

City of Seattle

Office of Cable Communications



Cable and Telecommunications Service Contracts For Multiple Dwelling Unit Buildings – Understanding Local and Federal Law

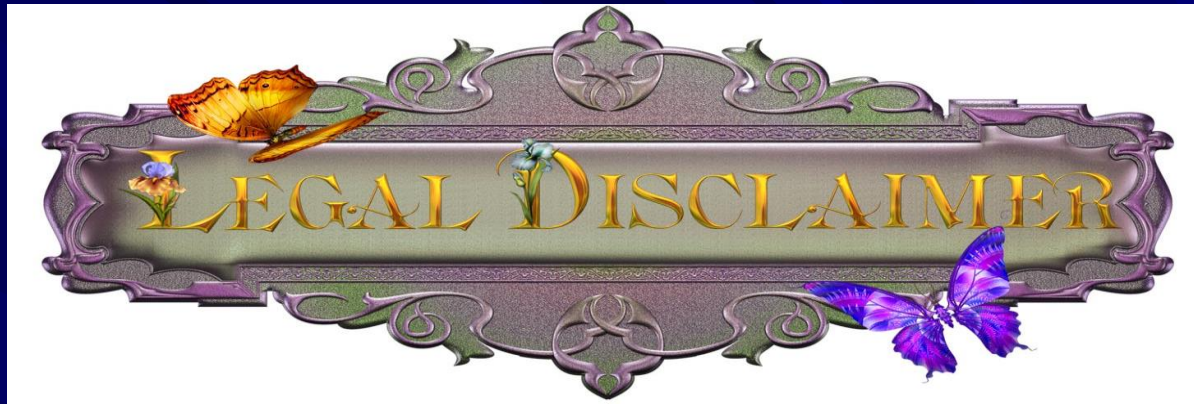
April 27, 2015

Ken Fellman

Kissinger & Fellman, P.C.

www.kandf.com





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New Seattle City Code Provisions



Multiple dwelling unit buildings. The grantee shall ensure that rates charged by the grantee to residents of multiple dwelling unit buildings do not exceed the charges paid by residents of single family homes. The grantee may not condition provision of services to multiple dwelling unit buildings on any requirement not imposed on other subscribers, except as expressly permitted in the franchise. The grantee may not condition provision of services to multiple dwelling unit buildings on an exclusive service agreement with grantee....

New Seattle City Code Provisions



Multiple dwelling unit buildings....The grantee may offer a building owner the option of a long-term agreement in return for installation of internal wiring or other telecommunications improvements unique to the building, but the grantee must offer the alternative of a no term agreement to building owners who wish to contract directly for installation by a contractor approved by the grantee and in accordance with the grantee's generally applicable technical standards. The foregoing does not restrict, condition, or inhibit the grantee's ability to negotiate longer-term right of entry agreements prior to offering service to multiple unit building residents for the purpose of maintaining grantee's on-site signal and facilities. For purposes of this subsection 21.60.820.F, a "right of entry agreement" means an agreement that permits the grantee access to the building to extend its distribution cable from the grantee's cable system in the right-of-way or public easement to the utility closet or other demarcation point in the multiple unit building.

New Seattle City Code Provisions (in short)

- Cannot charge MDU customers different prices for same services charged to residents of single family homes
- Cannot condition service to MDU on subscriber requirements that are not imposed on other subscribers (unless franchise allows)
- Exclusive service agreements prohibited
- Long term agreements for building access ok if building owner receives telecom improvement consideration AND also offers no-term agreement where building owner contracts for its own telecom improvements
- Long term right of entry agreements ok, allowing service provider to maintain its on-site signal and facilities



New Seattle City Code Provisions

- How do new City Code provisions interact with applicable federal and state law on building wiring and MDU contracts?
- Who is the provider – cable (video), broadband Internet, both?
- What are the terms of the contract between the provider and the property owner?



