

**CABLE TELEVISION LAW 2006:
COMPETITION IN VIDEO, INTERNET AND TELEPHONY**

**LOCAL COMMUNITIES AND COMMUNICATIONS NETWORKS:
KEY ISSUES 2006**

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LOCAL COMMUNITIES AND COMMUNICATIONS NETWORKS: KEY ISSUES 2006

By Nicholas P. Miller & Joseph Van Eaton

I. OVERVIEW

Cities are facing substantial challenges as they attempt to protect their traditional interests in managing and obtaining fair compensation for the use of the rights-of-way. This paper provides a brief overview of *federal* law governing municipal franchising of cable and telephone companies. State law may place significant, additional limits on local authority either generally, or based on whether the local authority is a county, a home rule/charter municipality, or a municipality with only limited, specific powers granted by the state. Additional information on these topics can be found at www.millervaneaton.com.

The first three sections of this article address, respectively, certain cable, telecommunications, and wireless issues generally. The cable section examines local franchise authority, open access and cable modem, franchise fee, and public, education, and government access ("PEG") issues. The telecommunications section primarily focuses on legal developments related to telecommunications provider use of public rights-of-way and compensation for use of public rights-of-way. The wireless section addresses certain zoning, tower siting, and public safety issues. Part IV is devoted to a discussion of telecommunications convergence, and the ongoing developments in the law and in the field which will affect the relationship between the cable industry and municipalities. Among other things, Part IV discusses how the movement to IP-based service offerings could affect local authority. Also, Part IV discusses the causes and effects of local government entering the communications provider marketplace.

II. LOCAL AUTHORITY OVER CABLE SYSTEMS

A. Generally.

1. *Scope of local authority.*

In 1984, Congress adopted what has become known as the "Cable Act," 47 U.S.C. § 521 *et seq.* While municipalities had been regulating cable systems for years, there was significant debate as to the scope of Federal Communications Commission authority over cable systems, as to the appropriate scope of cable regulation, and as to what level of government (federal, state or local) should have what regulatory responsibilities. The Cable Act attempted to resolve these issues. It placed significant and primary responsibility for key elements of cable regulation at the local level. The Act was intended to "establish franchise procedures and standards which encourage

the growth and development of cable systems and which assure that cable systems are responsive to the needs and interests of the local community." 47 U.S.C. § 521.

As a general matter, local governments have significant authority to ensure cable systems serve community interests well, and to replace system operators that are unwilling to provide adequate service. That is not to say that local authority is unlimited. It is limited in some areas that are key concerns of subscribers:

- *The Cable Act was intended to limit government authority to require cable operators to carry specific, commercial programming.* Thus, 47 U.S.C. § 544 states that "a franchising authority may not establish in its request for proposals for a [cable] franchise" requirements for "video programming or other information services." By agreement, an operator and a community can establish enforceable requirements "for broad categories of video programming or other services."
- *The Cable Act limits, but does not eliminate, local authority to regulate rates.* 47 U.S.C. § 543. In communities where the cable operator does not face effective competition, a local government can regulate rates for "basic" service (the lowest level of service – this is the level that includes all local broadcast channels) and for equipment. Through equipment rate regulation, a local government can set rates for converters and remotes, as well as rates for installations and service calls. Rates for services like HBO cannot be regulated.
- *The Cable Act states that no locality may "prohibit, condition, or restrict a cable system's use of any type of subscriber equipment or any transmission technology."* 47 U.S.C. § 544(e). FCC orders suggest that a city could not require an operator to use fiber optics as opposed to coaxial copper, microwave or other technologies to deliver service. On the other hand, some operators have argued that if an operator promises to build a particular type of system, that promise can be enforced. And, there is a strong argument that localities can require that the cable system have certain characteristics regardless of the transmission technology used (for example, a locality could require that the system be highly reliable and capable of delivering advanced cable services).
- *The Cable Act states that a locality may not, as a condition of granting or renewing a cable franchise, "require a cable operator to provide any telecommunications service or facilities, other than institutional networks" except as provided in the Cable Act sections regarding PEG access and commercial leased access.* 47 U.S.C. § 541(b). This limitation is one of a series of provisions that are designed (with important exceptions for PEG and institutional networks) to prevent localities from leveraging authority protected by the Cable Act to regulate the provision of telecommunications services and facilities. The Cable Act does not prohibit localities from regulating cable companies that provide telecommunications services in the same manner as other telecommunications providers are regulated.

On the other hand, localities specifically have the authority:

- *To adopt and enforce customer service standards.* The FCC has adopted minimum customer service standards, and a locality can choose to enforce these, but a locality can also adopt more stringent standards. 47 U.S.C. § 552.
- *To include a franchise requirement requiring the operator to pay a franchise fee equal to 5% of the gross revenues* derived from the operation of the cable system to provide cable services. 47 U.S.C. § 542.
- *To require an operator, through the franchising process, to submit a proposal for facilities, equipment and services adequate to meet the cable-related needs and interests of the community.* 47 U.S.C. §§ 546, 541(a)(4), 544(b).
- *To require the cable operator, through the franchising process, to build an institutional network, and to dedicate capacity on that network for educational and government use.* An institutional network is a portion of the cable system designed primarily to serve customers other than residential customers. In many communities, operators have agreed to construct institutional networks that link schools, libraries and other government buildings. These links are then used for voice, video and data transmissions, and to provide connections to the Internet. An institutional network can replace expensive phone lines that might otherwise be required, and can significantly enhance a local government's communications capabilities. *Id.*, 47 U.S.C. § 531.
- *To require an operator, through the franchising process, to provide channels, facilities, equipment and capital support for public, educational and government use of the cable system.* Thus, for example, many franchises require the operator to provide channels, equipment and studios that non-profit groups and others can use to produce programming. PEG requirements can significantly enhance the ability of government, schools, non-profits and others to deliver information to the community cost-effectively. In St. Paul, Minnesota, for example, the operator pays a 5% franchise fee and in addition provides more than \$1.50 per subscriber per month for PEG and institutional network uses. In Larchmont, New York, the operator provides more than \$1.00 per subscriber per month in PEG support. *Id.*

Through the franchising process a locality also can define where an operator must serve, and set the time for build-out of the system. 47 U.S.C. § 552(a). Some franchises require the operator to construct its system so that it can provide service to all residences in a community; some require that the system be constructed so that it can serve all businesses and residences; and some require operators to serve all areas with a certain population density. The point is that the community is in a position to ensure that service is available universally.

The result of the franchising process is a franchise – which is treated at law as a grant of special privilege to use the public rights-of-way in return for specific performance promises. In some communities this takes the form of a franchise ordinance that the operator accepts, and in some communities it takes the form of an issuing ordinance, authorizing city entry into a "franchise agreement" that the operator signs. Throughout this paper, the authors will refer to the collection of documents that set out the operator's contractual privileges and obligations as the "franchise".

There may be other separate regulatory rules and ordinances that also apply, such as rights-of-way management regulations and consumer protection regulations.

The Cable Act suggests that some requirements (such as PEG requirements) may only be established through the franchising process. However, it may also be wise for a community to adopt a general cable ordinance pursuant to its police and regulatory powers. A cable ordinance may set out the procedures for applying for a franchise, and may establish rules that the locality is entitled to establish unilaterally. For example, an ordinance might establish street permitting, joint trenching and other such requirements (or even customer service standards, which can be adopted unilaterally). The advantage of such an ordinance is that, generally, it can be unilaterally changed over time, while a franchise, because it is a contract, generally cannot (except as the parties may agree otherwise). However the City proceeds, it must be careful to avoid drafting any franchise in a manner that prevents it from responding to new challenges to rights-of-way and land use management. The problem and risks are illustrated by *Southern California Gas Co. v. City of Santa Ana*, 336 F.3d 885 (9th Cir. 2003) (Municipal ordinance requiring advance payment by anyone wishing to perform excavations or trench cuts "substantially impaired" gas utility's rights under prior franchise agreement).

2. *Keys to effective regulation.*

There are several keys to effective cable regulation for a local government. Among other things, it can be important for a locality to:

- *Draft the cable franchise carefully*, recognizing that it is a long-term contract that will affect local infrastructure for a decade or more.
- *Enforce the franchise publicly, and regularly.* A community that demands and reviews reports by its operator, that conducts regular reviews to determine whether the operator is actually meeting its obligations, and which takes public enforcement action when the operator fails to comply will tend to receive better service than a community that only acts when subscribers begin to complain.
- *Recognize that there are points during the franchise term where a community may have important opportunities to require an operator to bring itself into compliance with its franchise obligations...and may lose rights if it fails to do so.*

B. Franchise Transfers

Local franchise authorities normally have broad discretion to approve or disapprove a cable franchisee request to *transfer* the franchise. The filing of a transfer request does not entitle a municipality to renegotiate its franchise. However, it does provide an opportunity to insist that the community receive the full benefits of its bargain with the existing operator. This usually takes two forms. The selling operator should bring its system into compliance with existing ordinance and franchise requirements. And the buying operator should serve the community in a manner that is fully equivalent to the promises by the first operator.

In the course of the transfer process, the parties are often able to resolve long-standing disputes either directly or through renegotiation of franchise terms. In cities which receive a transfer application when the franchise has expired or is about to expire, it may be possible to make resolution of renewal issues a condition of approving the transfer.

Operator claims about the transfer process are too often based upon canards. Local franchise authorities are advised to fully apprise themselves of the relevant law. For example, operators often claim localities are limited by federal law to reviewing a transferee's financial, technical and legal qualifications. In fact, case law suggests that localities may have broad authority under federal law to grant or deny a transfer request. *Charter Communications, Inc. v. County of Santa Cruz*, 304 F.3d 927 (9th Cir. 2002) (finding, among other things, that "a municipality exercising its discretion concerning a cable franchise acts legislatively and that, under California law, legislative acts are within the county's 'regulatory or police power' and are entitled to judicial deference"). Of course, a locality could limit its review authority by negotiating restrictive language in its own franchise, and state law might also limit local authority. *City of Thousand Oaks v. Verizon Media Ventures, Inc.*, 69 Fed.Appx. 826 (9th Cir. 2003 – not selected for publication) (finding franchise as drafted did not require approval of sale of cable system assets).

