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UPDATE ON RECENT HILL, FCC AND COURT DEVELOPMENTS

by

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I. THE HILL.

A. Legislation.

1. Renewal of the Satellite Home Viewer Extension and Reauthorization Act ("SHVERA").

    - Must pass this year.

2. FCC Reform.

    - HR 2183 – Barton/Stearns bill would (among other things) require text of proposed rules to be subject to 30-day comment and 30-day reply comment period, and would require FCC to publish decisions within 30 days of adoption.

3. Broadband Conduit Deployment Legislation.

    - HR 2428 and S. 1266.
        - Would require broadband conduit installation in new federally-funded highway projects.

4. State and Local Taxes.

    a. Cell Tax Moratorium Legislation.

    - HR 1521 – House Subcommittee hearing on 6/9.
    - S. 1192.

    b. Permanent ITFA Legislation.

    - HR 1650 and S. 43.

    c. SSTP Legislation.

    - Not yet introduced.
    - Issue: whether telecom/cable taxes and fees will be included.

    d. BAT Legislation (HR 1083).

    e. DBS Tax Preemption Legislation.

- HR 1019.
- Would require "non-discriminatory" state and local taxation of DBS and cable.

5. Federal Spectrum Audit Legislation.
   - S. 649 (Kerry).
   - H.R. 3125 (Waxman).
6. Wireless Consumer Protection Legislation.
   - Preemption and unfunded mandate concerns.
7. "Connecting America Act of 2009."
   - S. 1447 (Hutchinson).
   - Would preempt local zoning authority over collocation or changes to existing towers.
   - Would transfer $1 billion of the ARRA's $7.2 billion in broadband grant funds into private sector tax credits.
8. Other Possible Cell Site Zoning Preemption Legislation.
   - Would set shot clock on applications.
9. Possible PEG Reform Legislation.
10. USF Reform.

B. Hearings & Other Issues.

1. Confirmation Hearings.
   - FCC, RUS and NTIA nominees have been confirmed.
2. FCC and ARRA Oversight.
   - Will be ongoing.

II. THE FCC.

A. DTV Transition.

- Occurred 6/12.
- Relatively few problems.
- Clean-up issues.
  - Signal coverage and reception.
  - Low-power TV transition.

B. ARRA and Broadband.

1. *Broadband Data Collection*,
   WC Docket No. 07-38

2. *FCC's Consultative Role in the Broadband Provisions of the Recovery Act*,
   GN Docket No. 09-40

3. *International Comparison and Consumer Survey Requirements in the Broadband Data Improvement Act*,
   GN Docket No. 09-47

4. Notice of Inquiry, *A National Broadband Plan for Our Future*,
   GN Docket No. 09-51

   On September 1, the Commission released a Public Notice in GN Docket No. 09-51, entitled "The Commission Welcomes Responses to Staff Workshops," encouraging anyone interested to respond "to the facts and reasoning asserted during [the FCC's broadband] workshops, or to raise facts and reasoning that should have been discussed." The notice sets deadlines as follows:

   Responses to workshops held from August 6 to August 20 should be filed with the Commission by September 15.

   Responses to workshops held from August 25 to September 15 should be filed with the Commission by October 2.

   Responses to workshops held from September 16 to October 20 should be filed with the Commission by October 30.

5. *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such*

Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act, GN Docket 09-137.

Comments were filed on September 4. In their comments, CTIA and PCIA raised issues of interest related to CTIA's pending petition to place a "shot clock" on local cell tower site zoning decisions (WT DN 08-165) and CTIA's pending efforts to persuade Congress to enact a cell tax moratorium.

CTIA argued at some length, complete with supporting data, that "wireless broadband is growing exponentially faster than any other category of broadband service," that "mobile broadband usage is skyrocketing" and "will grow at a rate about one hundred times faster than [wireless] voice traffic over the next ten years," and that the number of cell sites is growing apace, with an average of "one cell site for every 1,116 estimated wireless subscribers in the United States." PCIA argued the same. This data would seem to strongly support local governments' positions that local zoning requirements are *not* impeding wireless broadband deployment, and that state and local wireless taxes are likewise *not* impeding wireless broadband deployment. (The data also suggest that, unless wireless broadband data services are included in state and local wireless tax bases, state and local government tax revenue budgets will be denied the benefit of almost all future wireless industry revenue growth.)

Not surprisingly, however, CTIA and PCIA seek to have their cake and eat it too. Thus, although CTIA and PCIA claim that wireless broadband is enjoying rock-star subscriber and deployment growth, they nevertheless argue that the FCC "can facilitate wireless broadband infrastructure deployment" by granting CTIA's pending "shot clock" preemption petition, and by "clarify[ing] and affirm[ing]" its pole attachment rules to make clear that they require pole owners to allow pole-top attachment of wireless facilities, and at rates that are "as low as possible."

6. *Smart Grid Technology and Broadband*, NBP Public Notice #2.