Know Your Current Rights

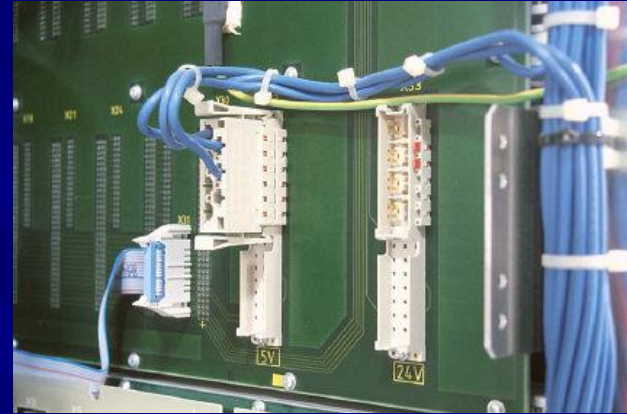
- Important that MDU owners and residents become familiar with terms of original development documents regarding wiring within the MDU structures for voice/video/data (Internet)
- Some MDU developments provide for unit owners to own cable home wiring from time of original ownership
- Agreements may also provide that MDU owner is owner of home run wiring
- In many cases however, voice/video/data provider may have obtained ownership of original home run wiring and/or cable home wiring
- In these cases, FCC rules describe how wiring is addressed when service provider ceases to provide service within the development

FCC's Cable Inside Wiring Rules



- Cable home wiring
 - facilities on the subscriber's side of the demarcation point
- Home run wiring
 - facilities on the service provider's side of the demarcation point

- While individual subscribers may own wiring in their units, the cable operator (or other service provider) may control the distribution network outside of each unit



- Therefore, if a competitive service provider wishes to serve residents in an MDU, it must gain access to the subscriber's home wiring by either deploying its own network or obtaining the right to use the existing home run wiring

Definitions

■ “Cable Home Wiring” is “[t]he internal wiring contained within the premises of a subscriber which begins at the demarcation point. Cable home wiring includes passive splitters on the subscriber's side of the demarcation point, but does not include any active elements such as amplifiers, converter or decoder boxes, or remote control units. 47 C.F.R. § 76.5(11)



■ “Home Run Wiring” is the wiring from the demarcation point to the point which the MVPD’s wiring becomes devoted to an individual subscriber or individual loop. 47 C.F.R. §76.800 (d).



Definitions (cont.)

- “Demarcation Point” (1) For new and existing single unit installations, the demarcation point shall be a point at (or about) twelve inches outside of where the cable wire enters the subscriber's premises. (2) For new and existing multiple dwelling unit installations with non-loop-through wiring configurations, the demarcation point shall be a point at (or about) twelve inches outside of where the cable wire enters the subscriber's dwelling unit, or, where the wire is physically inaccessible at such point, the closest practicable point thereto that does not require access to the individual subscriber's dwelling unit. (3) For new and existing multiple dwelling unit installations with loop-through wiring configurations, the demarcation points shall be at (or about) twelve inches outside of where the cable wire enters or exits the first and last individual dwelling units on the loop, or, where the wire is physically inaccessible at such point(s), the closest practicable point thereto that does not require access to an individual subscriber's dwelling unit. 47 C.F.R. § 76.5(mm)

Cable Home Wiring

When MVPD owns cable home wiring and the subscriber cancels service – 3 options:

- Sell the cable home wiring to the subscriber or incoming service provider
- Remove the cable home wiring (must first give subscriber opportunity to purchase) or
- Abandon the cable home wiring

Cable Home Wiring

When subscriber contacts MVPD to voluntarily terminate cable service, if MVPD owns and intends to remove home wiring – it must inform the subscriber:

- That it owns the home wiring
- That it intends to remove the home wiring
- Subscriber has right to purchase home wiring; and
- The replacement cost for the home wiring:

“Replacement Costs” equals “replacement cost per foot of the wiring . . . multiplied by the length in feet or such wiring, and the replacement cost of any passive splitters . . .” 47

C.F.R. § 76.802 (a)(3)