C. Franchise Renewal

A local government has particular opportunities to enhance the local communications infrastructure and to advance the quality of life in the community through the cable television franchise renewal process.

Some contend that the renewal process is stacked against cities. The experience of many communities suggests otherwise. While there are very few cases where a locality and an operator have completed the "formal" renewal process, in every case where a locality has been through the process and denied renewal, the denial has been upheld by the courts. *Union CATV, Inc. v. City of Sturgis*, 107 F.3d 434, 438 (6th Cir.1977); *Rolla Cable Sys., Inc. v. City of Rolla*, 761 F.Supp. 1398 (E.D.Mo.1991); *Cablevision of the Midwest, Inc. v. City of Brunswick, Ohio*, 1:99CV1442 (E.D. Ohio Dec. 18, 2000); see also *Communications Sys., Inc. v. City of Danville*, 880 F.2d 887, 891-92 (6th Cir.1989).

Perhaps even more importantly, recent "informal" renewals include: (1) substantial system upgrades; (2) substantial improvements in the quality of cable service; (3) contributions of television channel capacity, facilities and equipment for local community programming and (4) video, data and voice facilities that link schools, libraries and government buildings so that these institutions can communicate more efficiently with one another and with the public. These benefits have been obtained in many communities without significantly increasing rates to consumers.

1. *The renewal process.*

A request for a franchise renewal can be resolved informally, through negotiations. Federal law has very little to say about the conduct of informal negotiations. It merely provides that, once a renewal franchise has been negotiated, the franchising authority must notify the public and

provide an opportunity to comment on the renewal franchise before it is finally adopted. 47 U.S.C. § 546(h).

But the Cable Act also spells out a more formal process. This formal process must be followed if the operator or the City properly initiates it, although it can be stopped at any time if renewal issues are resolved informally. Typically, localities have little reason to initiate the formal process, but almost all operators do initiate it. In order to comply with federal law, a community must take certain steps once the formal process is initiated. For that reason communities typically move forward with the formal process and informal negotiations at the same time. Conceptually this is no different than settlement negotiations in typical litigation – the parties move forward through the courts while at the same time trying to settle disputes amicably. In the end, most renewals are resolved informally.¹

The formal renewal process is initiated either by the cable operator's submitting a written notice to the franchising authority requesting the commencement of formal renewal proceedings, or by the franchising authority's initiating such proceedings on its own in the 36-30 month window before the franchise is scheduled to expire. Any operator renewal notice must request that the franchising authority commence renewal proceedings under the Cable Act. If the window is missed, the locality has no obligation to follow the federal formal process. *See Triad CATV, Inc. v. The City of Hastings and Americable International-Michigan, Inc.*, 89-30090LA (W.D. Mich. filed October 2, 1989) (operator lost renewal rights under Cable Act because notice requesting renewal not timely and notice did not state intent to renew utilizing Cable Act procedures). However, the franchise or state law may set certain unavoidable renewal requirements.

The federal law formal process, once begun, can be divided into four stages.

First stage. The Cable Act directs the franchising authority to commence a proceeding within six months from the date of submission of a renewal notice. The proceeding is to identify future cable-related community needs and interests and review the past performance of the cable operator. 47 U.S.C. § 546(a). "Proceeding" is an undefined term and is best read as any process that allows the community to develop and understand its needs and interests and the operator's past performance. The proceeding can go on as long as desired. The "needs and interests" and "past performance" ascertainment can be performed using a variety of tools, including public hearings, surveys, focus groups, interviews, and reports and audits of the operator's past performance. In some communities, this initial proceeding ends with the adoption of a staff report that lists the cable-related needs and interests of the community, and evaluates the operator's past performance.

Second stage. Once the City has decided its needs and interests and reviewed the operator's past performance, the initial proceeding is closed. The federal law then permits the City to reduce these findings into a demand document to the operator, requiring the operator to submit a detailed renewal proposal that addresses those findings. The City can issue a formal request for a renewal proposal to the incumbent operator. That request may establish requirements, *inter alia* for facilities and equipment, PEG channels and the like. 47 U.S.C. § 531, 544(b). A franchising authority can establish a deadline for submission of the operator's formal proposal. 47 U.S.C. § 546(b)(3). Such deadlines must conform to state and local law and must be

communicated to the cable operator in writing. *See Eastern Telecom Corporation v. Borough of East Conemaugh*, 872 F.2d 30, 35 (3rd Cir. 1989). Best practices suggest that the request for renewal proposal should be issued contemporaneous with the closing of the First stage proceeding. The federal law permits the cable operator to submit a proposal on its own initiative upon completion of the first stage. 47 U.S.C. § 546(b)(1). This may preempt the City's later request for renewal proposal and unnecessarily confuse the procedural setting.

Within four months of receipt of the operator's formal proposal, the franchising authority must either renew or issue a preliminary assessment that renewal should be denied. It may be possible to delay this deadline by agreement, although that issue has not been firmly resolved, *FrontierVision Operating Partners, L.P. v. Town of Naples*, 2001 WL 220192 (D.Me., Mar 07, 2001).

Third stage. If the franchise is not renewed, the cable operator can require the City to commence an administrative proceeding before making a final determination to grant or deny renewal. 47 U.S.C. § 546(c)(1). The cable operator must be given adequate notice and fair opportunity for full participation in the administrative proceeding, including the right to introduce evidence, to require the production of evidence and to question witnesses. A transcript of the proceedings must be made.

Four issues are considered in the administrative hearing. Those are:

- Whether the cable operator has substantially complied with the material terms of the franchise and applicable law.
- Whether the quality of the cable operator's service, including signal quality, response to consumer complaints, and billing practices, but without regard to the mix or quality of cable services or other services provided over the system has been reasonable in light of community needs.²
- Whether the cable operator has the financial, legal and technical ability to provide the services, facilities and equipment as set forth in the cable operator's proposal. The mere fact that an operator is large or well-funded does not mean it is qualified – it is also important to consider whether the operator is willing to devote the resources required to serve a community properly.
- Whether the cable operator's proposal is reasonable to meet the future cable-related community needs and interests, taking into account the cost of meeting such needs and interests.

The franchising authority may not deny a proposal merely on the basis of a comparative bid that offers more, but "a court should defer to the franchising authority's identification of the community's needs and interests except to the extent necessary to weigh the needs and interests against the cost of implementing them." *Union CATV, Inc. v. City of Sturgis*, 107 F.3d 434 (6th Cir. 1997).

Upon completion of the administrative proceeding, the franchising authority must issue a written decision stating the reasons for denial. 47 U.S.C. § 546(c)(3). The operator can appeal the franchising authority decision to the courts, but is not entitled to have the court conduct a new hearing to determine whether the franchise should be renewed. The court reviews the record of the proceeding below and (absent procedural error) must affirm unless the operator proves that the decision of the franchising authority was not supported by a preponderance of the evidence. 47 U.S.C. §§ 546(e)(1), 555.

2. *Renewal challenges.*

While the basic outline of the renewal process is clear, cable operators have begun to raise fundamental challenges to local franchising authority under the Cable Act on statutory and first amendment grounds. Among the outstanding questions:

What system rebuild requirements can a community establish? The cable industry argues that 1996 changes to the Cable Act prohibit communities from requiring a company to install fiber optics, or from requiring any particular system design. The FCC has stated that there are some limitations on local authority: according to the FCC, a community may not dictate "whether a cable operator uses digital or analog transmissions [or to] determine whether its transmission plant is composed of coaxial cable, fiber optic cable or microwave radio facilities"³ However, the FCC went on to state that "[w]hile the 1996 Act imposes some specific limits of the role [local franchising authorities] play with respect to subscriber equipment and transmission technology, it does not diminish the [local franchising authorities'] important responsibilities in determining local cable-related needs and interests and seeing that those needs are met through the franchising and renewal process. Although local authorities are limited in dictating the use of transmission technologies, other facility and equipment requirements can still be enforced..."⁴ The FCC decision has led many operators to argue (the authors believe, incorrectly) that design requirements are prohibited altogether, or that requirements that have an effect on design choices are prohibited. Such a reading may prove difficult to square with the wording of the statute (since it allows localities to establish facilities and equipment requirements at 47 U.S.C. § 544(b)) and the language quoted above. As importantly for the industry, any ruling that prevents a locality from establishing meaningful build requirements should also lead cities to significantly shorten franchise terms – since one of the justifications for a longer franchise term has traditionally been the need to recover funds invested to meet franchise construction requirements.

Institutional networks. Communities commonly require operators to provide institutional networks to link schools, libraries and governments for video, voice, and data communications. I-Nets take a variety of forms. In some cases, the "I-Net" is a frequency set aside on the established network; in some cases, the operator provides fiber optic links, and the community is responsible for purchasing end-user equipment necessary to "light" the fiber and use those links; in some cases, operators agree to provide a pool of funds that can be used to pay for a certain amount of construction and equipment. I-Nets are traditionally planned to transport video, data, and voice. The 1984 legislative history notes that institutional networks were being used "to provide communications facilities that link almost all individuals and institutions in a universally available communications network."⁵ The legislative history explains that localities may establish "facilities and equipment requirements" for institutional networks pursuant to 47 U.S.C.

