not physically difficult and costly to reach."¹

Under the May 31, 2007 ruling, alternative video (and telephone) providers are now permitted to use existing cable wiring and sub-loops installed or otherwise owned by a video provider that is currently providing service to the condominium or cooperative. Accordingly, the new, alternative provider will no longer have to cut through walls to connect new cable lines inside the unit, and will be able to use existing wiring installed or otherwise owned by the existing video service provider. Under these new rules, competing video providers are now permitted to use home-run wiring owned by an existing video provider in condominiums and cooperative buildings at the terminal block in order to install an alternative video programming service.

These new rules will make it much easier for condominium and cooperatives to contract to allow alternative video providers to provide service to their community. Indeed, at the time the FCC issued its ruling, FCC chairman Kevin Martin

said, "Today we take an important step to facilitate competition in both markets by addressing the ability of new competitors to use the internal wiring of both incumbent telephone and cable operators in a consistent fashion."²

For the first time, condominiums and cooperatives can provide their members with alternative programming options without concern for whether an alternative provider must install its own wiring and infrastructure, which can be very expensive to the association.

More recently, on October 31, 2007, the FCC adopted a "Report and Order" that bans the use of exclusivity clauses for the provision of video services to multi-family dwellings and other real estate developments, such as a homeowners association.³ According to the October 31, 2007 FCC press release, the "Report and Order" found that the use of exclusivity clauses in contracts for the provision of video services to multi-family dwellings constitutes an unfair method of competition or an unfair act or practice as defined by FCC regulations.⁴

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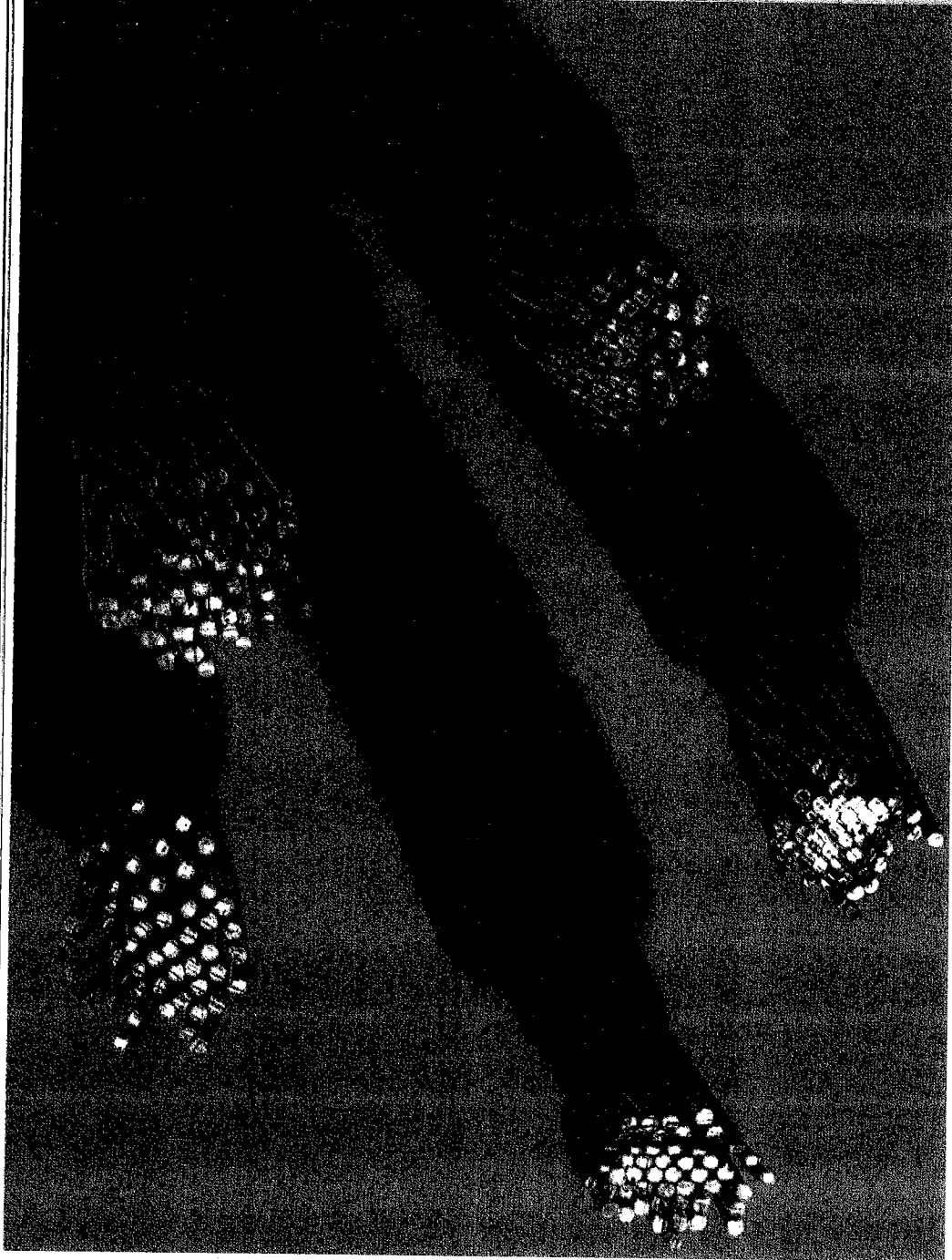
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the market, associations should proceed with extreme caution when negotiating agreements with video providers. If an association is approached by a cable or satellite television provider to enter into an agreement to provide bulk service video programming, an association should engage in a thorough review of the FCC rules and consult with counsel to evaluate whether the proposed arrangement is proper under existing FCC rules or may be invalidated in the near future based on the FCC's expressed intent to adopt rules to prohibit exclusive marketing and bulk billing arrangements. 

¹ In the Matter of Telecommunications Services Inside Wiring Customer Premises Equipment, Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Cable Home Wiring; Clarification of the Commission's Rules and Policies Regarding Unbundled Access to Incumbent Local Exchange Carriers' Inside Wire Subloop, (Report and Order and Declaratory Ruling of the Federal Communications Commission dated May 31, 2007).

² Statement of Chairman Kevin J. Martin, (FCC 07-111 dated May 31, 2007).

³ FCC Adopts Rules to Increase Choice and Competition Among Video Providers for Consumers Residing in Multiple Dwelling Units, FCC Press Release (October 31, 2007).

⁴ Please note that DC and Virginia law already prohibit video programming contracts that provide a single provider with the exclusive right to provide video programming services to an association or multi-family dwelling.

As a result, the "Report and Order" prohibits the enforcement of any existing exclusivity clauses and bans any future exclusivity clauses in video programming contracts. While the "Report and Order" does not currently ban contract provisions that establish exclusive marketing rights or bulk billing arrangements with video providers, the FCC also announced that it is adopting a "Further Notice of Proposed Rulemaking" to obtain comments on whether the FCC should prohibit exclusive marketing and bulk billing arrangements with video providers. If the FCC adopts rules prohibiting exclusive marketing and bulk billing arrangements with video providers, it will dramatically change the contractual relationships between community associations and video providers.

At this time, it is not clear whether the video programming industry will challenge the validity of these new regulations. If a lawsuit is filed to overturn the new FCC regulations, it will be some time before the community association industry will have a firm grasp on whether open competition is here to stay. What is clear from the May 31 and October 31, 2007 orders from the FCC is that the FCC is actively regulating the cable and satellite television industries to restrict or prohibit agreements that reduce the choices of individual owners or creates a financial disincentive for owners to obtain a different video programming service than that which may be available through an agreement between a video provider and the association.

Therefore, in this period of uncertainty in

