

Client Briefing

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RECENT DEVELOPMENTS IN CABLE & TELECOMMUNICATIONS LAW

Adelphia Is For Sale

Bankrupt cable television operator Adelphia announced on April 22 that the Board of Directors has approved a plan to put the company up for sale. Originally, Adelphia's management had sought to keep the company intact when it emerged from Chapter 11 bankruptcy. The company modified its position after lenders, bondholders, and shareholders filed objections with the bankruptcy court, arguing that they would recoup more of their money if the company was sold. Adelphia is believed to be worth at least \$20 billion on the open market. Industry analysts have indicated there will be great interest in the company and that likely bidders include Comcast, Time Warner Cable and Cox Communications.

A sale of Adelphia assets, including local cable franchises, could move very quickly. Adelphia cable communities should be vigilant in preparing for the possibility of a sale, and should begin preparing as soon as possible. Adelphia will probably take the position that it may transfer or assign franchises regardless of whether a community's franchise agreement requires local consent. But under bankruptcy law, Adelphia will still need to "assume" or affirm each franchise agreement prior to assigning it to any buyer. And in order to assume a franchise agreement, Adelphia will be required to cure any defaults under the agreement or to provide adequate

assurance of a prompt cure. Finally, the company purchasing the franchise will need to provide adequate assurance of future performance under the franchise agreement.

What does all this mean? While the process would be different if Adelphia were not in bankruptcy, communities will still have an opportunity to ensure their interests are protected. It will be important to be able to identify any defaults by Adelphia, and to do so quickly, because if they exist a community may need to file documents in bankruptcy court raising conditional objections to a proposed transfer. For that reason, Adelphia communities should review Adelphia's compliance with franchise obligations, including franchise fee payments since Adelphia filed its bankruptcy petition in June 2002, as soon as possible. We will keep you updated on developments in the Adelphia bankruptcy.

Adelphia Changes Providers of Performance Bonds and Letter of Credit

Many Adelphia communities recently received cancellation or non-renewal notices from Hanover Insurance, Wachovia or other companies that provide performance bonds and letters of credit where the community's franchise with Adelphia requires them.

Adelphia has informed Walter & Haverfield LLP that it will provide replacement bonds issued by Travelers Insurance by mid-to-late May, in the amounts required by the franchise agreements, and that there will be no break in coverage. Please feel free to contact us if you have any questions about a notice you may have received or about the propriety of any new bond or letter of credit you receive within the next few weeks.

Regulatory Classification of Cable Modem Service May Be Decided By United States Supreme Court

On March 31, 2004, the U. S. Court of Appeals for the Ninth Circuit denied petitions for rehearing that had been filed by the FCC and a consortium of local government interests. The petitions sought to have the Court reconsider its October 6, 2003 decision that cable modem service is neither a cable service nor purely an information service, but rather is an information service with a telecommunications component. The FCC has indicated that it will appeal to the United States Supreme Court. Local government advocates are considering their options as well. While seeking review from the Supreme Court would be expensive, it may be a worthwhile investment, because the FCC will certainly not appeal the portion of the Ninth Circuit decision that is most damaging to local government interests - namely, that cable modem service is not a cable service under federal law. If that holding is left intact, local governments will be unable to collect franchise fees on revenues from cable modem internet access service or to regulate the customer service performance of cable modem service providers. The inability to collect franchise fees from cable modem revenues would cost local governments billions of dollars over the next decade.

FCC Considers New Communications Technologies

On February 12, 2004 the FCC issued two notices of proposed rulemaking (sometimes referred to as NPRMs) that have potentially far-reaching consequences for local government authorities.

Broadband over Power Lines (BPL)

The first Notice proposes a definition for BPL services and considers the need for their regulation. BPL technology permits the transmission of digital information as radio frequency energy over electric utility power lines directly into computers and other household devices. The FCC has proposed the following definition: "A carrier current system that transmits radio frequency energy over electric power lines owned, operated, or controlled by an electric service provider. The electric power lines may be aerial (overhead) or underground." BPL technology suggests an opportunity to provide broadband access to any location with an electric power outlet and may be the best hope for making the Internet truly accessible and useful in rural areas where broadband is currently unavailable. In addition, it may represent an opportunity for municipalities and other local governments that operate their own electric utilities to more economically create municipal networks for government use and to speed deployment of broadband access to their communities.

Because BPL technology uses radio frequency energy, however, shortwave (ham) radio enthusiasts and government agencies have expressed concerns with the potential for interference with radio services. For example, the Federal Emergency Management Agency (FEMA) has expressed to the FCC that although it believes BPL could be a major factor in achieving widespread national availability of broadband, it has identified interference risks posed by BPL to certain FEMA emergency radio communications systems. Therefore, the FCC seeks comment on the potential of BPL to interfere with radio communication and on methods to measure and control such interference. To read the FCC Notice, FCC No. 04-29, [click here](#).

IP-Enabled Services

The second NPRM concerns what the FCC describes as IP-Enabled Services (IP meaning "Internet Protocol"). These services include Voice over Internet Protocol (VoIP) Telephony as well as

other advanced services, and may pose a serious threat to local cable franchising authority in the not-too-distant future. VoIP technology permits voice communications to be provided over the Internet, using packets of digital data, rather than over traditional circuit-switched telephone lines. VoIP technology has been around for a number of years, but only recently have voice-quality problems been solved so that the quality of VoIP calls now rivals that of traditional telephone calls. The FCC has already taken the position that one type of VoIP service is an "information service" free from state or local regulation, and now asks whether all such services should be treated the same way. Courts considering the issue, too, have decided that VoIP telephony cannot be regulated by states. See *Vonage Holdings Corp. v. Minnesota Public Utilities Commission* (D.C. Minn. October 16, 2003), 290 F. Supp.2d 993 [click here](#).