§ 544(b).⁶ Nonetheless, some cable operators are now arguing, *inter alia* that (a) localities cannot require operators to build I-Nets; and (b) that I-Nets are restricted to internal communications, or to video communications. Some operators do not make these arguments explicitly, but propose I-Net language containing restrictions on use which seem inoffensive but which have the effect of preventing interconnection of the I-NET to other networks, or which prevent a community from providing services to the community (such as transmission of GIS information) and recovering costs associated with providing that service.

PEG Requirements. Communities have required operators to set aside subscriber network channels for public, educational and government use for some time now - and many communities that have obtained adequate financial support for those channels generally have found them to be an invaluable communications asset to the community. As companies move into a new digital world, however, new questions arise: can the community control the new digital capacity for PEG purposes and use this digital capacity to provide multiple channels of video and non-video information to subscribers' homes? If the operator controls all of the digital capacity, will PEG be precluded from digital use entirely, or limited only to the bandwidth required to send a one-way video channel to the home, thereby limiting the type and amount of information that can be provided via PEG channels? Should some PEG programming be provided "on-demand" just as commercial programming is provided "on-demand." To what extent can communities insist that PEG users be permitted to take advantage of cable system capabilities for simultaneous transmission of video and data? Some operators argue that PEG is limited to transmission of one-way video – meaning that PEG users would not be able to take advantage of technology developments.

Scope of the franchise. Operators often seek to include language in the franchise which effectively authorizes provision of telecommunications and other services without obtaining any additional license or franchise. Operators will often argue that 1996 amendments to the Cable Act require cities to allow cable operators to provide telecommunications services without such additional authorization. This argument is tenuous to say the least [*see* www.millervaneaton.com for more on this topic]. While operators sometimes contend that the issue was resolved in their favor by the FCC, the issue has specifically *not* been resolved by the Commission. *See Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, GN Docket No. 00-185, CS Docket No. 02-52 ("Cable Modem Rulemaking"), Declaratory Ruling and Notice of Proposed Rulemaking, FCC 02-77 at ¶ 38 (March 15, 2002) ("Cable Modem Ruling").

Why is the debate significant? Local authority to charge for use of the rights-of-way to provide non-cable services could be affected. Prior to 1996, the franchise fee provisions of the Cable Act permitted localities to require operators to pay a franchise fee equal to 5% of gross revenues derived from the operation of the cable system. 47 U.S.C. § 542. As part of the Telecommunications Act of 1996, Congress amended the franchise fee provisions of the Cable Act to allow imposition of a Cable Act franchise fee on gross revenues derived from the operation of the system "to provide cable services." While the amendment limited fees that could be imposed under the federal Cable Act, the conferees indicated that they did not intend to prevent imposition of franchise fees on other services "to the extent permissible under State and

local law.” H. Rep. No. 104-458, 104th Cong 2d Sess. at 180 (1996) (noting cable operators could be required to pay “fair and reasonable fees” in connection with the provision of telecommunications services). An operator that convinces a community to issue a franchise authorizing the construction of a cable system, without limiting the services authorized by the franchise, can be expected to claim that the fees and charges it must pay are limited to those specified in the cable franchise. Fees in post-1996 franchises typically do not reach telecommunications or other non-cable services.

Several of the issues described above have been preliminarily debated in a court case involving Comcast and the City of San José. Comcast claimed, among other things, that the Cable Act strictly limited what a community can do with an institutional network, and that amounts contributed by an operator to support construction of an institutional network must be treated as part of the franchise fee payment. Comcast also argued that PEG requirements must be limited to one-way video programming. Comcast claimed that the City was demanding things through the renewal process that it could not demand and that the court should stop the renewal process in the City until the City had reformed that process. In 2003, the district court rejected Comcast’s motion for a preliminary injunction. *Comcast of California II, LLC v. San José*, NO. 5:03-cv-02532-RS (N.D. Cal. Sept. 29, 2003). In 2004, the district court dismissed Comcast’s claims entirely, concluding that, because Comcast’s request for renewal had not been finally denied, its contentions were not yet ripe for determination. While the decision is quite favorable to the City and preserves the integrity of the process, the decision does not resolve the merits of Comcast’s complaint. Comcast has appealed the decision to the Ninth Circuit.

The “level playing field” demand. Almost all operators are now demanding a renewal clause that requires anyone who provides cable service within the community to satisfy the same conditions as those imposed on the incumbent operator. These clauses can create several significant problems for local governments. First, in 1996 Congress authorized local telephone companies and other entities to enter the cable services market by building open video systems (“OVS”). An OVS provides services similar to those provided by traditional cable operators, but an OVS operator is required to set aside up to a third of the capacity of its system for lease to other companies. In return for assuming this common-carrier type obligation, an OVS is relieved of several federal requirements that apply to cable operators – including the obligation to construct an institutional network. 47 U.S.C. § 573. The OVS provisions of federal law do not preempt local franchising authority, *City of Dallas v. FCC*, 165 F.3d 341, 347 (5th Cir. 1999). OVS operators contend that the federal provisions do eliminate local authority to impose requirements such as build-out and universal service requirements on an OVS. At least one court has rejected that position, *WH Link, LLC v. City of Otsego*, 664 N.W.2d 390 (Ct. App. Mn. 2003), but the matter is not finally settled. Depending on the franchise language and scope, a level playing field clause (a) may prevent a locality from adopting a deregulatory policy for OVS paralleling the federal policy; and (b) may face the locality with the prospect of litigation from the OVS (challenging local franchise requirements) or from the cable operator (seeking to enforce the level playing field contract).

More generally, new entrants into the market often argue that applying the same requirements to them effectively makes it impossible to enter the market. For example, new entrants often argue overbuilds will only work in very high-density areas, so that a “level playing field” clause that

requires a build out of 100% of the incumbent's territory prevents entry. One may agree or disagree with this analysis; the point is that a level playing field clause can limit the ability of local government to develop rules to promote competition.

D. Hot Cable Franchising Issues

1. *Scope of Authority Over Internet [Cable Modem] Services.*

The cable modem debate involves at least two distinct issues. The first issue is: what is the proper classification of the service. The Federal Communications Commission issued a declaratory order finding that cable modem service is not a cable service but is instead an interstate information service. *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GN Docket No. 00-185, CS Docket N0. 02-52, (released Mar. 15, 2002). The 9th Circuit in *Brand X Internet Services v. FCC*, 345 F.3d 1120 (9th Cir., 2003) affirmed the FCC's finding that cable modem service is not a cable service, but reversed the FCC with respect to its finding that cable modem service is *not* a telecommunications service. In the 9th Circuit's view, cable modem service *is* a telecommunications service.

The Supreme Court granted a petition for certiorari filed by the cable industry and by the FCC and the United States to address whether cable modem service is a telecommunications service or an information service. *FCC v. Brand X Internet Services*, 2004 WL 2153536 (December 3, 2004). The Court denied a petition for certiorari filed by local governments. In a decision issued in June of 2005, the Court reversed the Ninth Circuit. *National Cable & Telecommunications Ass'n v. Brand X*, 125 S.Ct. 2688 (2005). The Court held that the FCC's classification of cable modem service as an information service was not inconsistent with the Communications Act, and was entitled to deference under the framework of *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

What is the effect of the decision? The cable industry may not be better off with cable modem service classified as an information service. As discussed below in Part IV, some telephone companies appear to intend to use the "information services" model to escape traditional telephone regulation *and to escape cable regulation when providing cable services*. The traditional distinction between "cable services" and "telecommunications services" is not sustainable if the FCC persists in creating a new class of "information services" which require neither federal nor local authorization.

Based upon the FCC's determination, cable operators also acted uniformly across the nation and refused to pay franchise fees on cable modem service, even where the franchise explicitly required such payments. The operators claimed that the franchise fee is limited to 5% of the gross revenues derived from the operation of the cable system "to provide cable service." The operators claimed that because the FCC declared that cable modem service is not a cable service, it would be illegal to pay a franchise fee on cable modem service. This argument, as discussed above, is based on the 1996 change in the language of the Cable Act's franchise fee provision. More generally, operators have argued that localities are prohibited from imposing any requirements related in any respect to cable modem service. In fact, as discussed above, the

FCC has an ongoing rulemaking under way to decide what effect, if any, its decision has on the authority of local governments to charge a franchise fee on cable modem service based on state or local law requirements (as opposed to the Cable Act's franchise fee provision). The FCC is also considering whether localities may otherwise regulate the provision of cable modem service, or require facilities and equipment related to the provision of cable modem service. In addition, it is far from obvious (a) whether the 1996 amendments affect local authority to collect the full franchise fee negotiated under pre-1996 agreements, or (b) whether the 1996 amendments affect local authority to collect a fee on cable modem service where the franchise requires a fee less than the 5% federal maximum.⁷

Several communities brought suit against their cable franchisees in late 2002 and 2003, claiming that fees were owed on cable modem revenues based on the franchise agreements with the City. Most notable is a case involving the City of Chicago. Chicago cable franchises require payment of franchise fees on cable modem services. A federal district court ruled that payment of franchise fees on cable modem services was prohibited by federal law. *City of Chicago v. AT&T Broadband, Inc.*, No. 02 C 7517, 2003 WL 22057905 (N.D. Ill. Sept. 4, 2003). The district court's decision was vacated in *City of Chicago v. Comcast Cable Holdings, L.L.C.*, 384 F.3d 901 (7th Cir. 2004). Chicago had originally filed suit in state court based on the language of (what is now) the Comcast franchise. The case was removed to the federal district court, and the district court issued its decision on the merits. The Seventh Circuit concluded that the case should never have been heard by the district court because it did not involve a federal question. According to the Court, the Cable Act could be raised as a defense against the enforcement of what would otherwise be an illegal franchise fee provision; but the source of local authority to charge the fee was state, not federal law, and as a result the case was not in and of itself based on federal law. The case now returns to state court, where the City will again be able to present its contract claims, and Comcast, presumably, will again argue that the claims have been preempted.⁸ The Seventh Circuit's view of the case is significant. If compensation for use of the rights-of-way is primarily a state claim on a contract, then FCC preemption of the classification of the services for regulatory purposes will not control the ultimate authority of local governments to charge franchise fees for the services.