On September 4, the FCC released a Public Notice seeking comment on the implementation of Smart Grid technology in connection with the FCC's development of a National Broadband Plan. The Notice seeks comment in five broad areas – suitability of different types of communications network technologies for Smart Gird; availability of communications networks for Smart Grid; spectrum issues relating to Smart Grid; real-time data needs for demand response in Smart Grid; and home area network needs for Smart Grid – and asks detailed questions within each area.

Comments are due October 2, 2009.

C. *Fostering Innovation and Investment in the Wireless Communications Market*, GN Docket No. 09-157.

On August 27, the FCC released a new Notice of Inquiry on "Fostering Innovation and Investment in the Wireless Communications Market" (new DN 09-157). This new NOI is also a part of the FCC's pending National Broadband Plan proceeding (DN 09-51). The NOI makes for interesting reading, and asks a lot of intriguing questions about spectrum policy. But some of the questions asked in a few paragraphs – primarily ¶¶ 11 & 52-53 – could, and may well, be construed by the wireless industry as an opening to continue their attack on local wireless antenna/tower zoning practices.

Comments are due September 30, and reply comments are due October 15.

D. *The PEG Declaratory Ruling Petitions*, MB Docket No. 09-13, CSR-8126 (ACM *et al.*), CSR-8127 (Lansing), and CSR-8128 (Dearborn *et al.*).

1. The ACM and Lansing petitions challenge AT&T's PEG product.

2. The Dearborn petition, a referral from Mich. Dist. Court, involves Comcast's "digital slamming" of PEG channels.

3. A related "sleeper" proceeding: *IP-Enabled Services*, WC Docket No. 04-36, where SBC (now AT&T) has pending a petition for declaratory ruling, filed on Feb. 4, 2004, that all "IP platform services," including video services, are subject to Title I but are exempt from other Communications Act titles, including Title VI.

E. *CTIA's Wireless Siting Preemption Petition*, WT Docket No. 08-165.

F. *FCC's Annual Wireless Competition Report*, WT Docket No. 09-66.

On August 27, the FCC released an NOI, as well as the Commissioners' separate statements, seeking comment for the FCC's annual report to Congress required by the Omnibus Budget Reconciliation Act of 1993. This NOI seeks to expand the scope of the FCC's previous annual wireless competition reports, both in the scope of the types of commenters who might participate, and in the scope of wireless-related markets it addresses. Thus, the FCC

> "invites new stakeholders and interested parties – those who might not otherwise have participated with the prior, narrower analytic scope – to provide further input [via this NOI]. Such parties may include application providers, equipment and device manufacturers, consumer groups, new content providers, software developers, analysts, and academics."

The NOI also for the first time seeks comment and data concerning markets "adjacent" to the wireless service market itself, including "upstream" markets for wireless inputs (such as cell towers, backhaul and transport facilities) and "downstream" markets (such as handset devices, mobile applications, content and online commerce).

The good news is that the NOI doesn't appear to mention explicitly either local zoning requirements or state and local taxes and fees as barriers to wireless deployment or growth. The bad news is that the NOI does ask sufficiently broad questions – concerning any structural or other problems in the markets for cell sites, towers and backhaul facilities and information and data concerning "barriers to entry or growth" in the wireless market, including any "regulatory barriers to entry or growth" – that industry can, and likely will, construe them as an invitation to continue its assault on local zoning requirements and fees and taxes.

Comments are due September 30; reply comments are due October 15.

G. *Consumer Protection and Disclosure, Truth-in-Billing and Billing Format, and IP-Enabled Services*, CG Docket No. 09-158, CC Docket No. 98-170, & WC Docket No. 04-36.

On August 28, the FCC released an NOI on Consumer Information and Disclosure and Truth-in-Billing ("TIB"). This NOI is broad-ranging, asking for comment on a variety of consumer protection issues relating to communications services of all kinds, including broadband and IP-enabled services. The FCC currently has TIB rules only for landline and wireless telecom carriers, and their application to wireless service is more limited. Moreover, the adequacy of those TIB rules has been questioned.

The FCC seeks comment on whether any changes should be made to the TIB rules. Of perhaps even more interest, the FCC also asks whether the TIB rules should be extended to VoIP, broadband, subscription video services (*i.e.*, cable and DBS) and bundled services.

The NOI doesn't appear to directly ask about whether provider practices in the itemization of state and local taxes and fees are misleading or a problem, but it does note the FCC's prior tentative (but as yet unadopted) proposal to impose point-of-sale requirements about disclosure of "non-mandated line items" and "government mandated surcharges." The NOI also notes apparent "consumer confusion" about "line-item charges associated with federal regulatory actions, such as universal service, local number portability, 911 and access charges." The state and local tax/fee itemization issue is likely to arise in the comments, however, and local governments should make sure that any FCC proposals on that issue are accurate (*e.g.*, they don't confuse charges imposed on the provider with charges imposed on the subscriber but collected by the provider) and do not have any preemptive effect on how providers must calculate what they owe in local fees or taxes. (This is an analogue to the "*Dallas*" franchise fee issue.)

