



## Homeowners Association Board of Directors

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December 18, 2007

Commissions Secretary, Office of the Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington DC 20554

Re: Notice of Proposed Rulemaking – Request for Comments, MB Docket No. 07-51

Commissioners –

The timeliness of this request by the commission to seek additional comments and further proposed rulemaking as it relates to competition in the MDU market comes at a time where we as an association are locked in a legal battle with the exclusive provider at our property by right of a negotiated 'deal' with the developer. As a member of The Plaza Midtown Homeowners Association's Board of Directors (association) and liaison to the association's Technology Committee, I would like to share our experience as it relates to your action on exclusive provider contracts in MDU's.

We urge the commission to extend the ban on exclusive contracts to include all MVPD's or any persons or parties that directly or indirectly provides multiple channels of video programming over facilities that are directly or indirectly controlled by said parties. In addition, we would recommend that the commission further rule that any exclusive contract entered into between a developer and an MVPD or infrastructure provider that potentially carries multiple channels of video programming prior to the homeowners takeover of the association be deemed null and void. Lastly, we would ask the commission to permit exclusive contracts entered into by an association controlled by its homeowners/members as this provides the members/residents with increased bargaining power to promote market competition. By ruling in the above manner it would hold the overzealous infrastructure providers at bay who are looking to tie the hands of an association and prevent open market competition within an MDU community.

The owners/members of the association have experienced first hand the havoc that exclusive contracts bring to bear on a community when the lack of a competitive market is created through crafty legal agreements circumventing the intent of governing bodies such as the FCC. We have experienced satellite video programming outages, intermittent Internet outages and slow download speeds, as well as Quality of Service (QoS) and Service Level agreement (SLA) issues for both video and data services since the first owner took occupancy in February of 2006. Our 'state of the art' system as marketed to the community consisted of the rebroadcast of 70 channels of satellite programming in an analog format. The result is television that resembles the early cable days back in the 70's with ghosting and grainy broadcasts throughout the building. And presumably since the signal is analog, the quality varies greatly from floor to floor and unit to unit within the building due to improper splitting of the signal and signal loss due to homerun wiring lengths.

Over the course of the last year and a half we have attempted to work with the provider to rectify the situation, alter the basic package and step up the service without success. This has prompted us to seek legal action in an effort to terminate

the agreements and bring in competition, believing that the right to choose will force the current provider to step up the level of service or face elimination through natural market competition. We have been locked into a financially draining legal battle since February of this year partially resulting in a HOA dues increase in an effort to offset some of the costs. Furthermore, the Association has tried to exercise its rights under the cable inside wiring rules, only to be told by Connexion Technologies (f.k.a. Capitol Infrastructure) that as previously stipulated and according to the current agreement with the developer, it is not an MVPD and that the ruling does not apply.

Prior to the association being incorporated, the developer of the condominium was approached by Capitol Infrastructure, LLC to provide in-unit wiring during the construction phase with the stipulation they be granted exclusive easements and rights to provide wiring and equipment for service providers of their choice to provide services to the building. This infrastructure was provided in exchange for a rental fee. The provider negotiated a number of long term, exclusive agreements to provide services in our high rise condominium project with the developer, effectively restricting our ability to promote competition of any kind and stripping the community of their ability to have choice, quality of service, and competitive rates. This agreement was entered into prior to the association taking control from the developer and binds us to a single source for 12 years.

The series of agreements that the developer entered into with Capitol Infrastructure were, by the company's CEO's own admission during a meeting held last summer, artfully crafted by a legal team to specifically ensure they side step both the Georgia Condo Act, PUC CLEC guidelines, as well as those FCC rulings surrounding MVPDs and PCOs. This series of agreements and perpetual exclusive easement, in the eyes of the provider, isolate this business from the rulings of this commission while still maintaining control over the infrastructure wiring and thus control access by which only those service providers who pay a 'toll' for crossing the easement and/or use of the right away provide for the financial benefit of this infrastructure provider. In addition, this provider continues to maintain the association is not a party to the original Master Infrastructure Agreement, since it was entered into prior to the association being formed, and therefore we as an association, have no remedy or cure under the agreement.