2. *When must a company apply for a franchise?*

Several communities are now watching as telephone companies install facilities that they intend to use to provide cable service (either as a cable operator, or as an open video system). Some telephone companies claim to be installing the facilities under the certificate received from the state to construct telephone lines (the companies argue that the same facilities would be installed even if they did not plan to offer video services). And, they argue the Cable Act does not require the telephone company to obtain a franchise until the company actually begins to offer cable service. Under this approach, build-out of a new telephone company network occurs without the normal protections and community planning of the cable franchising process.

It is far from obvious that the telephone industry's position is correct. Under federal law, it is illegal for a cable operator to *provide* cable service without a franchise, 47 U.S.C. § 541(b)(1). But that does not mean that federal law assumes franchises will issue after, rather than before, construction starts. A franchise is defined as an "authorization" "which authorizes the

construction or operation of a cable system.” 47 U.S.C. § 522(9). (emphasis supplied). There is thus a good argument that localities are entitled to require a franchise before construction begins. Indeed, some obligations imposed on local governments under the Cable Act – including the duty to prevent redlining – may be much more difficult to satisfy post-construction.⁹ Yet for now, franchise-less construction is proceeding in many communities.

In March of 2005, the Town of Babylon, Cablevision, and the Cable Telecommunications Association of New York sought a declaratory ruling from the New York Public Service Commission (“NYPSC”) that Verizon’s FTTP Network constitutes a “cable television system” and, therefore, Verizon must obtain a franchise prior to commencement of construction. On June 15, 2005, the New York Public Service Commission issued a *Declaratory Ruling on Verizon Communications, Inc.’s Build-Out of Its Fiber to the Premises Network*, 05-M-0250. The PSC declared that “Verizon must first obtain cable franchises from affected municipalities before it offers cable service or installs plant in its FTTP network that can only be used exclusively for a cable television system.” *Id.* at 29.

3. *How should cities regulate in a more competitive environment?*

Cable service remains a monopoly service in most communities. However, most communities are beginning to face questions that arise as new companies seek the opportunity to begin to provide competitive cable services; as cable companies begin to provide advanced cable services; and as cable companies begin to enter non-cable markets. For example, some communities have inserted provisions in cable ordinances that allow for suspension of certain requirements once two cable companies begin to compete head-to-head throughout the community (the franchise for Tacoma, Washington provides an example of this approach). Some communities are beginning to focus exclusively on rights-of-way management and related problems, establishing generic requirements that apply to all users of the rights-of-way (for example, some cities are adopting cable franchise and OVS ordinances simultaneously). And some communities are beginning to consider how to review and audit franchise fee payments under circumstances where an operator may be providing a bundle of services – telephone, Internet and cable service – for a consolidated price. Is the entire package subject to a fee? Or only a portion of it?

III. LOCAL AUTHORITY OVER TELECOMMUNICATIONS SYSTEMS.

Telecommunications law for municipalities is currently characterized by a basic underlying clash with respect to local governments’ right to control and to gain the benefit of their property. As a general matter, local governments either own their public rights-of-way in fee, or at least are trustees for their use for the benefit of the whole community. Localities grant private parties, including communications companies, valuable rights to use and occupy those rights-of-way. This grant gives the typical grantee who intends to provide service in a community:

(1) The *option* to place facilities throughout the public rights-of-way, and thus to burden those rights-of-way;

(2) A right to *burden* the public rights-of-way through construction work, and then on an ongoing basis through repairing and maintaining facilities in the limited space within the streets and public utility easements; and

(3) The ability to *use* the public rights-of-way in doing business.

The central questions for local governments in telecommunications under federal law are (a) Can the City charge for the rights granted, and if so, on what basis? (b) What regulations can and should be imposed in connection with the rights granted? (c) What rights does a community have to refuse to enter into a franchise (a contract) granting such rights?

Two provisions of federal law are of particular importance. The first -- and the principal focus of federal judicial decisions since 1996 -- is Section 253 of the 1996 Act, 47 U.S.C. § 253, titled "Removal of Barriers to Entry." Section 253(a) preempts any state or local legal requirement that would "prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." Subsections (b) and (c) of § 253, however, create "safe harbors" for certain types of state and local requirements. Even if a requirement would "prohibit or have the effect of prohibiting" under subsection (a), it will not be preempted by § 253 if it falls within the scope of subsections (b) or (c). Sections 253(a)-(c) provide:

(a) IN GENERAL.--No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

(b) STATE REGULATORY AUTHORITY.--Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

(c) STATE AND LOCAL GOVERNMENT AUTHORITY.--Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

While Section 253(b) refers only to the authority of a "State," the FCC has concluded that the subsection also protects the exercise of authority delegated by the state to a locality. As responsibility for "public safety and welfare" is often at least in part the responsibility of local governments, this exception may prove quite important, although it has not been much-litigated to this point. Subsection (d) of § 253 gives the FCC authority to determine whether a particular requirement prohibits entry, but provides that the FCC has no jurisdiction to determine whether a particular provision is protected by the safe harbor of § 253(c).

Also critical, but less litigated, is Section 601 of the Telecommunications Act, which appears at 47 U.S.C. § 152 nt. Section 601 provides:

(c) FEDERAL, STATE AND LOCAL LAW.-

(1) NO IMPLIED EFFECT. This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State or local law unless expressly so provided in such Act or amendments.

(2) STATE TAX SAVINGS PROVISION.- Notwithstanding paragraph (1), nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede, or authorize the modification, impairment, or supersession of, any State or local law pertaining to taxation, except as provided in sections 622 and 653(c) of the Communications Act of 1934 and section 602 of this Act.

Taken together, Section 601 and Section 253 indicate that:

(a) state and local taxing authority is completely protected from preemption under Section 253, and a telecommunications provider challenge to a tax (as opposed to a rent levied in return for the right to use the rights-of-way to provide service) should be dismissed. And so the only case to address the issue so holds. *Qwest Corporation v. City of Globe*, No. CV 01-2500-PHX-JAT (D.Az. July 16, 2003).

(b) A local law should only be preempted if it prohibits or has the effect of prohibiting service.

(c) A local law should only be preempted if it falls outside the safe harbors of Section 253(b) or (c).

(d) Local authority to obtain reasonable compensation for use of public rights-of-way is preserved, consistent with applicable state law.

(e) Local authority to manage the rights-of-way is protected, consistent with applicable state law.

There is, however, substantial confusion reflected in the case law on all of the last four points. Some courts have suggested that a local law is preempted if it falls outside the safe harbors of Section 253(b)-(c), even if there is *no* prohibition. Other courts suggest that local laws are only preempted if (a) the local requirements prohibit or have the effect of prohibiting entry *and* (c) the local requirements fall outside the safe harbors. *Compare Bell Atlantic-Maryland, Inc., v. Prince George's County, Maryland*, 49 F. Supp. 2d 805, 816 (D. Md. 1999), *vacated* 212 F.3d 863 (4th Cir. 2000); *City of Auburn v. Qwest Corporation*, 247 F.3d 966 (9th Cir. 2001), *cert. denied*, 122 S. Ct. 809 (2002); *BellSouth Telecommunications, Inc., v. Town of Palm Beach*, 252 F.3d 1169 (11th Cir. May 25, 2001).

The breadth of the safe harbors is also in dispute.

Telecommunications providers argue that compensation is limited to the marginal cost of issuing permits, while municipalities argue that the law permits them to charge a rent that is not confined to recovering costs. *Puerto Rico Telephone Co., Inc. v. Municipality of Guayanilla*, 283 F.Supp.2d 534 (D.P.R. 2003) summarizes the case law on point, and notes that the trend favors

the municipal view. However, recent case law also emphasizes that compensation must be "nondiscriminatory" and "competitively neutral."

In some states, the incumbent local telephone company claims to operate pursuant to a state or pre-statehood franchise, and claims the right to operate pursuant to that franchise without making any payment to localities. The ancient grants may not protect new entrants, however, and so the question arises as to whether one can charge a fee for use of the rights-of-way to a new entrant if the incumbent is not subject to such a requirement. One federal Court of Appeals has said that new entrants can be charged compensation, while the decision of another Court of Appeals questions that analysis. *TCG Detroit v. City of Dearborn*, 206 F.3d 618 (6th Cir. 2000); *TCG New York, Inc., et al. v. City of White Plains*, 305 F.3d 67 (2d Cir. 2002).¹⁰ A federal bankruptcy court in New York recently struck a claim filed by Montgomery County, Maryland in MFN's bankruptcy proceeding because, *inter alia*, MFN's expired franchise required it to pay a fee that Verizon was not required to pay. The court stated: "[r]equiring one provider to pay certain fees not imposed on another gives the latter competitive advantages to 'either undercut [the former's] prices or to improve [the latter's] profit margin relative to [the former's] profit margin...' The county-sanctioned competitive advantages in the instant case clearly 'run directly contrary to the pro-competitive goals of [the FTA].'" *Id.* Therefore, the 5% Franchise Fee is invalid under Section 253." *In re Metromedia Fiber Network, Inc.* 313 B.R. 153 (Bkrcty.S.D.N.Y. 2004). The Southern District of New York affirmed the Bankruptcy Court decision. *Montgomery County Maryland v. Metromedia Fiber Network, Inc.*, 326 B.R. 483 (S.D.N.Y. 2005). Montgomery County has appealed the decision to the Second Circuit Court of Appeals.