As the use of VoIP technologies increases, classifying such services as information services free from regulation threatens to dramatically decrease the contributions to the Universal Service Fund paid by providers of telecommunications services. And because VoIP telephony uses phone numbers that have no physical location, local governments may face difficulties in administering 911 emergency service. The ability of law enforcement agencies to conduct wiretaps and telephonic surveillance may also be threatened.

But the most disturbing implication of a pure hand-off approach to regulation of IP-enabled services, if the FCC should go that way, is the potential impact on local cable franchising authorities. The FCC's Notice specifically points out, for example, that Microsoft is already testing an Internet Protocol Television (IPTV) product. Microsoft's IPTV is intended to offer video programming through internet-based webstreaming and would include many new advanced television services such as interactive television, HDTV, and multiple pictures-in-picture. If IPTV were launched successfully and considered an information service, local governments would have no authority under current law to franchise IPTV service, to collect franchise fees on IPTV revenues, or to regulate IPTV customer service. Thus the FCC seeks comment on

whether any VoIP or other IP-enabled services should be construed to be cable services for franchising purposes. To read the FCC's IP-Enabled Services NPRM, No. FCC 04-28, [click here](#).

U.S. Supreme Court Says States May Prohibit Municipal Provision of Telecommunication Services

On March 24, 2004, the U.S. Supreme Court issued a decision that allows states to limit municipalities and other political subdivisions from entering the telecommunications business. At issue in *Nixon v. Missouri Municipal League* was Section 253 of the Telecommunications Act of 1996, which preempts state and local laws that directly or effectively prohibit "any entity" from providing telecommunications services. The Supreme Court held that Section 253 does *not* apply to a state law that limits the power of local governments to provide telecommunications services. The Court reasoned that preempting such state laws would insert the federal government into the relationship between States and municipalities, thereby ending the States' absolute discretion to allow municipalities to exercise specific powers.

Currently several states limit the ability of municipalities to provide telecommunications or prohibit it altogether. In other states, the issue is not as clear. Municipalities in "general law" states may have their abilities limited to enumerated powers only by the state constitution or statutes. In "home rule" states, municipalities generally have broader powers. Although Ohio is a home rule state, aspiring municipal cable operators should be aware of Ohio Revised Code Chapter 1332, "Fair Competition In Cable Operations," which governs municipal cable television systems. The Supreme Court's ruling in *Nixon* may prompt greater legislative activity in many states as both state and municipal authorities seek greater clarity on these issues. For the Supreme Court's decision, reported at 124 S. Ct. 1555 [click here](#).

A Supreme Court Victory For The Good Guys

Finally, on a positive note for local franchising authorities, the United States Supreme Court refused to hear Charter Communications' challenge to the

Ninth Circuit Court of Appeals' decision in *Charter Communications, Inc. v. County of Santa Cruz*. The Supreme Court's January 12, 2004 action left intact the Ninth Circuit's September 2002 decision that the County of Santa Cruz did not unreasonably deny Charter's request for approval of a change in ownership. The County denied Charter's transfer request because Charter refused to provide certain financial information and guarantees that Charter argued were unreasonable and unlawful. Crucial to the Ninth Circuit's decision was its determination that the local review of a request to approve a transfer of control is a legislative action entitled to judicial deference, and that a court therefore may not simply substitute its judgment for that of the local franchise authority. The Ninth Circuit reviewed the County's action to determine if there was substantial evidence supporting *any* basis for denial of the request for

consent to the transfer of control of the franchise. Applying this test, the Court determined that the County's financial concerns were not unreasonable and that the denial was therefore justified. The Supreme Court's refusal to hear Charter's appeal means that *Charter v. Santa Cruz* remains the leading case on cable franchise transfer issues. For a copy of the Ninth Circuit decision, reported at 304 F.3d 927, [click here](#).

John Gibbon, Todd Hunt, Bill Hanna, Janet Alter and Teresa Purtiman 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, community and institutional networks, wireless telecommunications siting and leasing, and public right of way regulation.*

For more information on these or other telecommunications issues, please contact one of our Cable & Telecom lawyers:

John H. Gibbon	(jgibbon@walterhav.com)	216-928-2909
R. Todd Hunt	(rthunt@walterhav.com)	216-928-2935
William R. Hanna	(whanna@walterhav.com)	216-928-2940
Janet L. Alter	(jalter@walterhav.com)	216-928-2920
Teresa E. Purtiman	(tpurtiman@walterhav.com)	216-928-2972

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The information in this newsletter is a summary of often complex legal issues and may not cover all the "fine points" related to a specific situation or court jurisdiction. Accordingly, it is not intended to be legal advice, which should always be obtained in consultation with an attorney.

WALTER & HAVERFIELD LLP
ATTORNEYS AT LAW

The Tower at Erieview • 1301 E. Ninth Street • Suite 3500 • Cleveland, Ohio 44114-1821
Tel: 216.781.1212 • Fax: 216.575.0911 • www.walterhav.com