

franchise “lite-speed:”

Hi-Jacking the FCC’s IP Dockets?

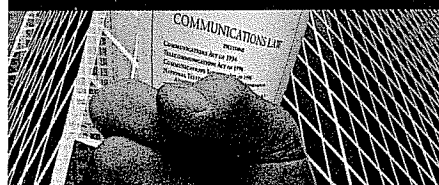
■ Introduction

The legislative efforts of the regional bell operating companies (RBOC¹) to eliminate or restrict local cable franchise requirements are well known.² This article discusses the lesser known, but equally dangerous effort of the RBOCs to achieve similar results at the Federal Communications Commission.

■ Background

The last twelve months have seen a sea-change in telecommunications policy. The FCC ruled that VoIP services are inherently interstate.³ The Supreme Court ruled that the FCC was entitled to deference in its cable modem classification as a Title I information service and had authority under Title I to set appropriate regulations for information services.⁴ Emboldened by the Court’s actions, the Commission extended the same Title I information service classification to DSL services just over a month later.⁵

The Communications Act: A New Look and Feel?



BY GERARD LAVERY LEDERER

Franchise "Lite-Speed"

The Commission has also acted to impose some social obligations on information services by extending CALEA⁶, IP-911⁷, and crafting a short term universal service funding fix for some IP services.⁸ The industry now asks the Commission in a whitepaper entitled: *The Impact and Legal Propriety of Applying Cable Franchise Regulation to IP-Enabled Video Services*⁹ (SBC paper) to free them from the obligation of a cable franchise as mandated by Congress in Section 621¹⁰ of the Act.

■ The Claims

Aside from engineering problems, the RBOC effort to hi-jack the FCC's IP dockets has a high hurdle to clear.¹¹ Section 621 (b) of the Act provides: "a cable operator may not provide cable service without a franchise." The FCC cannot ignore or overrule this statutory requirement. The RBOC must therefore distinguish

what they are offering as not being a cable service or in the alternative that they are somehow exempt from the requirements of Section 621.

In its paper, SBC offers the Commission three alternative theories for why SBC should not be required to obtain a franchise:

- The video service offering will not be a cable service;¹² therefore SBC will not be a cable provider.¹³
- The "v" in the *Vonage Order*,¹⁴ which found VoIP services are not subject to any state and local oversight, applies equally to the v of video.¹⁵

Even if SBC will be providing cable services, the franchise requirement of Section 621 does not require a cable franchise of "telecommunications carriers already subject to the equivalent of a 'franchise' or other agreement to use the public rights of way."¹⁶

¹ This paper uses the term "RBOC" to collectively reference Verizon, SBC, BellSouth, and Qwest. While it is true that Verizon and SBC have been the most vocal advocates on the issue, BellSouth and Qwest are ready to accept any legislative or regulatory relief. It is also true that franchising relief might also be available to any incumbent local exchange service provider, not just the RBOC.

² See, e.g., Kenneth Fellman and Brett D. Chardavoyne's paper in this edition entitled *Emerging Telecommunications Legislation — The Challenging Road Ahead*. See also Marilyn Praisner & Gerard Lavery Lederer, *The 109th Congress: On the Road to a Rewrite*, Journal of Municipal Telecommunications Policy, Volume 12, Issue 4, Winter 2002.

³ *Vonage Holdings Corporation*, FCC 04-267, Memorandum Opinion and Order, 19 FCC Rcd. 22404 (November 12, 2004) (*Vonage Order*).

⁴ *National Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 125 S. Ct. 2688 (2005).

⁵ *In the Matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33, Report and Order and Notice of Proposed Rulemaking (September 23, 2005).

⁶ *In the Matter of Communications Assistance for Law Enforcement Act and Broadband Access and Services*, ET Docket No. 04-295; RM-10865; First Report and Order and Further Notice of Proposed Rulemaking (September 23, 2005).

⁷ *In the Matter of IP-Enabled Services*, WC Docket No. 04-36; First Report and Order and Notice of Proposed Rulemaking (June 3, 2005).

⁸ According to the press reports accompanying the Commission's DSL order, DSL providers must continue to pay into the universal service funds for 270 days following the effective date of the order, thereby granting themselves at least a year to work out other universal service funding issues, or be directed by Congress to do the same.

⁹ SBC, *The Impact and Legal Propriety of Applying Cable Franchise Regulation to IP-Enabled Video Services*, WC Docket No. 04-36 (*In the Matter of IP-Enabled Services*), at 2 (filed Sept 14, 2005) (SBC paper).

¹⁰ 47 U.S.C. § 541.

¹¹ SBC in particular still has technical challenges to overcome. See, e.g., Matt Richtel and Ken Belson, *SBC's TV Project Isn't Happening at 'Lightspeed'*, The New York Times, June 27, 2005. A fuller discussion of the Commission's IP dockets was presented in the last edition of this Journal. See, Nicholas Miller & Gerard Lavery Lederer, *Federal Communications Commission IP Dockets: Pragmatic or Presumptuous*, Journal of Municipal Telecommunications Policy, Volume 13, Issue 1 (Spring 2005).