Cable Home Wiring

- If subscriber chooses to purchase wiring – purchase price is replacement cost
- If subscriber declines purchase offer, MDU owner or alternative MVPD has option to purchase if it “has provided reasonable advance notice to the incumbent provider that it would purchase cable home wiring . . .”
- If subscriber declines to purchase, and there’s no offer from MDU owner or alternative provider, cable operator must remove wiring within 7 days, and if not removed it is deemed abandoned, and service provider may not subsequently attempt to remove it, or restrict its use. 47 C.F.R. § 76.802 (a)(2)

Cable Home Wiring

Failure to follow regulatory process:



“If the cable operator fails to adhere to the procedures . . . it will be deemed to have relinquished immediately any and all ownership interests in the home wiring; thus, the operator will not be entitled to compensation for the wiring and shall make no subsequent attempt to remove it or restrict its use.” 47 C.F.R. § 76.802(e)

Cable Home Run Wiring

- The home run wiring rules apply when “an MVPD owns the home run wiring in an MDU and does not (or will not at the conclusion of the notice period) have a legally enforceable right to remain on the premises against the wishes of the MDU owner.” 47 C.F.R. § 76.804(a) and (b)
- The rules addressing disposition of home run wiring differ slightly depending upon whether all of the home run wiring in a building will be addressed collectively, or whether it will be addressed by individual unit

Cable Home Run Wiring

Full Building or Full Development Disposition

- The MDU owner may give the MVPD a minimum of 90 days' written notice that access to the entire building will be terminated. After receipt of such notice:
 - MVPD has 30 days to notify MDU owner in writing of decision whether to remove all home run wiring and restore building consistent with state law within 30 days of the end of 90-day notice period or within 30 days of actual service termination, whichever occurs first; or
 - Abandon and not disable the wiring, at the end of the 90-day notice period; or
 - Sell the wiring to the MDU building owner or alternate MVPD
- For purposes of abandonment, passive devices, including splitters, are considered part of the home run wiring. MVPD may remove its amplifiers or other active devices, if an equivalent replacement can easily be reattached.

Cable Home Run Wiring

Purchase of Home Run Wiring

- If home run wiring is to be purchased, MDU owner or alternative provider has 30 days from date of election to negotiate acquisition price
- If parties cannot agree on price within 30 days, incumbent provider must elect:
 - to abandon without disabling the wiring
 - to remove the wiring and restore the MDU consistent with state law
 - to submit the price determination to binding arbitration by an independent expert
- Federal regulations set out specific process for binding arbitration

Cable Home Run Wiring

Unit by Unit Disposition

“Where an MVPD owns the home run wiring in an MDU and does not (or will not at the conclusion of the notice period) have a legally enforceable right to *maintain any particular home run wire dedicated to a particular unit* on the premises against the wishes of the MDU owner, *the MDU owner may permit multiple MVPDs to compete for the right to use the individual home run wires dedicated to each unit in the MDU*”

47 C.F.R. § 76.804(b)

Cable Home Run Wiring

Unit by Unit Disposition

- MDU owner must provide at least 60 days' written notice to incumbent MVPD of its intent for other MVPDs to compete for rights to use home run wires
- Incumbent MVPD has 30 days to provide written election to MDU owner as to whether, for each of its home run wires dedicated to a subscriber who chooses an alternative provider's service, the incumbent MVPD will:
 - Remove and restore
 - Abandon without disabling; or
 - Sell the wiring