You can expect industry in its comments to take the position that no new TIB rules are necessary, but that if they are, they should be preemptive – *i.e.*, that they preempt any state or local deceptive trade practice or other law. That will need to be challenged.

Comments are due October 13; reply comments are due October 28.

H. *Level 3 Petition for Declaratory Ruling That Certain Right-of-Way Rents Imposed by the New York State Thruway Authority are Preempted under Section 253*, WC Docket No. 09-153.

On August 25, the FCC released a Public Notice announcing the comment and reply dates on Level 3's petition for declaratory ruling that certain right-of-way rents imposed by the New York State Thruway Authority ("NYSTA") are preempted under Section 253.

This is a troubling petition for local governments. To date, the FCC has steered clear of assessing what is fair, reasonable, and non-discriminatory ROW compensation under § 253(c). Local governments have consistently taken the position that the courts, not the FCC, have jurisdiction over § 253(c) issues. Moreover, local governments have also argued that even if the FCC did have concurrent jurisdiction with the courts on § 253(c) issues, courts, rather than the FCC, are better positioned to make the inherently fact-bound determination of what is fair and reasonable, and non-discriminatory ROW, compensation in a particular instance.

This petition would pose the risk of the FCC once again intervening in § 253 ROW compensation disputes. Level 3's "broadband" angle raises the stakes, in two different ways. First, the petition's "broadband" angle could prove appealing to many who would view state and local government ROW fees as an easy scapegoat for delays in broadband deployment and thus a convenient target for federal "broadband plan" preemption. Second, § 253 only applies to "telecommunications services," and the FCC has ruled that broadband is not a "telecommunications service." Thus, Level 3's petition will raise the issue of whether § 253 can be expanded to broadband.

The Petition appears to be the culmination of a long-simmering dispute between Level 3 and its predecessors-in-interest and NYSTA. Level 3 seems to have learned the lesson of the 9th Circuit's *Sprint Telephony* and the 8th Circuit's *Level 3* decisions and has supplied lots of facts ostensibly supporting its § 253(a) claim of "prohibitive" effect.

Moreover, Level 3 has cleverly weaved into its petition an argument clearly designed to appeal to the new FCC's broadband agenda, arguing at some length about how NYSTA's actions frustrate its ability to apply for a broadband grant in upstate NY under the Recovery Act broadband grant programs and, more generally, how NYSTA's actions are contrary to both the Recovery Act's broadband goals and the FCC's broadband goals. Equally troubling is that Level 3 seeks to broaden the reach of the FCC ruling it seeks beyond the NYSTA issue, ominously claiming that, "Establishing that there is a federal limit on right-of-way fees will also help facilitate broadband deployment and investment nationwide, not just along the New York State Thruway."

Level 3's petition presents a host of critical legal issues for local governments. While by no means an exhaustive list, the following leap to mind immediately: (1) whether the FCC has any jurisdiction over § 253(c) ROW compensation issues (local governments have always argued

not, courts are split, and the FCC has never squarely answered the question); (2) whether § 253 even applies to broadband at all (local governments would argue not, since broadband is not a "telecom service", and providers can't have it both ways by avoiding Title II "telecom service" regulation yet gaining the protective Title II benefits of § 253); (3) whether ROW compensation must be related to the costs of ROW use (again, courts are less than clear on this issue); and (4) whether a § 253 claim can be waived by a party's (here, Level 3's predecessor-in-interest) signing of an agreement releasing any such claims (if Level 3's argument to the contrary is accepted, no local ROW agreement will be worth the paper it's written on).

Comments are due October 15, and reply comments are due November 5.

I. *AEP Petition for a Declaratory Ruling regarding the Rate for Cable System Attachments Used to Provide Voice over Internet Protocol Service*, WC Docket No. 09-154.

On August 25, the FCC released a Public Notice seeking comment on petition filed by AEP, Duke Energy, the Southern Co., and Excel Energy seeking a declaratory ruling that the FCC's higher telecom pole attachment rate formula, rather than its lower cable pole attachment formula, should apply to cable operator attachments used to provide interconnected VoIP service (which is of course the kind of voice service almost all cable operators now provide).

Because municipal and co-op utilities are exempt from the Pole Attachment Act, 47 U.S.C. § 224, and thus from the FCC's pole attachment rate formulas, the relief requested by these investor-owner utilities would not directly apply to municipal and co-op utilities. The outcome could nevertheless have an impact on some municipal and co-op utilities. It would affect those municipal and co-op utilities in the few states that have incorporated the FCC rate formulas into state law and elected to extend state-law pole attachment regulation to municipal and/or co-op utilities (as the Pole Attachment Act gives states the option of doing if they wish). Moreover, to the extent some municipal and co-op utilities pole attachment agreements contain rates that are based on the federal formula (as again, some, but not most, do), the outcome could affect those agreements. And finally, the outcome would more directly affect those municipal and co-op utilities that have telecom/cable/broadband pole attachment agreements to attach those facilities to telephone company or investor-owned utility poles.

Comments on the petition are due September 24, and replies are due October 9.