¹² "Legacy cable systems are inherently one-way closed transmission systems, designed to broadcast all video channels simultaneously to every household and business connected to those systems. In contrast, advanced broadband networks used to deliver IP-enabled video services, such as SBC's Project Lightspeed, are two-way networks that involve regular communication and interaction with customers in the delivery of video services, and are based on a client-server architecture similar to the architecture used by customers to access the Internet.

"[B]ased on the specific terms of the Cable Act, it is a relatively straightforward determination that, as a legal matter, IP-enabled video networks such as Project Lightspeed are not "cable systems" designed to provide "cable services" and are thus not subject to the legacy cable regulations in Title VI that apply to "cable operators." SBC paper at 3.

¹³ SBC explains its position this way: "Title VI of the Act — otherwise known as the Cable Act — includes both legacy cable provisions, such as legacy franchising requirements, as well as provisions designed more broadly to apply to all multichannel video program distributors. The cable franchise provisions apply specifically to 'cable operators' that provide 'cable services' over 'cable systems.'" SBC paper at 2.

¹⁴ *Vonage Order*, *supra* n.3, at ¶ 20.

¹⁵ "[The FCC's *Vonage Order*] confirmed that, under existing law, IP-enabled voice providers are not subject to legacy state and local entry regulation designed for incumbents. That same conclusion ... applies with equal force to the other VoIP — Video-over-IP." SBC paper at 2. Interestingly enough, NCTA filed a counter to the RBOC effort to claim that since VoIP is subject to the functional equivalent test for purposes of CALEA, 911 and other regulations, one could argue that video over IP is not a pure cable service would have been the functionally equivalent test and therefore be subject to Title VI. See *In the Matter of IP Enabled Services*, Letter of Neil Goldberg, General Counsel of NCTA to Marlene Dortch, FCC Secretary, filed September 9, 2005.

¹⁶ According to SBC, "In enacting Section 621 of the Cable Act, Congress was primarily concerned with the use of public streets and rights-of-way by cable television operations and the ability of state and local entities to regulate such use. In contrast to cable operators, local telephone companies already receive authorization to use the public rights-of-way pursuant to common carrier regulation. Consequently, there is no basis to infer that Congress intended that local telephone companies secure a cable television franchise to use the same rights of way they are already authorized to use." SBC paper at 32-33"

■ Up Hill Fight until Brand X?

Prior to the Supreme Court's decision in *Brand X* in July of 2005, the FCC had little appetite to consider the RBOC's claims of a franchise-free world. In June of 2005, Commissioner Kathleen Abernathy was joined by Commissioner Jonathan Adelstein in expressing skepticism as to the Commission's authority to relieve the RBOC of a cable franchise requirement.¹⁷ The Commissioners' skepticism and the fact that they made their feelings known at the RBOC tradeshow might have derailed the RBOC's effort to hijack the FCC IP enabled services dockets. But then came the Supreme Court's powerful display of deference to the Commission in its *Brand X* opinion.

Press accounts state it was only a matter of days following the release of the *Brand X* decision when Chairman Martin "asked the FCC staff to explore what the commission can do to ensure that local governments are not unreasonably refusing to award additional competitive licenses."¹⁸ Commissioner Abernathy, a month after questioning whether the Commission had the legal authority to address the issue, told reporters, "she believes her agency will take a look at the issue of franchising for regional Bell-operating companies attempting entering the video services market, but how it goes about it remains to be seen ... [as it had no formal petition before it.]"¹⁹ While not a formal petition, the SBC paper is a request for relief.

■ ECI or Dallas (OVS) Revisited?

SBC's request that incumbent local exchange telephone carriers (ILEC) be excused from Section 621 franchise obligations is not a case of first impression for the Commission. In the ECI and Dallas (OVS) dockets, the Commission has twice faced the issue of whether Section 621 applies to local exchange carriers.²⁰ In both of those matters the ILEC was seeking to provide transport. In both cases, the Commission found that there was no Section 621 franchise obligation and both times the Commission's logic was upheld by the courts. Still, in the Dallas (OVS) decision the Fifth Circuit found that there exists a free standing local right to require a franchise over and above any Section 621 obligations and in ECI, the local exchange carrier was not the party providing the video programming.

In ECI, the Commission was faced with a video service provider providing service to approximately 1,600 subscribers in twelve different MDUs, interconnected by leased facilities in the rights-of-way owned and operated by Michigan Bell. The Commission ruled 4-1 that ECI was not a cable operator because while it provided cable services, it did not do so over a cable system. The Seventh Circuit, in a 2-1 decision, upheld the FCC's ECI order *City of Chicago v. FCC*, 199 F.3d 424 (7th Cir. 1999). Like the Supreme Court in *Brand X*, the Seventh Circuit concluded that the statute was ambiguous; the FCC's interpretation of the statute was reasonable, and therefore the decision was entitled to deference.