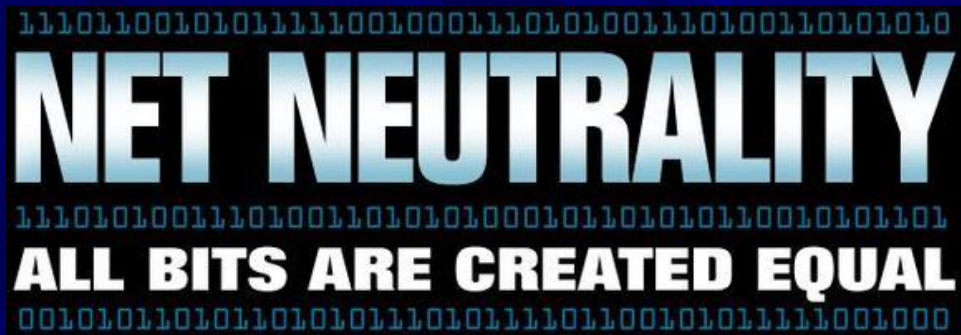
Cable Home Run Wiring

Unit by Unit Purchase of Wiring

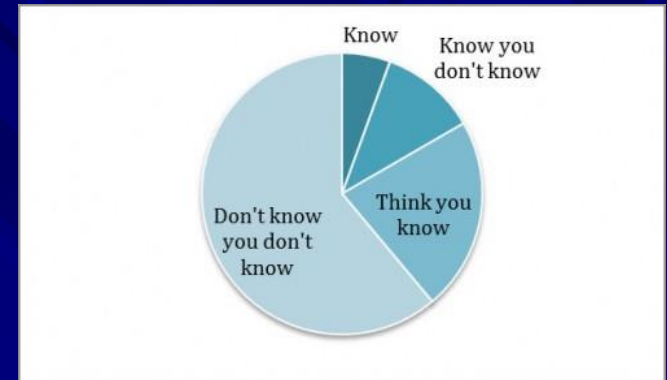
- The process for selling the wiring is the same as described for full building sales, except that parties may negotiate an up-front lump sum payment in lieu of a unit-by-unit payment
- If parties can not agree on a price during the 30 day window, options are the same as building-by-building disposition, except that independent expert is required to assess a reasonable price for the home run wiring within 14 days

Inside Wiring Disposition When Provider is not a MVPD

- Unlike rules for MVPDs, there are no comparable federal rules for disposition of telephone and/or Internet inside wiring
- State law: Generally unregulated, but ... per RCW 80.36.370(5), Shared Tenant Services (STS) providers must provide for alternative access to local exchange telecommunications companies. If WUTC finds that customers have no alternative access, it can require STS providers to make alternative facilities or conduit space available on reasonable terms and conditions at reasonable prices.
- So ...
 - More focus on terms of agreement between provider and property owner
 - Developers should make sure their buildings are constructed in a way that will easily allow tenants to be able to order service from a Local Exchange Provider other than the landlord/STS provider.



- How do the new FCC net neutrality rules impact these issues?
- If broadband Internet service is a telecommunications utility service, does the FCC have the ability to impose rules on the access to inside wiring for Internet service in MDUs?



- Classifying Internet as a telecom service gives the FCC a lot more rule making authority over the service
- But the FCC also has the authority to “forbear” from Title II telecom regulation, and the FCC says it is going to treat Internet service with a “light regulatory touch”
- According to FCC staff, Open Internet Order may not impact existing rules regarding exclusive contracts, but it’s a “gray area”

Exclusive Contracts

- In the past, often saw an MVPD or telecommunications service provider offer an MDU owner a one time up front sum equal up to several hundred dollars per unit in exchange for MDU owner's agreement to give the MVPD and/or telecom service provider an exclusive right to provide services to the MDU residents
- MDU owner or manager agreed to exclusively market MVPD's or service provider's services to residents
- These contractual provisions in current agreements are have been rendered unenforceable by recent FCC rulings
- Caveat: each MDU with this kind of a contract should have the terms reviewed carefully by its legal counsel to determine specifically how the FCC rulings apply to those individual contractual terms

Exclusive Contracts

FCC Orders in 2007 (for video)
and 2008 (for telecom) held:



- All MVPDs subject to section 628 of the Communications Act of 1934 are prohibited from executing or enforcing contractual provisions that give them the exclusive right to provide video programming service to MDUs
- Bulk billing and exclusive marketing arrangements are allowed
- Exclusive contracts for telecommunication services between providers and owners of multiple tenant environments are prohibited
- FCC cable order was upheld in federal appeals court in 2009

Exclusive Contracts

Important Note About FCC Orders:

- While FCC rules ban MVPDs and telecom service providers from insisting upon exclusive agreements and from enforcing existing exclusive agreements, it *does not* prohibit MDU owners from acting independently to give a provider an exclusive agreement (but it does prevent actions by the service provider to enforce these kinds of provisions)
- Bulk billing arrangements and exclusive marketing provisions are still legal

Exclusive Contracts

What is bulk billing?