J. *Public Safety 700 MHz D-Block Re-Auction Proceeding*, WT Docket No. 06-150 & PS Docket No. 06-229.

K. *Broadband "White Spaces" Proceeding*, ET Docket No. 04-186.

L. *Video Franchising Proceeding*, MB Docket No. 05-311.

- Petition for recon. of 2d R&O (applying some, but not all, of the 1st R&O to incumbent cable operators) still pending.

M. Forthcoming Inquiry Into Wireless Handset Exclusives.

N. Other Carrier-Related Issues.

- USF reform.
- Overhaul of inter-carrier compensation.
- Special access rates.
- VoIP state USF Fee issue.

III. THE COURTS.

A. The Supreme Court.

1. Appeal of FCC *Video Franchising* Order – *Alliance for Community Media et al. v. FCC*, No. 08-1027 (U.S. filed Feb. 10, 2009).
    - Cert. was denied on 6/15.
2. Section 253.
    - *Level 3 Communications LLC v. City of St. Louis*, No. 08-626 (U.S. filed Nov. 7, 2008).
    - *Sprint Telephony PCS v. County of San Diego*, No. 08-759 (U.S. filed Dec. 10, 2008).
    - Cert. was denied in both on 6/29.
3. Indecency – *FCC v. Fox Television Stations*, No. 07-582 (U.S. filed Apr. 28, 2009).
    - The "fleeting expletive" case.
    - Supreme Court reversed and remanded on APA grounds, holding that the FCC's change in policy with respect to "fleeting expletives" was consistent with the APA.
    - Court did not reach First Amendment issue, but teed that issue up for remand to the Second Circuit and, perhaps ultimately, for the Supreme Court itself.

- On May 4, Court granted cert. in and remanded *FCC v. CBS*, No. 08-653 (U.S. filed Nov. 18, 2008) (a/k/a, the Janet Jackson "wardrobe malfunction" case), to the Third Circuit in light of the *Fox* decision.

B. The Courts of Appeal.

1. *Comcast c. FCC*, No. 08-1114 (D.C. Cir. filed Aug. 28, 2009).

The court granted Comcast's petition and vacated the FCC's cable system ownership rule that capped at 30% the market share of all cable subscribers nationwide that any single cable television operator may serve. The outcome was expected. Back in 2001, the DC Circuit rejected and remanded the FCC's first attempt to justify the 30% cap. *Time Warner Entertainment v. FCC*, 240 F.3d 1126 (DC Cir. 2001). In that decision the court had found the FCC's 30% cap arbitrary and capricious because the FCC had failed to take into account the effects of DBS in its market analyses, and instructed the FCC to do so on remand. Importantly, however, the court left the FCC's 30% cap in effect during the remand.

On remand, the FCC made a few adjustments to its formula, retained the 30% cap, and offered new justifications for that cap. On appeal, the court was clearly irritated with the FCC, finding that the FCC's remand decision was again arbitrary and capricious because, at least in the court's view, the FCC had only come up with reasons why DBS growth wasn't relevant rather than taking into account DBS growth as the court had instructed it to do back in 2001. And the court found the FCC's reasons for not giving much weight to DBS wanting, both factually and logically. (The opinion is an excellent example of how courts, if they don't like an agency's decision, recite, but largely ignore, *Chevron* deference. And when it comes to regulation vs. deregulation, the DC Circuit almost never likes any "regulatory" agency decision.)

The most interesting aspect of the decision is perhaps the relief ordered by the court. The panel was so ticked off by what they perceived as the FCC's refusal to follow its earlier instructions that they agreed that the FCC's ownership rule should be vacated, rather than left in place while the FCC considers the matter again on remand. (Judge Randolph wrote separately to set forth his view that he thought vacating the rule entirely was mandatory rather than discretionary on the court's part.)

As a result of the court's decision, there now is no longer any FCC cable ownership cap at all. While the FCC may attempt to create a new ownership cap, the DC Circuit's rulings will make that very difficult for the FCC to justify. At a minimum, any new rule would have to take DBS

and telco-provided video into account, meaning that to have any chance of being defensible in court, any new cap would have to be substantially larger than 30% – at least 40% and probably higher, leaving plenty of room for new cable industry consolidation. Whether and when the FCC will make the effort, and with what new cap, are too early to predict.

Of course, antitrust review, and potential challenge, of any such new cable industry mergers would also still be available, and the Obama Administration's Antitrust Division has indicated a willingness to be more aggressive than its predecessor in looking into mergers generally, and communications-related ones in particular. But even in the antitrust, rather than the FCC arena, antitrust enforcers would likely encounter courts that, based on years of recent merger-friendly precedent, would not be overly receptive to antitrust challenges to cable industry mergers. That's not to say that such challenges won't occur or that they won't be successful, but it does mean that turning the giant ship of years of lax antitrust enforcement will not be an easy or fast endeavor. Patience and persistence (and perhaps some judicial turnover) will be required.