It is also not clear what constitutes protected "management of the rights-of-way" within the meaning of Section 253(c). As to some matters, there is little dispute. The FCC has indicated that:

"Section 253(c) preserves the authority of state and local governments to manage public rights-of-way. Local governments must be allowed to perform the range of vital tasks necessary to preserve the physical integrity of streets and highways, to control the orderly flow of vehicles and pedestrians, to manage gas, water, cable (both electric and cable television), and telephone facilities that crisscross the streets and public rights-of-way.... The types of activities that fall within the sphere of appropriate rights-of-way management ... include coordination of construction schedules, determination of insurance, bonding and indemnity requirements, establishment and enforcement of building codes, and keeping track of the various systems using the rights-of-way to prevent interference between them."

In re TCI Cablevision of Oakland County, Inc., 12 FCC Rcd 21396 (1997), P103, 1997 WL 580831. The FCC based its analysis on statements by Senator Diane Feinstein, who offered examples of the types of restrictions that Congress intended to permit under section 253(c), including:

(1) "regulate the time or location of excavation to preserve effective traffic flow, prevent hazardous road conditions, or minimize notice impacts;" (2) "require a company to place its facilities underground, rather than overhead, consistent with the requirements imposed on other utility companies;" (3) "require a company to pay fees to recover an appropriate share of the

increased street repair and paving costs that result from repeated excavation;" (4) "enforce local zoning regulations;" and (5) "require a company to indemnify the City against any claims of injury arising from the company's excavation."

In re Classic Telephone, Inc. 11 FCC Rcd 13082, 1996 WL 554531 (1996), P39 (quoting 141 Cong. Rec. S8172 (daily ed. June 12, 1995) (statement of Sen. Feinstein, quoting letter from the Office of City Attorney, City and County of San Francisco).

Some courts have suggested that rights-of-way management encompasses these specified activities, see *Prince Georges. Auburn* suggests that the distinction is between a regulation aimed at the rights-of-way, and a regulation of the provider (a line that is far from clear); *White Plains* made a similar distinction, but went on to suggest that the issue is whether the challenged requirement is "reasonably related to regulating the use of the rights-of-way." In order to fall within the "management" safe harbor, it appears a locality must at least be able to articulate a credible nexus between the proposed regulation and rights-of-way management. *Cox Communications PCS v. City of San Marcos*, 204 F. Supp. 2d 1260 and 1272 (S.D. Cal. 2002) (noting that provisions which have simply too tenuous a connection to the 'management of the rights-of-way' will not be saved under 253(c)). Courts are concerned that unless *some* line is drawn, almost any requirement could be justified as a rights-of-way management requirement. On the other hand, second-guessing the manner in which the rights-of-way is regulated should not be appropriate under Section 253(c), which was designed to protect municipal rights-of-way discretion and choices related to conflicting demands on rights-of-way.

Almost all courts which have considered the question recognize that federal law does not prohibit telecommunications franchising. On the other hand, courts have been reluctant to uphold ordinances where it appears to the court that the locality has unbridled discretion to deny entry if a provider refuses to agree to conditions that would be unlawful, and where entry has been denied or effectively denied through the franchising process. *White Plains*. But it is hard to say that the law is clear even on this point. Section 253 cases often involve strange mixtures of state and federal law questions, as *Auburn* demonstrates: in that case, issues regarding *wireline* franchising were resolved under state law. The decision actually only deals with the local ordinance as applied to *wireless* providers.¹¹ And in a recent decision, the Supreme Court of Virginia rejected the notion that "discretion" inherently violates Section 253, drawing a distinction between that standard as applied in the context of Section 253(b) and that standard as applied in the context of Section 253(c). *Level 3 Communications of Virginia, Inc. v. State Corp. Comm'n*, 604 S.E.2d 71 (Va. 2004).

In several cases, the FCC has adopted an approach to Section 253(a) that is generally favorable to localities. *In re California Payphone Ass'n*, Opinion and Order, 12 FCC Rcd. 14,191 (1997) states that the first question in any Section 253(a) analysis is whether there is an *explicit* prohibition on entry. If there is none "[w]e then consider whether the Ordinance has the *practical effect* of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." *Id.* at 14,204 ¶ 27. *In re Public Utility Comm'n of Texas*, 13 FCC Rcd. 3460 emphasizes that there is no prohibition unless challenged requirements "materially inhibit or limit the ability" of an entity to compete. *Id.* at 3470 ¶ 22.¹² It also indicated that in determining whether a Section 253 violation has occurred, the key is "implementation," not

speculation. *Id.* at 3465 ¶ 10. The burden is on the telecommunications service provider to prove that there is a prohibition. If that burden is met (according to the FCC), it is then up to the locality to explain why it believes that a challenged provision falls within the ambit of the safe harbors. *See also Classic Telephone, Inc., Petition for Preemption of Local Entry Barriers*, 11 FCC Rcd 13082 (1996).

Other courts have also taken up Section 253. A Tenth Circuit case involved an appeal from the decision in *Qwest v. Santa Fe*, 224 F.Supp.2d 1305 (D N.M. 2002). The Tenth Circuit essentially affirmed the district court's determinations, including, importantly, the district court's conclusion that (a) Section 253 does not create federal rights; and (b) therefore, telecommunications providers who prevail in challenges to local ordinances may not obtain damages or attorneys fees under Section 1983 or Section 1988 of the Civil Rights laws. *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258 (10th Cir. 2004). But the issue is far from settled. In December, 2004, a district court in New York ruled that both Section 253(a) and 253(c) create private federal rights of action, and that a claim for damages and attorneys fees is available under Sections 1983 and 1988 for violation of those provisions. *NextG Networks of New York, Inc. v. City of New York*, 2004 WL 2884308 (S.D.N.Y. Dec. 10, 2004).¹³ In contrast, in December of 2005, the district court for the Eastern District of Missouri denied a claim for damages under Section 1983, ruling that the Telecommunications Act did not confer a federal right on the company. *Level 3 Communications v. City of St. Louis*, 4-04-CV-871, slip op. at 25 (E.D.Mo., Dec. 19, 2005). In so finding, the court relied, in part, on the Supreme Court's 2005 holding that Section 1983 damages were not available under Section 332 of the Telecommunications Act. *City of Rancho Palos Verdes v. Abrams*, 125 S.Ct. 1453 (2005).

In *Qwest Corp. v. City of Portland*, 200 F.Supp.2d 1250 (D. Or. 2002), Qwest challenged local franchising requirements, as well as local franchise fee and tax requirements. The district court granted summary judgment to defendant cities on the ground that Qwest had failed to show that any of the regulations it challenged "prohibited or had the effect of prohibiting" Qwest from providing service. The district court also concluded, *inter alia* that Qwest could not challenge the fee requirements, as it had challenged the fee requirements in state courts, and lost. In *Qwest Corp. v. City of Portland*, 385 F.3d 1236 (9th Cir. 2004), the appeals court affirmed the district court's holding with respect to the fee requirements: the Ninth Circuit ruled Qwest was barred by doctrine of claim preclusion from challenging ordinances of several Oregon cities which imposed revenue-based fee on service for its use of public rights-of-ways. The court reversed the district court's decision in other respects, concluding that the district court had failed to follow the analysis dictated by court's decision in the *Auburn* decision (without explaining precisely what that analysis requires). However, the court did emphasize one important limitation on the *Auburn* decision and on Section 253 generally. *Auburn* and most other Section 253 cases involve challenges to telecommunications-specific ordinance. The Ninth Circuit noted: "[w]e doubt whether City of Auburn can be read so broadly as to apply to ordinances that are not specific to the telecommunications permitting process. Based on the record before us, there is no indication that Portland or the other Cities, with the exception of Ashland, Eugene, and Springfield, have passed ordinances that are specific to the telecommunications process and apply to all telecommunications providers attempting to enter the market. Therefore, to the extent that Qwest challenges these ordinance provisions, it is questionable whether § 253 even applies." The case was remanded back to the district court.

Both the Ninth and the Tenth Circuit denied petitions for rehearing *en banc*.

While the ultimate interpretation of Section 253 is still in doubt on many key points, the federal case law increasingly recognizes the right of localities to charge rents for use of the rights-of-way (and not just recover costs) and to develop reasonable rules for use of the rights-of-way. However, that does not mean that local authority is unlimited. In the case of cable regulation, the law has tended to place significant regulatory authority at the local level. In the case of telecommunications providers, the reverse is true. Since early in the 20th century, most rate, service, and facilities regulation has occurred at the state level. Courts have tended to be willing to protect traditional local authority, but unwilling to allow localities to leverage this traditional authority into broader regulation of telecommunications services. The lessons from the cases, at this point, may be that:

- Telecommunications regulation must be developed with a close eye on state law requirements and the division of authority between state, local and federal rights. *One mistake some localities have made is to take cable regulations and import them wholesale into the telecommunications environment. Courts have not been sympathetic to this approach. In fact, the recent Portland decision may suggest that telecommunications-specific regulations may be less defensible than general requirements obligating persons who use the rights-of-way to obtain a franchise and pay a fee for use of the rights-of-way.*
- It is helpful to review proposed regulations to determine whether there is a clear relationship between the regulation and interests that the locality has a right to protect. Courts have been sympathetic where localities have been able to factually support the ordinances adopted.
- Courts are reluctant to countenance an ad hoc approach to telecommunications regulation which leaves localities free to indefinitely delay or deny entry.

IV. LOCAL AUTHORITY OVER WIRELESS DEPLOYMENT AND PUBLIC SAFETY USE

A. Tower Siting

When Congress passed the Telecommunications Act of 1996, it adopted a new provision entitled “Preservation of Local Zoning Authority,” 47 U.S.C. § 332(c)(7). Cell phone companies were placing towers throughout the nation, and Section 332(c)(7) ensured local governments could regulate the placement, construction, and modification of those towers consistent with normal land use planning processes. But Congress also wanted to promote deployment of cell services, so it placed certain conditions on the exercise of local zoning authority. The regulation of the “placement, construction and modification” of cell towers:

- Cannot unreasonably discriminate among providers of functionally equivalent services;
- Cannot prohibit or have the effect of prohibiting the provision of personal wireless services.