The agreements entered into by the developer prior to the association taken over consist of the following (copies of which can be provided upon request):

- Master Infrastructure Agreement – Executed on July 13, 2005 between Capitol Infrastructure, LLC (infrastructure provider) and Plaza Midtown, LLC (Developer). Provisions the installation of backbone, homerun, and head end wiring and equipment infrastructure in exchange for in-unit wiring and exclusive easements and rights granted to Infrastructure Facility Provider (IFP), Capitol Infrastructure, LLC. All other agreements below are exhibits to this agreement.
- Exclusive Perpetual Easement – Recorded December 2, 2005 and executed on behalf of Capitol Infrastructure, LLC and granted by Plaza Midtown, LLC. Recorded to provide exclusivity during the term of the Master Infrastructure Agreement, and non-exclusive at conclusion or termination for cause.

- Service Provider Designation Agreement – Executed XXXX, 2005 between Capitol Infrastructure, LLC (provider) and The Plaza Midtown Residential Condominium Association, Inc. (Association). Provisions Capitol Infrastructure, LLC with the ability to act as the association agent in seeking service providers for the community. Terms of the Master agreement provide Capitol with the ability to 'rent' or charge a 'fee' for the use of the infrastructure. Capitol has made it clear to the association, no pay, no wire.
- Bulk Services Agreement – Executed December 2, 2005 between Fusion Broadband, LLC (service provider) and The Plaza Midtown Residential Condominium Association, Inc. (Association). Drafted by Capitol by rights granted in Service Provider Designation agreement to provide video, internet and security to the community. Length of contract is 6 years with automatic renewal.
- Clearinghouse Agreement – Executed December 2, 2005 between Capitol Infrastructure, LLC and The Plaza Midtown Residential Condominium Association, Inc. (Association). Capitol collects the bulk fee from the association and distributes monies to individual providers, holding out its fee's for use of infrastructure.

It is the opinion of the association and its legal counsel that this Master Community Infrastructure Agreement together with the tangle of additional service provider, billing and agent agreements, was specifically drafted to circumvent both the Georgia Condo Act and prevailing FCC regulations.

- This agreement coupled with the exclusive property easements granted within prevents our association for a period of 12 years from allowing/promoting competition and free trade in our community.
- The developer benefited from entering into this long term agreement by having individual in-unit wiring provided at no charge.
- By holding an exclusive easement for the rights to provide video, data, telecommunications and security services, Capitol Infrastructure benefits financially by charging access fees or overrides to providers for use of the easement and denies access for lack of sufficient financial gain.
- Acting as billing/collection agent, Capitol Infrastructure enters into separate agreements unknown to the association as it relates to these access charges.
- The Service Designation agreement provides Capitol Infrastructure with sole responsibility to pick and choose for the association who is responsible for providing service, in fact without say or right of veto by the association.

While the association understands that developers are under constant pressure to reduce construction costs while providing 'state of the art' amenities, it is the opinion of this board that this type of deceptive marketing by overzealous providers such as Capitol Infrastructure, LLC, and the use of the tangle of legal documents they hide behind should be bothersome to this commission. By exposing this type of deceptive business model and practices it is the hope of our association that the commission will provide a ruling in this matter that is broad enough in scope to prevent this type of practice in the future. Rights of individual owners and the association have been

compromised by this type of agreement. Under normal market conditions, an owner's right to choose a service provider, or multiple service providers willing to service the community, would have rectified the various service issues and availability they might experience in a typical MDU arrangement.

Legal counsel for the association has suggested that we seek a declaratory judgment in this matter before the commission based on the grounds that the provider, Capitol Infrastructure, LLC is in fact a MVPD and therefore would in fact be required to comply with FCC regulations. Since time is of the essence and this type of action can prove extremely expensive to a non-profit organization, the association believes these comments and the commissions subsequent rulings in this matter may provide the association with the relief it seeks.

Since the takeover from the declarant the association has been diligently working to promote competition within our MDU community. We have been blocked every step of the way by the originating infrastructure provider through this tangle of legal agreements. This provider continues to insist its exclusive easement granted by the original developer together with the 12 year master infrastructure agreement prohibits us from inviting competition by denying physical access to any other provider due to an exclusive easement. While they insist they would allow a competitor to use this easement for a fee, Capital Infrastructure has structured it so that it is cost prohibitive for a competing service provider to do so while at the same time investing in the necessary physical infrastructure to provide service to our community.

I would be willing to provide the Commission with any and all documentation from our particular situation if it would benefit the Commission as it reviews and decides on any necessary adoption of rules that would promote a state of free competition in the MDU marketplace. We again urge the commission to adopt such rules as necessary to prevent these type of exclusive agreements by providers of both infrastructure and service to communities such as ours.

Respectfully,

Raymond Orndorff  
Board of Directors  
The Plaza Midtown Homeowners Association