

Memorandum

To: Clients & Friends
From: Walter & Haverfield LLP Cable & Telecom Practice Group:
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Date: October 10, 2003
Subject: *Recent Developments in Cable & Telecommunications Law*

Below are highlights (and some lowlights) of some recent developments and decisions in the field of cable television and telecommunications which may be of interest to municipalities, townships and other local government authorities. Please feel free to contact us if you would like more information.

Adelphia Moves Bankruptcy Court to Set Bar Date for Prepetition Claims

Adelphia on October 2, 2003 moved the United States Bankruptcy Court for the Southern District of New York to set a bar date for all prepetition bankruptcy claims. The Bar Date is the date by which any claim for monies owed from the period of time before Adelphia filed bankruptcy in June 2002 must be filed. Adelphia has asked that the court set the bar date 60 days after either (a) the date the Bar Date Order is entered or (b) the date that Adelphia files a notice that its amended schedules of liabilities have been filed. On October 8, 2003 Adelphia filed a 313-page first amended schedule of liabilities and executory contracts. What all this means is that if your community has a claim against Adelphia which arose before June 25, 2002, a proof of claim form should be filed in the bankruptcy court as soon as possible. Click for copies of Adelphia's [motion](#), [proposed order setting the bar date](#) and [bankruptcy proof of claim form](#), or visit the website of the United States Bankruptcy Court for the Southern District of New York, www.nysb.uscourts.gov. (The Adelphia bankruptcy is Case No. 02-41729).

Regulatory Classification of Cable Modem Service, Part I: Ninth Circuit Court of Appeals Reverses Federal Communications Commission Order – Sort Of

As you probably know, the Federal Communications Commission (FCC) in March 2002 determined that cable modem internet access service is not a cable service (despite its name and the fact that it is provided over the same pipeline as cable television service) and is not a telecommunications service but is, rather, an “interstate information service.” The FCC’s decision, which caused cable operators to immediately stop paying franchise fees on revenues from cable modem service, was appealed to the federal Ninth Circuit Court of Appeals. On October 6, 2003 the Ninth Circuit issued a decision reversing the FCC in part and affirming it in part. Unfortunately, the portion of the FCC decision that was upheld was the finding that cable modem service is not a cable service within the meaning of federal law – meaning that local government cannot collect franchise fees on such service under the Cable Act. The court reversed the FCC’s determination that cable modem service is solely an interstate information service and found, instead, that it is part

telecommunications service and part information service. This result could leave cable modem service subject to regulation under the federal common carriage rules, just like telephone service. The FCC has indicated that it will appeal, although it is not clear whether the first step will be to ask the Ninth Circuit to reconsider its decision or to appeal directly to the United States Supreme Court. Local government advocates, too, are considering their options. If the FCC's determination that cable modem service is not a cable service is left undisturbed, communities will continue to be unable to regulate the provision of cable modem service or to collect franchise fees on this substantial and quickly growing source of revenue – despite the fact that the pipeline used to provide cable modem service occupies the public right of ways regulated and maintained by local governments. For the Ninth Circuit Court of Appeals decision, [click here](#).

Franchise Fees on Cable Modem Service, Part II: More Bad News

While cities and townships wait for the higher courts to make a final decision about the nature of cable modem service (see Part I, above), lower federal district courts continue to issue decisions that prevent communities from collecting franchise fees on cable modem service. According to a Louisiana District Court in *Parish of Jefferson v. Cox Communications*, decided July 3, 2003, the Cable Act prohibits collecting franchise fees on cable modem and other non-cable services. Although the Parish argued that the terms of its cable franchise clearly required Cox to pay franchise fees on these services, the court concluded that the Cable Act preempted the terms of the agreement. The court sided with the FCC on two key issues, finding that: (1) cable modem service is not a “cable service” under the Cable Act; and (2) the Cable Act prohibits local communities from collecting franchise fees on telecommunications and data services provided by the cable operator. The Parish has filed a motion asking the court to reconsider, but a ruling on that request is some time away. The Court's decision can be found at 2003 WL 21634440, or [click here](#).

In *City of Chicago v. AT&T Broadband*, decided September 4, 2003, the federal district court for the Northern District of Illinois held that charging the cable operator 5 % franchise fees on its cable modem revenues in addition to the 5% franchise fees it already paid on cable television service would violate the Cable Act's 5% limitation on franchise fees, and was therefore prohibited. For the court's decision, [click here](#), or see 2003 WL 22057905 (you may also access the decision through the electronic bulletin on our website).