2. *T-Mobile USA, Inc. v. City of Anacortes*, No. 08-35493 (9th Cir. July 20, 2009)

The City of Anacortes (the "City") appealed the district court's determination that the City's denial of an application by T-Mobile to erect a 116-foot monopole antenna at a particular location violates 47 U.S.C. § 332(c)(7)(B). The district court found that T-Mobile's proposal was the least intrusive means to close a significant gap in its wireless service in the City, and that the City's denial was not supported by substantial evidence. The Ninth Circuit affirmed but on somewhat difficult grounds. It reasoned that, although the district court did not have the benefit of the court's opinion in *Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571 (9th Cir. 2008) (*en banc*) ("*Sprint II*"), and therefore failed to recognize that the City's denial of the application was supported by substantial evidence, the district court nevertheless properly concluded that the City's denial of the application violated § 332(c)(7)(B) because the City failed to rebut T-Mobile's showing that the denial of the application amounted to an effective prohibition of wireless services.

A few notes about this case: (1) In light of *Sprint II*, T-Mobile dropped its § 253 claim and relied only on § 332(c)(7); (2) the case provides a good example of the limits of the protection that *Sprint II* offers local governments – if the wireless applicant submits information showing the lack of available and feasible alternative sites, the burden of rebutting that showing shifts to the City, a burden the City failed to carry in this case; (3) the City seems to have been done in, in no small part, by the statements of

its own consultant and its own Police Chief and school district undermining the City's claim of the feasibility of alternative sites; and (4) the court's apparent discounting of those alternative sites that were outside the City limits seems, to me at least, to be contrary to the statute.

3. *NCTA v. FCC*, Nos. 08-1016 & 08-1017 (D.C. Cir. filed May 26, 2009).

   - Upheld FCC's decision in *Exclusive Contracts*, 22 FCC Rcd 20235 (2007), prohibiting exclusive contracts between cable operators and MDU owners and preempting preexisting exclusives.

   - Read 47 U.S.C. § 548(b), which industry claimed was intended to be directed only at programming access and agreements, more broadly to apply to any practice that hinders MVPD competition.

4. *Sorenson Communications, Inc. v. FCC*, Nos. 08-9503 *et al.* (10th Cir. filed June 4, 2009).

   - Court (1) strikes down as arbitrary and capricious FCC restriction on TRS providers' use of TRS funds for lobbying; (2) strikes down on First Amendment grounds FCC restriction on TRS providers' use of customer data; and (3) upholds FCC restriction on abusive marketing practices by TRS providers.

5. *Comcast Corp. v. FCC*, No. 08-1291 (D.C. Cir. petition for rev. filed Sept. 4, 2008).

   - Petition for review of *Complaint of Free Press and Public Knowledge*, 23 FCC Rcd 13028 (2008).

   - FCC found Comcast's broadband "network management" practices violated the FCC's *Internet Policy Statement*, 20 FCC Rcd 14986 (2005).

   - Briefing to be completed on November 23. Oral argument will occur shortly thereafter.

6. *Time Warner Telecom et al. v. City of Portland*, Nos. 06-36023, 06-36024 & 06-36061 (9th Cir. filed Apr. 8, 2009).

   - Based on the its earlier *en banc* decision in *Sprint Telephony v. County of San Diego* (for which a cert. petition is pending, *see* Part III(A)(2) above), the 9th Circuit upheld against § 253 challenge Portland's per-foot ROW fees, as well as Portland's in-kind

telecom franchise requirement, and also found that Portland's gross revenue-based ROW fee fell within the TIA, meaning that the district court lacked jurisdiction over TWT's § 253 challenge to those fees.

- On September 8, TW Telecom filed a petition for cert. seeking review of this decision. *TW Telecom v. City of Portland*, No. 09-309 (U.S. filed Sept. 8, 2009).

7. *Global Network Communications v. City of New York*, Nos. 07-5184-cv & No. 08-0802-cv (2d Cir. filed Apr. 8, 2009).

   - Based on § 253(c), the 2d Circuit upheld NYC's denial of Global's application for a public payphone franchise.

8. *S. New England Tel. Co. v. Office of Consumer Counsel*, No. 09-0116 (2d Cir. appeal filed Jan. 9, 2009).

   - This is AT&T's appeal of a district court decision holding that AT&T's U-verse video service is a "cable service," and thus AT&T is a "cable operator," within the meaning of the Cable Act. In the appeal, AT&T is primarily trying to get the lower court decision vacated as moot due to a change in state law.

   - Oral argument is scheduled for the week of November 2, 2009.

C. Other Cases.

1. *City of Eugene v. Comcast of Oregon II, Inc.*, No. 16-08-03280, Amended Opinion and Order (Ore. Cir., Lane County, filed August 7, 2009).

   - Court upholds, against all Cable Act and most Internet Tax Freedom Act ("ITFA") claims, application of Eugene Ordinance's 7% license fee on all communications service providers using city ROW and its 2% registration fee on all communications service providers in the City, to Comcast's cable modem service.

   - The court found that factual disputes remained as to whether the 2% registration fee was "generally collected" within the meaning of the ITFA, and whether both fees were consistent within the Oregon Constitution.