Certain procedural requirements also must be satisfied:

- A request for a tower authorization has to be acted on within a reasonable period of time;
- Any decision to deny a request for authorization must be supported by “substantial evidence” contained in a “written record,” and the decision denying the request must be “in writing.”
- No regulation of placement, construction or modification of towers on the basis of RF emissions if the facility complies with FCC regulations.

What happens when a municipality violates those conditions? The Act allows cell companies to obtain expedited judicial review,¹⁴ and a court hearing a cell phone case can order a locality to issue a permit to construct a tower. But cell phone providers have also argued that they are entitled to seek damages and attorneys fees from cities under the nation’s civil rights laws.

The Ninth Circuit Court of Appeals concluded cell phone providers could obtain relief under the civil rights laws in *Abrams v. City of Rancho Palos Verdes*, 354 F.3d 1094 (9th Cir. 2004). The case involves an amateur radio operator who tried to convert an antenna used for noncommercial purposes into a commercial tower. The Seventh Circuit and Third Circuit both came to the opposite conclusion with respect to civil rights claims, *Nextel Partners Inc. v. Kingston Township*, 286 F.3d 687 (3d Cir. 2002); *Primeco Personal Communications Ltd. (d/b/a Verizon Wireless) v. City of Mequon*, 352 F.3d 1147 (7th Cir. 2003).

The Supreme Court decided to resolve the dispute. On March 22, 2005, the Court ruled unanimously that wireless companies cannot obtain damages and attorneys fees under the civil rights laws from local governments which make wireless tower zoning decisions that violate the Telecommunications Act. *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 125 S.Ct. 1453 (2005). As Justice Breyer wrote in a concurring opinion, “[T]o permit § 1983 actions here would undermine the compromise – between purely federal and purely local siting policies – that the statute reflects.” *Id.* at 1463.

More generally, local authorities will continue to face challenges to local zoning authority in cases brought under Section 332 and (where local rights-of-way are also involved) cases brought under Section 253. However, courts have generally been very sympathetic to local concerns regarding the placement of towers, and have been reluctant to overly burden the local zoning process. See, e.g., *Omnipoint Holdings, Inc. v. City of Southfield*, 355 F.3d 601 (6th Cir. 2004)(upholding summary judgment against Omnipoint); *U.S. Cellular Corp. v. City of Wichita Falls, Tex.*, 364 F.3d 250 (5th Cir. 2004)(upholding denial of tower variance request that departed sharply from local land use regulations); *Sprint Spectrum L.P. v. City of Carmel, Indiana*, 361 F.3d 998(7th Cir. 2004)(dismissing challenge as unripe).

B. Wireless and Public Safety.

While much of the case law is focused on commercial wireless tower siting, the FCC has adopted or is considering rules that would authorize local governments to sub-lease space traditionally reserved for use by local public safety licensees.

The FCC released an order on public safety leasing in September of 2004,¹⁵ and it promises to make municipal use of radio resources more efficient and productive for those government licensees who choose to take advantage of the opportunities.

Two points should be emphasized at the outset:

- Leasing is purely voluntary. The FCC recognizes that some municipalities have no channels to spare.
- Leases can be as “dynamic” and “interruptible” as necessary, meaning that channels rented as unused on one day must be returned the next day if the licensee needs them back.¹⁶

According to the FCC, not all uses qualifying as public safety-related¹⁷ are so time-sensitive as to flatly bar any sharing of the spectrum by secondary users on a temporary basis. For example, some eligible non-commercial prospective lessees might have “batch transfer” needs that involve transmitting large quantities of data. Transmission times could be chosen for least likelihood of competing needs on the part of the licensee.

The FCC’s September order expanded on an earlier decision permitting commercial licensees to lease to each other.¹⁸ At that time, the agency was uncertain about permitting non-commercial licensees to rent spectrum. In the Safety Order, the FCC took a middle ground. Non-commercial entities, such as public safety licensees, could lease spectrum, but only to each other, not to commercial entities. This restriction applies, under Section 90.523(d), even if the commercial services are rendered by public safety or quasi-public safety entities.

When the FCC decided to allow public safety spectrum leasing, it approved the same leasing models authorized in the earlier Commercial Order. There are two basic types: (1) Spectrum Manager Leasing; (2) De Facto Transfer Leasing. The second category is divided into “long-term” and “temporary short-term” classifications. We discuss each of these below.

1. *Spectrum Manager Leasing*

The over-arching legal context for all leasing models is Section 310(d) of the Communications Act, 47 U.S.C. § 310(d), which requires FCC approval prior to assignment or transfer of control of a radio license. Under spectrum manager leasing (“SML”), both factual (operational) and legal control of the lessee’s spectrum remain with the original licensee. This does not mean the licensee must interfere in the lessee’s business or directly monitor the lessee’s separate facilities, but rather that the FCC will look to the licensee for its lessee’s compliance with all the rules of spectrum use. Because neither actual nor legal transfer of the license from licensee to lessee

takes place, Commission approval of this arrangement is not required. However, the licensee must notify the agency of the details of each lease.

2. *De Facto Transfer Leasing*

By contrast to SML, De Facto Transfer (“DFT”) leasing involves a transfer of actual control (but not “legal” control) from the licensee to the lessee. Therefore, prior Commission approval of DFT is required. In this model, the FCC will look first to the lessee, rather than the lessor/licensee, for compliance with Commission rules. Approval processes are more streamlined for short-term (360 days or less) than for longer-term arrangements.¹⁹

3. *Other Considerations*

In both the SML and DFT models, a lessee would be permitted to sub-let, but only with the lessor/licensee’s permission. Likewise, in both kinds of arrangements, the FCC expects that specific and concrete contractual allowances and restrictions will describe the relative responsibilities of the licensee and lessee.

As discussed at n. 15, the Commission’s leasing decision is tied to developments in its “smart radio” initiatives. The Commission is considering whether to expand local authority to enter into leases of spectrum to *commercial* entities. It also has before it proposals to allow local governments to capture *commercial* spectrum on an “as-needed” emergency basis – the radio equivalent of requiring an automobile to move aside to allow an ambulance to use public rights-of-way. These initiatives will create enormous potential opportunities (and risks) for local governments.

V. TELECOMMUNICATIONS CONVERGENCE AND LOCAL GOVERNMENTS.

A. Overview

The current federal regulatory scheme envisions two very different types of networks:

Open networks like telephone systems are subject to rules that prevent the owner of the network from favoring its own content and its own services. The subscriber chooses who to communicate with, and what to communicate.

Closed networks, such as cable systems and broadcast stations, are the opposite. The owner of the closed distribution system exercises control over the content on the network and picks and chooses who may use the network under what terms and conditions. There is no requirement to treat all users equally. But, there was usually a “public interest” obligation imposed for the special privilege of operating the network.

Under the open network model, the law distinguished between the “transmission” function, which was subject to common carrier rules and regulations, and “enhanced services” or “information services” which were competitive services provided via telecommunications. A

facilities owner could provide information services, but it had to purchase the “transmission” function required to provide that service from itself on the same terms and conditions that the transmission service was offered to others.

These lines have never been absolute. Cable operators are subject to PEG and leased access obligations, and may be required to open their networks on antitrust or other grounds. “Open video systems” combine characteristics of common carriage and cable systems. And telephone companies have been permitted to build private networks available only to specific customers under negotiated contract terms.

Now some companies are pushing for closed network treatment for advanced and broadband networks. This goal is being pursued in two distinct but related ways: first, some telephone companies are asking to be relieved of common carrier obligations with respect to any broadband services; second, some are urging that packet-switched based services using the Internet Protocol (IP) (and the networks transmitting them) be categorized and treated differently from traditional video and voice services (and their networks).

This has in turn led to a debate as to whether there should be any distinction drawn between services and facilities – and whether the old line between common carrier and non-common carrier facilities should be maintained or not. At the simplest level, the argument is that anyone who markets equivalent services to subscribers should be treated the same, regardless of the technologies used. So, anyone providing voice services should be treated the same as others providing voice services. However, in a technologically converged world of data packets traveling over packet switched networks, it quickly becomes evident that it is difficult to distinguish between “voice” services and “video” services and “data” services. There is a question as to whether any service distinction can be drawn, and whether one can viably maintain a distinction between “open” and “closed” networks that traditionally was based on the type of service provided over the networks.

The debate is being played out in a number of FCC proceedings, and in a series of pending proceedings where local exchange carriers are asking the FCC to “forbear” from traditional common carrier regulation. These include, among others:

- *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities, Notice of Proposed Rulemaking, CS Docket 02-52, 17 FCC Rcd 4798 (“Cable Modem NPRM”);*
- *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, Universal Service Obligations of Broadband Providers, Notice of Proposed Rulemaking, CC Docket Nos. 02-33, 95-20, 98-10, 17 FCC Rcd 3019 (2002) (“Wireline Broadband NPRM”);*
- *In the Matter of IP-Enabled Services, Notice of Proposed Rulemaking, WC Docket No. 04-36, 19 FCC Rcd 4863 (2004) (“IP-Enabled Services NPRM”);*

- *In the Matter of Petition of BellSouth Telecommunications, Inc. For Forbearance From Application of Title II Common Carrier Regulation to IP Platform Services*, WC Docket No. 04-29 (BellSouth I); and
- *In the Matter of Petition of BellSouth Telecommunications, Inc. For Forbearance Under 47 U.S.C. § 160(c) From Application of Computer Inquiry and Title II Common-Carriage Requirements*, WC Docket No. 04-405 (BellSouth II).
- Verizon and Qwest have each also filed petitions for forbearance.