Federal Appeals Court Upholds FCC Resulting in Higher Cable Costs to Subscribers

In October 2001, the Federal Communications Commission (FCC) issued a decision that threatened to increase the cost of cable service to subscribers. In short, the FCC determined that cable operators could pass through and recover from subscribers all franchise fees paid to communities, even those franchise fees paid on revenues from non-subscriber related sources such as advertising. In November 2001, this pro-cable, anti-consumer decision was appealed to the Fifth Circuit Court of Appeals by a group of Texas communities. A significant group of Ohio communities participated in the case, filing a “friend of the court” *amicus* brief urging that the FCC's decision be reversed. Unfortunately, earlier this year the Fifth Circuit upheld the FCC, finding that the decision was within the authority of the FCC, and was not arbitrary or capricious. While the

decision is revenue-neutral to communities (i.e., it will not result in a reduction of the franchise fees you receive), it is illogical and wrongheaded. The more money a cable operator earns from advertising, the more its subscribers have to pay, because they are required to subsidize the franchise fees the cable company pays to the community on that advertising revenue. While most cable operators began passing such fees through to subscribers some time ago, some operators, including Adelphia, waited until the court battle played out this year. Adelphia subscribers have therefore recently seen increases in the franchise fee on their cable bills leading, in many cases, to angry telephone calls and letters to their city halls, township halls and local elected officials. The Fifth Circuit's decision is reported at *Texas Coalition of Cities for Utility Issues v. FCC* (5th Cir. 2003), 324 F.3d 802, or [click here](#).

FCC Says Cable Television Rates Rise Faster than Inflation

If your residents complain that the cost of cable is going up more than other goods and services – they're right. The FCC has confirmed that over the five years ending in July 2002, cable rates have increased an average of 7.1% per year, even though inflation over that period averaged only 2.3% per year. Cable television rates rose even faster during the one-year period ending July 2002, according to the FCC's report. The average customer's cable bill for programming and equipment rose 8.2%, from \$37.06 to \$40.11, despite the fact that the inflation rate for this period was only 1.5%. The average number of channels also increased in the last year of the survey, from 59 channels to almost 63 channels, while the average monthly rate per channel increased 1.2%, from 65.6 cents to 66.4 cents per channel. Cable rates in communities with two or more cable operators increased about the same percentage as rates in areas without competition but were, on average, 6.5% less than in areas with only one cable operator. The presence of competition also resulted in lower per channel costs. The FCC's most recent annual report on cable rates, released July 8, 2003, is available on the FCC's website, www.fcc.gov, or [click here](#).

Cable vs. Satellite

Another report issued recently studied the competition between cable operators and direct broadcast satellite television service providers (i.e., DBS services such as Dish and DirecTV). The J.D. Power and Associates 2003 Residential Cable/Satellite TV Customer Satisfaction Study found that, for the first time ever, the average monthly cost for satellite TV service has fallen below the average cable TV rate. According to J.D. Power, over a five-year period, average monthly satellite rates rose just 8%, to \$48.93 in 2003. Cable rates, on the other hand, rose 41% – from \$35.15 per month in 1998 to \$49.62 per month in 2003 – due, in part, to heavily-marketed higher priced services such as digital TV, video-on-demand (VOD) and high definition television. Although cable is still dominant, subscriptions are down from 68% of households five years ago to 60% of households in 2003. Satellite television subscriptions, in contrast, have grown from 7% of households in 1998 to 17% in 2003. Satellite TV providers also achieved higher overall customer satisfaction ratings than any of the cable providers in the J.D. Power study.

For local governments, the continuing growth and popularity of satellite television services has some negative implications, despite the fact that in some under-served areas (particularly rural areas), satellite television may be the only game in town for subscribers desiring more programming choices and advanced services. First, because the satellite providers do not occupy the public right of way, they are not required to pay franchise fees. Second, these companies do not carry the local public, educational and government access programming produced by your communities and schools.

Adelphia Bankruptcy Notes

At the annual conference of the National Association of Telecommunications Officers & Advisors (NATOA) in September 2003, Adelphia representatives indicated to local government officials from across the United States that the company is still on track to emerge from bankruptcy in mid-2004. Adelphia representative stressed that the company is focusing on core business issues such as programming, customer service and upgrading its cable systems, and on restoring profitability. This focus will lead in the near future to a revamped digital programming lineup, and will continue to exert upward pressure on cable rates, tempered by the reality of satellite and other competition. Finally, Adelphia's management has indicated that a name change is quite possible. No candidates for the new name have been released and, due to the negative publicity expected in connection with the criminal trials of the company's founder, John Rigas, and his sons and confidantes, management has hinted that announcement of a new name and rebranding of the company would probably happen only after the conclusion of those criminal proceedings.

John Gibbon, Todd Hunt, Bill Hanna and Janet Alter comprise Walter & Haverfield LLP's Cable & Telecommunications Practice Group, a part of the firm's Public Law Practice Group. Walter & Haverfield's Cable & Telecom lawyers represent local governments in all cable and telecom matters, including franchise renewals and transfers, franchise administration and enforcement, wireless telecommunications siting and leasing, and public right of way regulation.