2. *City of Los Angeles et al. v. Pacific Bell Tel. Co.*, No. BC414272 (Cal. Super., L.A. County, complaint filed May 21, 2009). This

lawsuit challenges AT&T's PEG product as violating the PEG provisions of DIVCA, California's state video franchising law.

3. *City of Chicago v. Comcast Cable Holdings*, 231 Ill. 2d 399, 900 N.E. 2d 256 (Ill. 2008). Court holds that (1) Chicago's cable franchise agreement with Comcast was preempted by 47 U.S.C. § 542 to the extent that it required Comcast to pay a 5% cable franchise fee on cable modem service; & (2) Chicago had no alternative avenue under Illinois' home rule law to impose a fee on cable modem service.

Miller & Van Eaton

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Municipal Telecommunications Agenda

September 28, 2009

Background

The same congressional committees responsible for communications legislation are also charged with crafting a national health care reform program. For that reason, communications legislation and oversight has receded in visibility this calendar year. However, much is happening behind the scenes and there are great opportunities as well as grave perils to local government in communications policy-making in Washington today. Below is a thumbnail of the issues in play at the FCC, in the Congress or before NTIA.

FEDERAL COMMUNICATIONS COMMISSION

National Broadband Plan and Broadband Map (see MVE handout)

The FCC has until February of 2011 to provide the Congress with a National Broadband Plan. A plan will be submitted. Those interests that ignore this process will face grave difficulties in the years ahead. The Plan is expected to become the FCC's and Congress's blueprint for future regulation and financial support for communications deployments. Local government must highlight its existing broadband networks, like I-Nets and WANs which serve anchor institutions and underserved populations. States that would limit a local government's ability to operate these important networks must be isolated and state laws restricting deployments need to be revisited. In opposition, industry providers will try to shape the Plan to reduce local government authority over rights of way and tower siting in the name of broadband deployment and to make local governments captive consumers of high-cost broadband services to subsidize other commercial deployments.

A related activity is the effort to construct a map of the availability of broadband infrastructure in the US. This map is intended to be a major planning tool directing federal government support and regulation to encourage universal availability of broadband services. On the downside, if the map is not accurate, whole areas of the nation will be left behind under a shadow claim that the area enjoys adequate broadband service.

Petitions for Declaratory Ruling Regarding PEG Channels (see MVE handout)

Local governments have filed three separate petitions at the FCC to protect Public, Educations and Government (PEG) channels. One petition seeks to halt the practice of moving PEG channels from an analog format to digital while the remainder of the basic tier remains analog. Absent FCC action in support of local government in this petition, consumers will be forced to purchase additional equipment to view PEG channels. The other two petitions challenge AT&T's channel 99 webstream on the grounds that it violates federal law mandates for adequate PEG service.

5th & 6th Net Neutrality Principles

On September 21, 2009, FCC Chairman Julius Genachowski announced his intentions to add two new open Internet principles and apply all six principles to wireless and satellite access to the Internet, as well as wireline access. The 5th principle would ban discriminating against any particular Internet content or applications. The 6th would require transparency in broadband Internet provider network management practices.

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Net Neutrality is important to local economic development and full utilization of the economic power of the internet. Research shows that net neutrality is important to new and innovative businesses, including telecommuting applications. Net neutrality will also ensure that local governments, as major users of communications technology, continue to control their own communications without paying carriers premium payments.

CTIA Preemption Petition (see MVE handout)
CTIA, the cellular telephone industry trade association, has asked the FCC to set new limitations on local zoning authority over cell tower siting. CTIA wants, among other things, a "shot clock" for wireless antenna or tower zoning decisions.

These same ideas are appearing in Congress and at lease one bill (S.1447) by Sen. Hutchison (R-TX) has been introduced. The industry is also seeking cell tower preemption as part of any FCC broadband plan report to Congress.

CONGRESS

Must Pass Legislation
Other than the annual appropriation for FCC and NTIA operations, there is one "must pass" piece of communications legislation for 2009 – SHVURA, the Satellite Home Viewer Update and Reauthorization Act. H.R. 3570 will extend satellite-TV authority to beam distant broadcast signals which expires 12/31. This legislation could become a vehicle for other issues.

Other Anticipated Legislation Local Government Should Support
- Establish national standards for interoperable public safety standards for first responders
- Preserve and extend municipal government authority to provide communications services to their constituents.
- Protect PEG programming and support
- Overturn the recent FCC cable franchise order and return to the local cable franchising scheme set out in 1984 federal Cable Act. (See MVE handout)

Legislation That Should Be Opposed
- Wireless Tax Moratorium
- Resist attempts to auction for private purposes the so called D-Block of 700 MHz spectrum earmarked for state and local public safety and to properly fund the operations of the Public Safety Spectrum Trust;

NTIA

ARRA Broadband Stimulus Grants

NTIA is now evaluating the first round of stimulus grant proposals. The most qualified grants are about to be posted for public comment/criticism by the wireline and wireless providers.

