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**Authors:**

**Frederick M. Joyce**  
[rjoyce@Venable.com](mailto:rjoyce@Venable.com)  
202.344.4653

**Philip M. Horowitz**  
[phorowitz@Venable.com](mailto:phorowitz@Venable.com)  
202.344.4746

**Seung-Hyun Ryu**  
[sryu@Venable.com](mailto:sryu@Venable.com)  
202.344.4531

## FCC Gives More Marketing Rights to Building Owners and Multichannel Video Program Distributors

On March 2, 2010, the Federal Communications Commission (FCC) adopted a *Second Report and Order* (MB docket No. 07-51) and resolved two issues: 1) whether Multichannel Video Program Distributors ("MVPDs") should be prohibited from using "bulk billing" arrangements and 2) whether MVPDs should be prohibited from using "exclusive marketing arrangements." Based on the effects on consumers under current marketplace conditions, the FCC decided to allow bulk billing and exclusivity marketing arrangements by all MVPDs to continue at this time. This decision allows building owners and MVPDs to use bulk billing and exclusivity marketing arrangement as "bargaining chips" in their negotiations.

### 1. Bulk Billing Arrangement

Bulk billing is an arrangement in which one MVPD provides video service to every resident of a Multiple Dwelling Unit ("MDU") building, and the MDU owner pays for service to all residents, usually at a significantly discounted rate. This arrangement does not prevent MDU residents from obtaining services from another MVPD; residents may purchase additional services, such as premium channels, directly from another MVPD at the regular retail rate.

According to the FCC, the benefits of bulk billing for MDU residents include lower prices, packages of programming tailored to the particular interests and needs of the MDU's residents, and avoidance of the inconvenience of establishing or disconnecting MVPD service. Yet, a bulk billing arrangement may discourage a second MVPD from entering an MDU and, even if it does not, MDU residents who want service from the second MVPD must pay for two MVPD services.

Concluding that the benefits to consumers of a bulk billing arrangement outweigh its harms, the FCC decided to allow this practice. In the large majority of cases, bulk billing lowered prices significantly, increased the volume and variety of programming, encouraged high quality and innovation, and brought video, voice, and data services to MDU residents. The FCC's decision was also based on the fact that bulk billing did not hinder significantly the entry into an MDU by a second MVPD and did not prevent consumers from choosing the new entrant.

### 2. Exclusive Marketing Arrangement

An exclusive marketing arrangement is an arrangement between an MDU owner and an MVPD that gives the MVPD the exclusive right to provide marketing materials and services to residents in the MDU. Typically, this includes advertising in the MDU's common areas, placement of the MVPD's brand on the MDU building's web page, placement of the MVPD's brochures in "welcome packs" for new residents, sponsoring events on the premises of the MDU, and slipping brochures under residents' doors.

According to the proponents, exclusive marketing arrangements provide readily accessible information to MDU residents about an MVPD provider. In exchange for receiving marketing exclusivity, an MVPD provider may afford the MDU and its residents lower rates and other benefits. The added revenue stream that can result from marketing exclusivity may also help the MDU owner or MVPD provider obtain financing to fund the expensive wiring of an MDU building. Real estate interests argue that marketing exclusivity and bulk billing are values they can offer to an MVPD in exchange for which the MVPD may pay a greater share of the wiring costs or agree to provide better service, thus benefiting MDU residents. The FCC stated that benefits of exclusive marketing arrangements appeared to flow through to MDU residents.

The FCC emphasized that marketing exclusivity neither prevented nor significantly hindered other MVPDs from providing video services in MDUs with such arrangements. In addition, the FCC found that marketing exclusivity did not prevent or significantly hinder other MVPDs from reaching MDU residents via television, radio, and other media; deter MDU residents from subscribing to other MVPDs' services; slow the evolution of competing wireless technologies; or raise prices.

Finding that exclusive marketing arrangements had some modest beneficial effects for consumers and no significantly harmful ones, the FCC decided to allow the continued use of marketing exclusivity

arrangements.

### 3. Conclusion

Based on the finding that the balance of consumer harms and benefits for bulk billing and exclusive marketing arrangements are significantly pro-consumer, the FCC decided to allow bulk billing and exclusivity marketing arrangements by all MVPDs to continue at this time. The FCC noted, however, that it may re-examine these issues if marketplace conditions change.

The FCC's decision makes it clear that building owners, developers and managers can enter into a variety of in-building video service arrangements that benefit their tenants and the building's owner. Should you be interested in reviewing existing or prospective contracts and service arrangements in light of this new law, please contact Venable's Real Estate ([Phil Horowitz](#)) or Communications Practice Groups ([Rick Joyce](#)).

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