- When service provider delivers that service to every resident of MDU, and bills MDU owner in “bulk” for all of the residents
- FCC ruling found that bulk billing does not physically or legally prohibit a second MVPD from providing service to the MDU owner and residents
- Key FCC consideration was that “unlike building exclusivity, [bulk billing] does not hinder significantly the entry into an MDU by a second MVPD and does not prevent consumers from choosing the new entrant.” A second MVPD provider is not physically or legally prohibited from providing service to a MDU owner.
- However, MDU residents who want service from second MVPD end up having to pay for two MVPD services (*we’ll discuss how this may be impacted by the new City Code language shortly*)

Exclusive Contracts

Exclusive Marketing Arrangements:

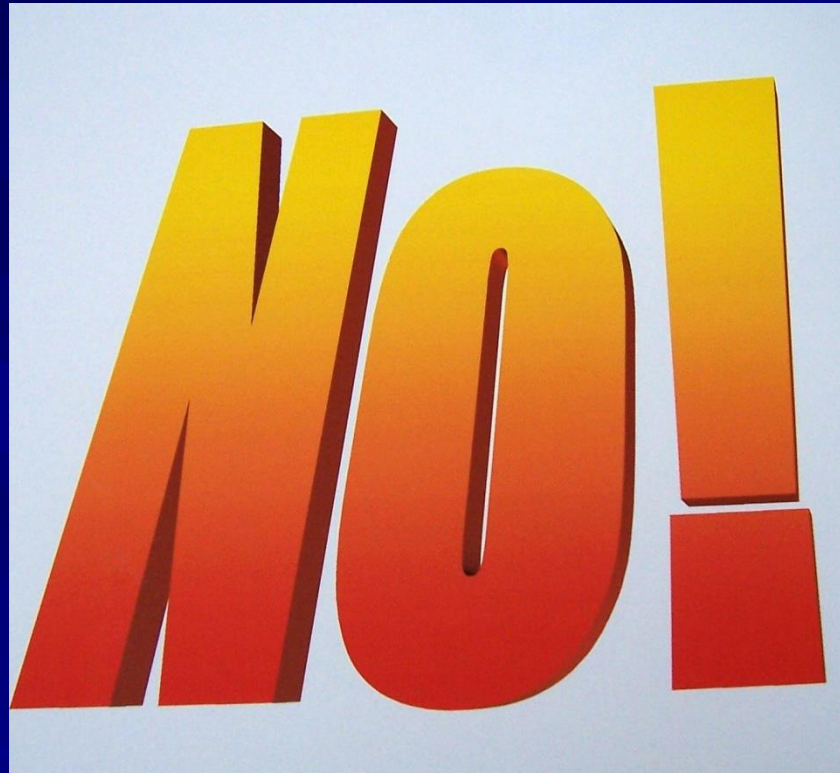
- Arrangements between an MDU owner and a service provider, in written agreement or in practice, that gives the service provider, usually in exchange for some consideration, the exclusive right to certain means of marketing its service to residents in the MDU
- So long as other service providers have access to serve customers in an MDU, exclusive marketing arrangements are permissible

Contractual Provisions to be Aware of:

- “Owner hereby grants to Provider the sole and exclusive right during the term of this Agreement to provide cable (or television; communications; telecommunications; data; Internet, etc.) and hereby grants solely to Provider an exclusive easement to install, modify, operate and maintain it’s wires and equipment upon or within the Premises...”