The second round of stimulus grant proposals are expected to be due sometime in the next few months. In October, NTIA will formally request suggestions on how it might improve the second NOFA for the BTOP program. Local governments should file comments with NTIA to make the program meaningful for the urban underserved populations.

About Us www.millervaneaton.com

The professionals at Miller & Van Eaton, P.L.L.C. have been representing local governments on communications issues for more than two decades. The firm assists localities working on cable, telecommunications and wireless issues. It has helped communities establish their own wireline and wireless networks. It helps communities develop communications plans, and protects their interests before state and federal legislatures and agencies, and in the courts.

NATOA ANNUAL CONFERENCE 2009
REGULATORY AND LEGISLATIVE UPDATE

RELEVANT COURT DECISION FROM
OCTOBER 2008 THROUGH SEPTEMBER 2009

Presented by Lani Williams, General Counsel
Local Government Lawyer's Roundtable
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47 USC SECTION 253

Time Warner Telecom of Oregon, LLC v. City of Portland, 322 Fed. Appx. 496 (9th Cir. 04/08/2009). The in-kind requirements that Qwest challenged, which were provided to the City twelve years ago, did not vest the City with broad discretion, and they did not have the effect of prohibiting the provision of telecommunications services, *as demonstrated by Qwest's continued operation*. Therefore, these requirements did not violate § 253(a) of the Telecommunications Act.

Similarly, because the annual fees imposed on Qwest, calculated on per-foot usage, did not have the effect of prohibiting Qwest from providing telecommunications services, they did not violate § 253(a).

Also, the five percent gross revenue fees imposed on TWT by the City are taxes within the meaning of the Tax Injunction Act.

T-Mobile USA, Inc. v. City of Anacortes, 572 F.3d 987 (9th Cir. 07/20/2009). Although the City's denial of the T-Mobile's application was supported by substantial evidence, the district court nevertheless properly concluded that the City's denial of the application violated § 332(c)(7)(B) because the City failed to rebut T-Mobile's showing that the denial of the application amounted to an effective prohibition of wireless services. The City failed to show that there were any available alternatives to T-Mobile's chosen site; therefore, the district court properly found that the denial of the permit constituted an effective prohibition of coverage.

PEG LITIGATION

City of St. Petersburg, Florida v. Bright House Networks, LLC, No. 8:07-cv-02105-T-24-MSS (M. D. Fla. Dec. 12, 2008). The Cities of St. Petersburg and Tampa ("the Cities"), sued Bright House Networks ("BHN"), alleging that the realignment of its public, educational, and government access ("PEG") programming from analog to digital channels violated the Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. § 543(b)(7)(A), and the Cities' franchise agreements.

To compete more effectively with the Direct Broadcast Satellite companies, BHN planned to move to an all-digit format. In late 2007, BHN moved its PEG channels to the digital portion of its basic tiers. To view digital channels, a cable subscriber must either have a digital cable-ready television set (with a QAM tuner), or a digital-to-analog converter box. Such converters can be purchased from electronics retailers or can be leased from BHN $1.00 per month.

The Cities asserted that 47 U.S.C. § 543(b)(7)(A)[1] required BHN to provide all subscribers with the PEG channels as part of a basic service tier and that BHN is prohibited from charging subscribers for equipment--in addition to the monthly cost for the basic service tier--in order to access the PEG programming. BHN contended that it was exempt from regulation under § 543(b)(7)(A), including any regulation of the content of the basic service tier or the fees charged for converter boxes, because the Federal Communications Commission ("FCC") had found that BHN was subject to "effective competition" in both St. Petersburg and in Tampa.

According to the district court, the Cities did not dispute BHN's claim that the FCC found effective competition in St. Petersburg and Tampa. Accordingly, neither City has the authority to regulate BHN's charges for converter boxes or its basic service tier under that statute.

City of Dearborn v. Comcast of Michigan III, Inc., No. 08-10156 (E.D.Mich. 10/03/2008). The district court held that the Federal Communications Commission ("FCC") has the special

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[1] Statutory Text:
47 U.S.C. § 543(b)(7) Components of basic tier subject to rate regulation

(A) Minimum contents

Each cable operator of a cable system shall provide its subscribers a separately available basic service tier to which subscription is required for access to any other tier of service. Such basic service tier shall, at a minimum, consist of the following:

(i) All signals carried in fulfillment of the requirements of sections 534 and 535 of this title.

(ii) Any public, educational, and governmental access programming required by the franchise of the cable system to be provided to subscribers.

(iii) Any signal of any television broadcast station that is provided by the cable operator to any subscriber, except a signal which is secondarily transmitted by a satellite carrier beyond the local service area of such station.

(B) Permitted additions to basic tier

A cable operator may add additional video programming signals or services to the basic service tier. Any such additional signals or services provided on the basic service tier shall be provided to subscribers at rates determined under the regulations prescribed by the Commission under this subsection.

competence to resolve questions regarding the Cities' 47 U.S.C. §543(b)(7) claims against Comcast. The restraining order preventing the digital migration remains in place.
In each of the municipalities, Comcast is operating pursuant to a franchise agreement which addresses PEG issues. If Comcast makes its proposed digital migration changes, cable subscribers could only access PEG channels if they: (1) have a television equipped with a QAM tuner; (2) have a digital television; or (3) lease/purchase converter boxes from Comcast. Comcast is prepared to provide one converter box per household, for one year, but a converter box would be needed for each television to access PEG channels.