Some commentators have begun to look to Information Technology (IT) models that define the way that networks operate. The traditional OSI model for regulation defines communications networks in terms of seven layers. They have been described as follows (web references omitted):

“Application (Layer 7) This layer supports application and end-user processes. Communication partners are identified, quality of service is identified, user authentication and privacy are considered, and any constraints on data syntax are identified. Everything at this layer is application-specific. This layer provides application services for file transfers, e-mail, and other network software services. Telnet and FTP are applications that exist entirely in the application level. Tiered application architectures are part of this layer.

Presentation (Layer 6) This layer provides independence from differences in data representation (e.g., encryption by translating from application to network format, and vice versa. The presentation layer works to transform data into the form that the application layer can accept. This layer formats and encrypts data to be sent across a network, providing freedom from compatibility problems. It is sometimes called the /syntax layer/.

Session (Layer 5) This layer establishes, manages and terminates connections between applications. The session layer sets up, coordinates, and terminates conversations, exchanges, and dialogues between the applications at each end. It deals with session and connection coordination.

Transport (Layer 4) This layer provides transparent transfer of data between end systems, or hosts, and is responsible for end-to-end error recovery and flow control. It ensures complete data transfer.

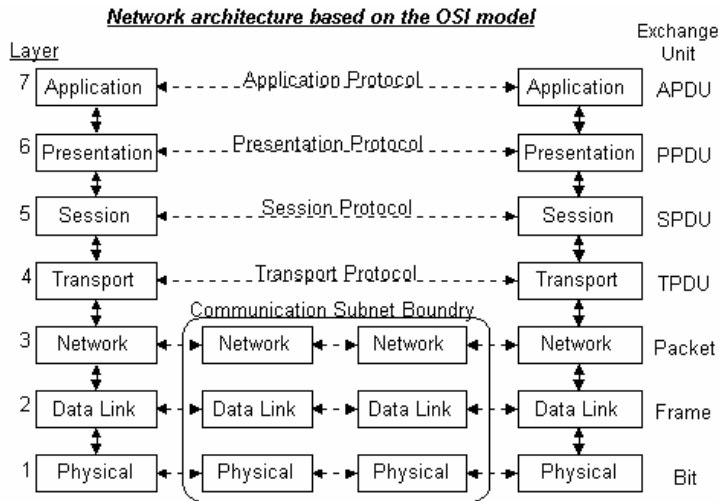
Network (Layer 3) This layer provides switching and routing technologies, creating logical paths, known as virtual circuits, for transmitting data from node to node. Routing and forwarding are functions of this layer, as well as addressing, internetworking, error handling, congestion control and packet sequencing.

Data Link (Layer 2) At this layer, data packets are encoded and decoded into bits. It furnishes transmission protocol knowledge and management and handles errors in the physical layer, flow control and frame synchronization. The data link layer is divided into two sublayers: The Media Access Control (MAC) layer and the Logical Link Control (LLC) layer. The MAC sublayer

controls how a computer on the network gains access to the data and permission to transmit it. The LLC layer controls frame synchronization, flow control and error checking.

Physical (Layer 1) This layer conveys the bit stream - electrical impulse, light or radio signal -- through the network at the electrical and mechanical level. It provides the hardware means of sending and receiving data on a carrier, including defining cables, cards and physical aspects. Fast Ethernet, RS232, and ATM are protocols with physical layer components.”

The layers are sometimes represented as follows:



MCI has developed a “four-layer” model that it proposes as a model for regulating communications networks. The MCI model conceptualizes four network layers:

- Physical Layer (with separate Access and Transport components)
- Logical Layer (IP)
- Applications Layer
- Content Layer.

MCI argues that a regulatory model that focuses on regulation of the physical layer when controlled by an entity with market power (1) avoids unsupportable legacy distinctions between services, networks, and industries; (2) appropriately separates upper layers (user applications and content) from lower layers (physical and logical networks); (3) groups and segregates pertinent public policy issues; (4) provides insights about the interdependence of different layers; (5) highlights interconnection between networks and functional layers; (6) focuses selectively on curtailing pockets of market power within and between individual layers; and (7) preserves the “innovation commons” of the Internet. In particular, the MCI Layers Model targets the lower network layers for regulation based on the existence of undue market power, rather than legacy service or industry labels.”

Under this model, presumably, the cable industry but not MCI would have to provide an open network. A similar four-layer model has been endorsed by some in the public interest community, albeit raising different regulatory lines and addressing different concerns than were

raised by MCI.²⁰ Local governments have also endorsed a regulatory policy that includes a focus on regulating the physical layer, but have not endorsed a model under which the provision of cable services and other services would be treated identically, or which would foreclose distinctions between cable and telecommunications networks. *See* Comments of Local Government Coalition, filed in *BellSouth II* December 20, 2004.

B. The Impact of the Petitions

Setting aside the significant local interest in maintenance of open networks – viewed as critical to many to economic development – the proceedings described above will create significant new issues for local governments seeking to control their rights-of-way, and raise a wide variety of legal and policy questions. Among them:

- If IP-based video services are classified as information services, will incumbent local exchange carriers be able to argue that they can provide those services under grants issued by the state, and without any local franchise? If so, would such services be subject to franchise fees and taxes, or not? It appears likely that the telephone industry will be pressing for a model under which traditional cable providers remain subject to local franchising while the largest telephone companies are free from local franchising requirements.
- If services that are traditionally treated as telecommunications services or cable services are reclassified as “information services,” what is the effect on local franchising authority? Because local franchising authority is a function of state and local law, not federal law, local governments should retain the right to franchise, charge fees for use of rights-of-way, and regulate those who seek to use public property to provide information services – unless, under state law, that authority has been preempted (see preceding bullet)
- If a provider offers cable service, voice services and other non-cable services in a package, should it be treated as a cable operator subject to Title VI requirements? Or not? There are good arguments that a provider should be treated as subject to Title VI even if it provides a variety of services in bundles (the definition of “cable system” in the Cable Act seems to support these arguments) but news reports suggest some telephone companies intend to structure offerings to avoid Cable Act requirements that apply to cable industry counterparts.
- The FCC has suggested that many IP-based and information services are interstate services. What will be the effect of convergence on local tax revenues where local tax authority is limited to taxing revenues from intrastate services?

C. Municipal Ownership

One important result of technological advancements, combined with convergence and legal uncertainties, is the renewed interest in municipal entry into communications markets. Many municipalities own networks or have rights to spectrum which have not been tapped; as technology permits these communications pathways to be used for a variety of purposes

simultaneously, cities are beginning to consider how to make best use of this valuable property. Among other things communities are considering:

- Using available facilities to cut communications costs (by providing key communications services to themselves, rather than purchasing services through commercial entities).²¹
- Using available facilities to attract industry and encourage economic development and to bridge the digital divide. Where this is the primary concern, the locality is less interested in offering service for a fee and more interested in offering communications service as a commodity.
- Moving away from regulation toward reliance on competition in the provision of telecommunications and cable services. Communities that focus on this issue are considering entering the market at either the wholesale or retail level in competition with entrenched providers.²²

Entrenched providers can be expected to respond to municipal entry by encouraging state legislatures to adopt rules that prohibit or sharply limit local authority to enter the communications marketplace.²³ In Pennsylvania, for example, Philadelphia announced that it intended to build a city-wide Wi-fi network that would provide a base level of Internet service to all citizens of Philadelphia (commercial providers would be allowed to use City facilities to provide more advanced services). The industry lobbied the Pennsylvania legislature which adopted H.B. 30. H.B. 30 limits local authority to enter into the communications marketplace. But the legislation illustrates the tensions at play. The legislation grandfathers any municipal networks that are in operation as of December, 31, 2005. In addition, a municipality may enter the marketplace if it proposes to provide a service at a particular data speed, requests a local provider to offer it, and the local provider refuses to offer it or fails to offer the service at the speed requested within 14 months.

Interest in municipal entry is increasing. Some examples:

Brockton, Massachusetts. On December 20, 2004, BrocktonMass.com reported: “Brockton, Massachusetts is thinking of building a city-owned and operated fiber optic and wireless communications network, according to The Enterprise, for use by the municipal government and the city's schools. Among the uses contemplated by the city:

- public safety (police and fire department applications) plus web cameras mounted in various locations;
- voice over IP (replacement of various cell phone plans used by city employees which cost the city \$90,000 per year and wireline voice communications which cost \$25,000 per year);
- replacement for the city's T1 line leases which cost \$400 to \$500 per month;
- wireless broadband public access;
- high speed broadband access for schools, hospitals and industrial parks.

Confederated Tribes of Warm Springs. Indian tribes often have sovereign control over large, rural tracts of land. The reservation of the Confederated Tribes of Warm Springs covers approximately 640,000 square acres, has 3300 residents (2400 in the largest community), and like many American Indian reservations does not have adequate, advanced communications networks.

The tribes' solution is to construct their own Internet-focused communications system. Initial system construction and operation is funded by a roughly \$700,000 grant from the Rural Utilities Service (RUS) to the Confederated Tribes. The funding will enable the tribe to bring broadband telecommunications access onto the reservation via a microwave link from a telecommunications backbone connection in Madras, Oregon. Once on tribal land, the broadband signal will be distributed via fiber optic cable to key tribal agencies. Broadband Internet access will also be made available to tribal residents and businesses via either a fiber optics cable or wireless connections. The connections should enable the Confederated Tribes to implement distance learning, telemedicine, enhanced public safety, tele-work opportunities, community television via Web-casts, and economic development projects requiring broadband, and e-government applications. A key element of the project is the creation of a Telecommunications Community Center. The center will house 24 desktop computer stations connected to the Internet at high speeds. The center will be open 7 days a week and will be free of charge to the community for the first 2 years of operation. It will cost approximately \$100,000 to build, \$60,000 to equip with computers and \$90,000 to staff. The grant from the RUS covers the first two years of operation.