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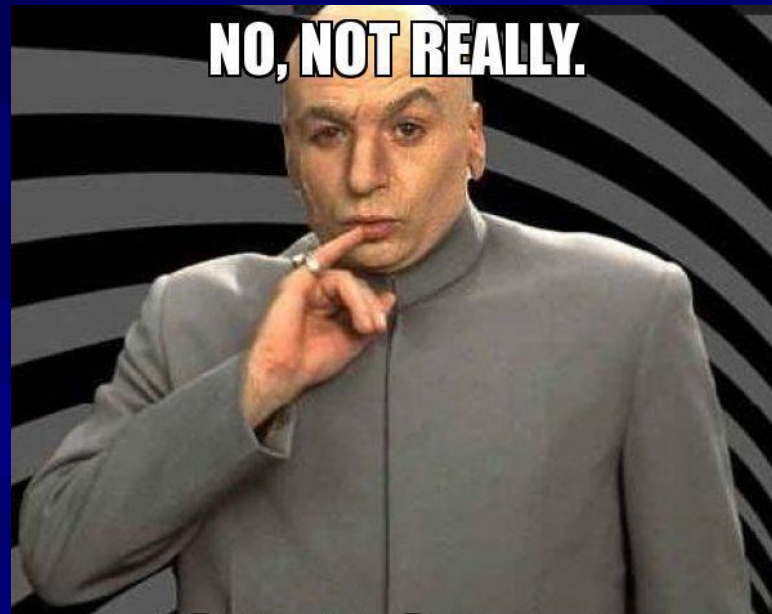
The FCC rules now prohibit
exclusive contractual arrangements

Contractual Provisions to be Aware of:

- “The Facilities installed by Provider pursuant to this Agreement shall remain the property of Provider, and Provider shall be entitled to remove any portions of the Facilities upon termination of this Agreement, in its sole discretion. Owner shall not remove any part of the Facilities without first obtaining the written agreement of Provider.”



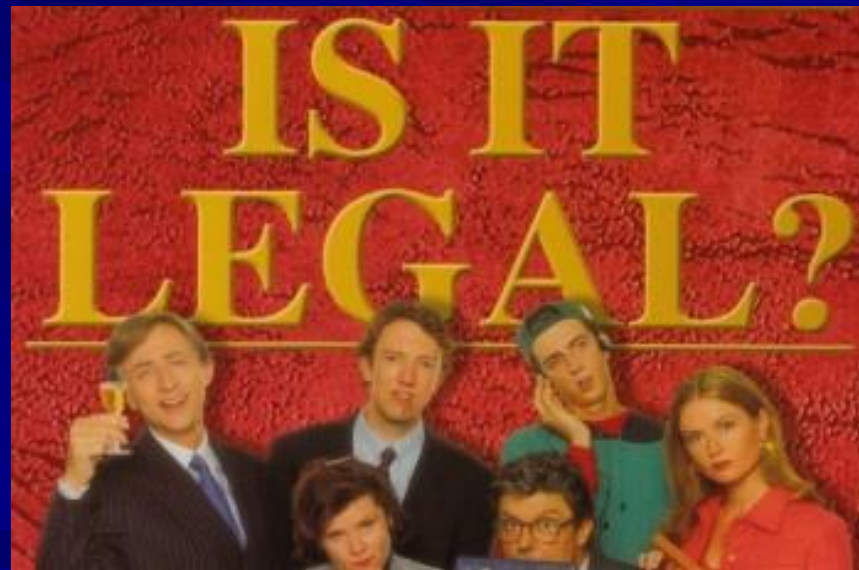
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... it is inconsistent with the FCC inside wiring rules, and owners cannot be forced to agree

Contractual Provisions to be Aware of:

- “The ownership of the cable home wiring and the home run wiring shall be and remain the personal property of the Owner (of the MDU) ...”



Contractual Provisions to be Aware of:

- “The ownership of the cable home wiring and the home run wiring shall be and remain the personal property of the Owner (of the MDU) ...”



Contractual Provisions to be Aware of:

- “At no time during or after the term hereof shall Owner or any third party have the right to use the system, including the cable home wiring and the home run wiring for any purpose, except upon termination of this Agreement Owner shall have the right to use the cable home wiring and the home run wiring ...”