The Cities contend that to view PEG channels, subscribers would incur expenses over and above what they pay for other basic service tier channels; the rate increase amounts to $4.00 per month. The Cities also contend the move will significantly limit PEG channel viewer-ship and access because PEG channels would be difficult to find.

The district court entered an order November 28, 2008 directing the Cities to file a Petition for Declaratory Rulemaking in with respect to seven questions. The Petition was filed in December and the comment period occurred in spring, 2009. The relevant questions are summarized below.

1) Is the discriminatory treatment of PEG channels a violation of federal law and regulations?
2) Does the federal obligation to provide PEG channels apply in communities where there is "effective competition?"
3) Should the question of discriminatory treatment or tier placement be from the point of view of the consumer?
4) What criteria can be used to determine whether channels are part of the basic tier?
5) Can providers charge for equipment used only to access PEG channels?
6) Are PEG channels part of a basic tier if digitized and special equipment is needed?
7) Is Comcast's proposed digitization of PEG channels discriminatory?

Ex parte meetings continue to be held on this issue with the FCC.

TAXES VERSUS FEES

MCI Communications Services, Inc. v. City of Eugene, Oregon, No. 07-35935 (9th Cir. 09/15/2009)(Unpublished). MCI Communications Services, Inc. and MCIMetro Access Transmission Services LLC (collectively "MCI") argued that the district court erred in concluding that the City's telecommunications registration fees are "taxes" for purposes of the Tax Injunction Act, 28 U.S.C. § 1341 ("TIA"). MCI argues that the court also erred in dismissing its challenge to the "non-fee" provisions of the City's telecommunications ordinance as being inextricably entwined with MCI's challenge to the fee provisions.

The district court and court of appeals concluded that the fee of two percent of gross revenue charged to telecommunications providers owning and operating facilities within the City, plus another seven percent of their gross revenue for the privilege of using public rights-of-way, is a "tax" within the meaning of the TIA as construed in *Bidart Bros. v. Cal. Apple Comm'n*, 73 F.3d 925, 931 (9th Cir. 1996), and *Qwest Corp. v. City of Surprise*, 434 F.3d 1176 (9th Cir. 2006).

The fact that Ordinance No. 20083 labels the charge as a "fee" rather than a "tax" is not controlling. Also not dispositive is the fact that the charge may be characterized as a "user fee" for the use of public rights-of-way.

A municipal fee that is found to be a "tax" falls outside of federal court jurisdiction under the TIA, regardless of whether it might otherwise be deemed reasonable or excessive under § 253, and it may ultimately be saved from § 253(a) preemption by § 601(c)(2) of the 1996 Act, should the question be raised in state court.

The Ninth Circuit remanded the case for review of whether the non-fee provisions could be severed from the remainder of the ordinance and therefore considered by the district court.

WIRELESS FACILITIES

Sprint Spectrum, L.P. v. Platte County, Missouri, No. 08-1965 (8th Cir. 08/06/2009). Sprint Spectrum, L.P. ("Sprint"), sued Platte County, Missouri, alleging that the County's Planning and Zoning Commission ("Commission") violated the Telecommunications Act of 1996 ("TCA") by denying Sprint's application for a special use permit to construct a telecommunications tower. Sprint argued that the Commission's decision was neither "in writing" nor "supported by substantial evidence contained in a written record," as required by the TCA. 47 U.S.C. § 332(c)(7)(B)(iii). The district court granted summary judgment in favor of Platte County, and Sprint appealed. The 8th circuit affirmed.

The 8th Circuit joined the majority of courts in assuming that decisions by local boards "must (1) be separate from the written record; (2) describe the reasons for the denial; and (3) contain a sufficient explanation of the reasons for the denial to allow a reviewing court to evaluate the evidence in the record that supports those reasons." It found that language reciting factors in the County's Code was sufficient to meet the requirements that a denial "contain a sufficient explanation of the reasons for the denial to allow a reviewing court to evaluate the evidence in the record that supports those reasons."

The dissent however argued that recitation the factors in the code was not sufficient to meet the substantial evidence requirement. According to the dissent, because the Commission's decision is not specific as to which of the general standards in the Code the tower transgressed, a reviewing court is left to speculate as to the real reason or reasons for the Commission's decision.

T-Mobile Central, LLC v. Unified Government of Wyandotte County, Kansas City, Kansas, 546 F.3d 1299 (10th Cir. 11/17/2008). The Board of Commissioner's denial of an application for the placement of a wireless tower was not supported by substantial evidence. The court of appeals found that the Board erred in T-Mobile demonstrate or comply with factors not contained in the county Code.

Also, mere generalized concerns regarding aesthetics are insufficient to constitute the substantial evidence justifying the denial of an application to construct a wireless telecommunications facility.