Each of the systems described above will deliver or be used to deliver traditional telephone and/or video services. But other communities – in the United States and around the world -- are looking at publicly-owned infrastructure that focuses on access to the Internet.

The unanswered question is whether the service can pay for itself through a combination of subscriptions, additional grants or other revenue-raising measures.

Critical to the success of this project is an open, affordable backbone connection to the Internet; the network does not completely bypass traditional telecommunications infrastructure. But the project does illustrate how a community may be able to improve communications infrastructure in a relatively short period of time through Internet-focused solutions.

New York City. New York City has also been investigating municipal-based development of a communications network, albeit from a slightly different perspective. New York is the largest municipal purchaser of telecommunications services in the U.S., and has traditionally purchased most of its services from the incumbent private telephone service provider in New York City. The City also owns fiber optic lines that it has installed for its own purposes, but whose capacity is not fully utilized. Finally, it owns property (rooftops, towers and the like) that can be used for placement of telecommunications facilities. In May, 2003, a City Council report recommended that the City coordinate use of these assets to encourage communications development. For example (as the report notes) the City could use its buying power to provide a market entrant with a stable sources of revenue; could lease fiber to make it easier to roll-out new services; and could lease real estate at preferential profits to encourage the roll-out of free wireless services

throughout the City. The New York effort would build upon what is already a widespread private effort to create Wi-Fi networks throughout the City.

* * *

The more federal rules tend to favor duopolies and large entrenched providers, eliminate other forms of compensation for the rights-of-way, and fail to provide adequately open networks, the more localities can be expected to respond by entering the market – particularly as new technologies allow localities to leverage existing facilities (such as traffic signaling systems and electric power systems) for new uses.

¹ Many communities try to avoid the formal process because they are intimidated by the complexity and expense. That is usually a mistake. The cable operator has no incentive to agree to more stringent franchise terms if there is no risk of non-renewal. Negotiations can drag on for years, be just as expensive as the formal process in terms of time and effort, and may effectively result in long, ongoing franchise extensions, with the resulting loss of improved service during the franchise extension period. The formal process provides a means for finally resolving disputes if the parties are unable to negotiate a fair deal. The formal process should generate information that is useful to both parties in negotiating a settlement, and the process can be timed to enhance the prospects for successful completion of the negotiation process.

² With respect to the first two standards, renewal cannot be denied based on violations occurring after 1984 unless the cable operator was given notice and opportunity to cure the defects in performance. 47 U.S.C. § 546(d). While notice could be given during the first stage of the renewal process, this requirement underlines the importance of ongoing enforcement.

³ *Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, Report and Order, FCC 99-57, 14 FCC Rcd. 5296 at ¶ 141 (March 29, 1999).

⁴ *Id.* at ¶ 142.

⁵ 1984 U.S.C.C.A.N. 4655, 4664 (1984). The legislative history goes on to recognize that I-Nets were being to provide data transmission services. *Id.* at 4665.

⁶ 1984 U.S.C.C.A.N. at 4705.

⁷ The Cable Act allows localities to charge a franchise fee, but states that the franchise fee “shall not exceed 5 percent of such cable operator's gross revenues derived...from the operation of the cable system to provide cable services.” The Act does not require fees to be based on gross revenues derived from the provision of cable service. Theoretically, a fee could be a “per foot” charge for rights-of-way, or another measure of right, so long as the amount collected by the locality does not exceed 5% of cable service-related revenue.

⁸ In *Parish of Jefferson v. Cox Communications Louisiana, LLC*, No. CIV.A. 02-3344, 2003 WL 21634440 (E.D. La. Jul. 3, 2003), the franchise agreement required fees on cable modem and telecommunications services, but also incorporated references to changes in law. The court found the franchise agreement endorsed the FCC reclassification of cable modem service as an information service, and thus, the cable modem franchise fee requirement could not be enforced.

Another suit was filed in the City of Rochester. The case was removed to federal court, and then remanded back to state court for reasons similar to those adopted by the Seventh (Continued)

Circuit. *City of Rochester v. Time Warner Cable*, 6:02-cv-06526 (W.D.N.Y. April 24, 2003). However, in a separate proceeding, Time Warner subsequently filed a separate 42 U.S.C. § 1983 action against the City. The *Rochester* court federal judge then consolidated Time Warner's state and federal cases in federal district court. On December 22, 2003, the district court granted Time Warner's motion for summary judgment, finding that cable modem is not cable service, and further enjoining Rochester from collecting any fees on any service other than Time Warner's provision of "cable service." *Time Warner Cable v. City of Rochester*, No. 6:03-cv-06257-DGL (W.D.N.Y. 2003). The latest decision in the *Rochester* dispute issued on November 3, 2004 is *Time Warner Cable-Rochester v. City Of Rochester*, 342 F.Supp.2d 143 (W.D.N.Y.,2004). Time Warner, having brought suit under § 1983, and having prevailed, asked the court to award attorneys fees under §1988. The district court concluded that attorneys fees were not available: "Section 1983 may provide a cable company with a cause of action to enforce its rights under the Act, but that does not automatically mean that all § 1983 remedies-attorney's fees in particular-are available in such an action...[I]t is not reasonable to assume that "any time Congress creates a right that is enforceable against state or local officials or agencies, section 1983, and its companion, section 1988, come in the door and the American rule [that parties to a lawsuit generally pay their own attorney's fees, regardless of who prevails in the lawsuit] goes out the window..." There is no evidence that Congress intended to make attorney's fee awards available in an action under the Communications Act, nor would such awards help implement the Act or further its purposes."

⁹ It is likewise much more difficult for a locality to establish and enforce effective PEG and I-Net obligations post-construction. For example, in order to program PEG channels easily, a physical link is often necessary between a PEG production facility and the headend of a cable operator. Unless that link is designed as part of the initial construction plans for a telco system, it may be much more difficult and expensive to program the PEG channels on the telco-owned system. Until a connection is established, it is impossible to do any live programming, such as carriage of City Council meetings.

¹⁰ In *White Plains*, the locality had voluntarily chosen not to apply an ordinance requiring payment of rents to the incumbent. The fee provisions in the ordinance were struck down on the ground that they were discriminatory and not competitively neutral, although the Court also emphasized that it was not ruling that the same charge had to be applied to all market participants. In *Dearborn*, the court ruled that the City *could not* apply its fee to the incumbent consistent with state law. It is not clear how the *White Plains* court would have ruled if presented with the same facts presented to the *Dearborn* court, although the 2d Circuit clearly criticized the 6th Circuit's analysis.

¹¹ A caution to attorneys reviewing claims of telecommunications companies: the companies routinely cite adverse precedent, like the *Prince Georges* district court decision, without citing the subsequent history of that precedent. It turns out that many of the adverse decisions, including *Prince Georges*, have been vacated or clarified. Similarly, *TCI Cablevision of Oakland County, Inc.*, 12 FCC Rcd 21396 (1997), *aff'd*, 13 FCC Rcd 16400 (1998), is often cited for the proposition that the Telecommunications Act forbids a "third tier" of regulation. The case does not actually support that proposition, although the Commission did caution that localities should resist overregulation of providers.

(Continued)

¹² Even this test may be more generous to the telecommunications industry than is warranted by the law.

¹³ The district court also rejected a claim by the City that the rules challenged by NextG Networks – which involved access to light poles for placement of wireless facilities – involved a proprietary function as opposed to a regulatory function. However, the court did rule that the Telecommunications Act “does not preempt nonregulatory decisions of a local government entity or instrumentality acting in its proprietary capacity.”

¹⁴ In matters of RF emissions, the FCC also may hear complaints.

¹⁵ Second Report and Order, Order on Reconsideration and Second Further Notice of Proposed Rulemaking, WT Docket 00-230, FCC 04-167, released September 2, 2004. (“Safety Order”)

¹⁶ The FCC’s spectrum leasing decisions are closely linked to the on-going examination of the potentials for cognitive (“smart”) radio in ET Docket O3-108. In the hands of spectrum lessees, future smart radios may be able to “sense” the primary transmissions of a licensee on the same spectrum and avoid interfering with that primary use. See Order, ¶56, n.135.

¹⁷ The class of public safety eligibles is defined at Section 90.523 of the FCC Rules, 47 CFR §90.523.

¹⁸ Report and Order, FCC 03-113, released October 6, 2003 (“Commercial Order”)

¹⁹ In the Safety Order, at ¶¶39-41 and 43, the Commission further streamlined the approval process for certain uncomplicated DFT arrangements by providing for “immediate grant.”

²⁰ Cooper, Mark N, Open Architecture As Communications Policy.

²¹ The IRNE network in Portland is an example of one such network, <http://www.irnet.net/>. One goal of a network like IRNE is to provide physical infrastructure that can support growth in data use without the substantial additional costs associated with buying the sort of “traffic-sensitive” services offered by traditional telecommunications service providers.

²² The UTOPIA network – the Utah Telecommunications Open Infrastructure Agency -- is an example of that sort of network, <http://www.utopianet.org>. UTOPIA is a Utah interlocal agreement agency (created by 18 founding cities) which is “dedicated to accelerating economic development and quality of life for its citizens and businesses by deploying a publicly owned advanced telecommunications network over the last mile to all homes and businesses within member communities.” As planned, the network would bring fiber to all the homes in each member community. Residents could then purchase services from any private service provider that leases capacity from UTOPIA. Theoretically, by eliminating up-front construction costs and delays, the UTOPIA network should encourage market entry by multiple providers.

²³ *Nixon v. Missouri Municipal League*, 124 S.Ct. 1555 (2004) makes it clear that local entry into the communications marketplace can be restricted by valid state laws.

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