“At no time during or after the term hereof shall Owner or any third party have the right to use the system, including the cable home wiring and the home run wiring for any purpose, except upon termination of this Agreement Owner shall have the right to use the cable home wiring and the home run wiring ...”

$$\text{MAYBE} = \frac{\text{YES}}{\text{NO}} + \frac{\text{NO}}{\text{YES}}$$

- The building owner can voluntarily agree to these terms, but ...
- the FCC rules would allow individual unit owners or tenants to use cable home wiring in connection with services from other providers, without this provision

Contractual Provisions to be Aware of:

- “Upon termination, the Company shall have the right, but not the obligation, to remove the system within six months ...”



“Upon termination, the Company shall have the right, but not the obligation, to remove the system within six months ...”



■ Part yes, part no

- For MVPDs, regulations give them 7 days (for home wiring) and 30 days after 90 day notice period (for home run wiring), but you can contract for a longer time
- Not legal for cable company to remove cable home wiring without providing legal notices and options to purchase to residents

Contractual Provisions to be Aware of:

- “The Owner has the authority to grant and does hereby grant to the Company during the term hereof the right, at its expense, to operate, maintain, repair and replace as necessary, the System on the Premises. Neither the Owner nor any third party shall tap into, use or otherwise interfere with the System on the Premises.”



“The Owner has the authority to grant and does hereby grant to the Company during the term hereof the right, at its expense, to operate, maintain, repair and replace as necessary, the System on the Premises. Neither the Owner nor any third party shall tap into, use or otherwise interfere with the System on the Premises.”



- FCC prohibition applies to carriers seeking to enter into or enforce exclusivity contracts – so part of the answer depends upon how we define “System”
- “[W]e are not hereby mandating access to residential or other MTEs”

Back to the New Code Provisions

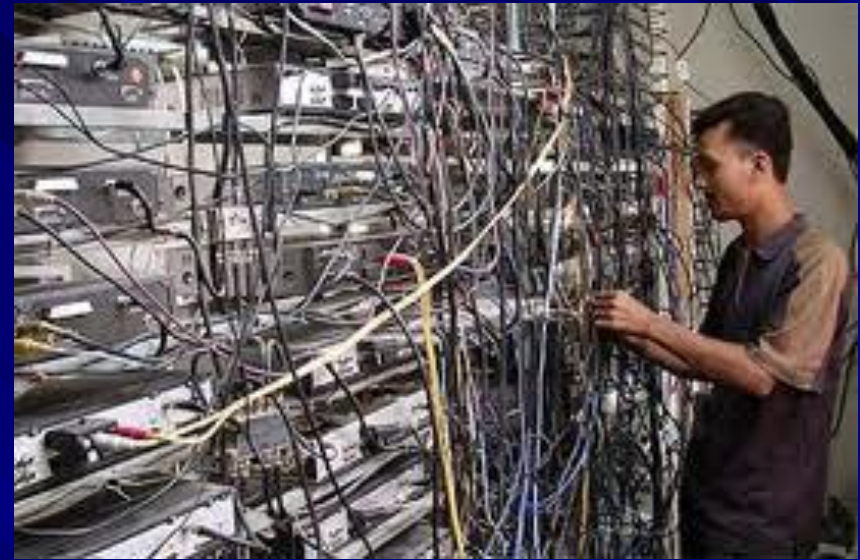


- Rates charged to residents of MDUs do not exceed charges paid by residents of single family homes
 - Query: what if MDU owner builds the cost of a bulk billing arrangement into the rent or HOA dues?
- Can't condition provision of services to MDUs on requirement not imposed on other subscribers, except if permitted by franchise
- Can't condition provision of services to MDUs on exclusive service agreement with grantee
 - This is a local codification of the federal rules adopted by the FCC

Back to the New Code Provisions



- Can offer a building owner option of a long-term agreement in return for installation of internal wiring or other telecommunications improvements unique to the building, but must offer alternative of a no term agreement to building owners who wish to contract directly for installation by a contractor approved by the grantee and in accordance with the grantee's generally applicable technical standards
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 - "Right of entry agreement" means an agreement that permits the grantee access to the building to extend its distribution cable from the grantee's cable system in the right-of-way or public easement to the utility closet or other demarcation point in the multiple unit building



For more information:
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Kissinger & Fellman, P.C.
kfellman@kandf.com
303-320-6100
www.kandf.com