The 1996 amendments to the Communications Act permitted local exchange carriers to build systems called open video systems (OVS) that were intended to operate as hybrid cable system/common carrier systems. The Dallas OVS case challenged the FCC regulations adopted to implement the Open Video System provisions of the Telecommunications Act of 1996. Among other challenges, local government claimed the FCC went too far in declaring right-of-way franchising by local governments was preempted. In the FCC's view, the federal statute that created the OVS status had also conveyed the right to use local rights-of-way without further local government review or approval.

The Fifth Circuit agreed with local government and held that the Commission could find that OVS did not require a cable television franchise, but the federal law did not free an OVS provider from obtaining permission from the local government to use the rights-of-way to provide OVS service. The Court held "eliminating §621 results in the deletion of the federal requirement that cable operators get a franchise before providing service; it does not eviscerate the ability of local authorities to impose franchise requirements, but only their obligation to do so." *City Of Dallas, Texas v. FCC*, 165 F.3d 341, 347 (5th Cir. 1999).

In redrafting its order to comply with the Fifth Circuit decision, the Commission acknowledged that local authority to franchise OVS systems was not preempted by federal law.²¹ Still, the Commission left open the question of what was required of an ILEC.

¹⁷ FCC Commissioner Jonathan S. Adelstein said the idea of telcos getting into video services "is just thrilling," adding that in addition to the broadband and video competition that would be created, the advent of a new content platform would address concerns about concentration of media ownership and vertical integration of content and platform providers. "I think we can certainly work with our state and local colleagues and industry ... to find ways to streamline [the franchise negotiation] process" and develop best practices, he said, given that all parties share the same goal of infrastructure deployment.

FCC Commissioner Kathleen Q. Abernathy said, "Unless someone comes up with a legal argument I haven't heard, I don't think there's a lot we [the FCC] can do. I haven't seen a moderately legal argument that lets us take away" the states' jurisdiction over cable franchises, she added. Lynn Stanton, *Commissioners Debate Federal Franchise Preemption*, TR Daily, June 8, 2005.

¹⁸ Leslie Cauley, *FCC Chief Considers Forcing Cable TV Competition*, USA Today, August 23, 2005. Interestingly enough, the USA Today story quoted two FCC analysts to the effect that there was little legal threat to local governments, and that Martin was merely using "the FCC's bully pulpit to warn the cities against log rolling the Bells." Id.

¹⁹ Ted Gotsch, *Abernathy Expects FCC To Wade Into States' Video Services Debate*, TR Daily, July 1, 2005.

²⁰ *In the Matter of Entertainment Connections, Inc.*, FCC No. 98-111 (June 30, 1998).

²¹ *In the Matter of Implementation of Section 302 of the Telecommunications Act of 1996*, Order on Remand, FCC 99-241, Order on Remand, 14 FCC Rcd. 19700 (1999).

Franchise "Lite-Speed"

The Commission stated, "Nothing in the court's decision requires new franchises for entities that already have the requisite authorization to use public rights of way. Thus for example, an open video system operator that already has a franchise as a telephone company would not necessarily require another franchise."²²

■ Wall Street's Best Guess

At least one financial analyst, Scott Cleland, believes that the FCC will take no action despite the offensive assault on the Commission by the RBOC.

Congress sets out a specific process for redressing local abuses, and did not give the FCC specific authority in this regard. The Act authorizes the aggrieved party, not the FCC, after a final determination by the local franchising authority, to seek remedial action. It authorizes the courts to grant relief, not the FCC. The Act gives no deadlines or time-frames for granting local cable franchises; and the Act provides an alternative escape from federal requirements for a local cable franchise. ... We therefore believe it is very unlikely that the FCC would, without substantial legal risk, invoke section

621(a)(1) and preemptively usurp Congressional, local, and court authority to, e.g., set deadlines or grant a national exemption from local franchising.²³

■ Conclusion

NATOA and her sister organizations of state and local government officials will need to educate the current staff and FCC commissioners on the purpose, scope and effect of Section 621(a)(1). Local government must win the argument that:

- The FCC has no jurisdiction to grant the relief requested
- IP Video is "cable service" and therefore when provided end-to-end over the video provider's local network, that network becomes a cable system subject to Section 621.
- IP technology does not trump the U.S. Constitutional protection of local government property rights in the public rights-of-ways.
- The FCC should not give SBC and other ILECs a free pass into the local public rights-of-way for video service. The ILECs themselves have accepted cable franchise status in Texas and other locations.²⁴ ■

²² *Id.*, n.29, at 19704.

²³ Scott Cleland, *Section 621 Is Not a Magic Bullet for Bell Video Franchise Time-to-Market Drag*, Precursor Bulletin, August 24, 2005.

²⁴ The RBOC have no apparent intellectual difficulties accepting cable operator status when it accompanies legislative and regulatory relief while arguing to the FCC they are not cable operators providing cable service. SBC apparently intends to accept status as a franchised cable operator in Texas while still claiming it "will continue to seek clarity of its legal and regulatory obligations and advance its position that IP-enabled video services should be free from all franchise and entry-barrier regulations under Title VI." SBC paper at 5, n.8.