

On Cable & Telecommunications Law

This Is Not A Test: FCC Threatens Local Emergency Alert Systems

Since the earliest days of cable television, cities and other local franchise authorities (collectively, "LFAs") have insisted that franchise agreements include emergency alert system (EAS) provisions that give local officials direct access to the cable system to transmit emergency messages to subscribers in the franchise area. Local franchise-based EAS capability allows local officials to quickly notify residents of local emergencies such as chemical spills, tornadoes, broken water lines and snow parking bans, and to provide other important information.

Unfortunately, these franchise-based EAS systems may now be in jeopardy due to an August 2004 Notice of Proposed Rule-making ("NPRM") issued by the FCC concerning the federal EAS system created by the 1992 Cable Act. Although the federal EAS system establishes a framework of state and local emergency alert areas, it does not provide the same local-message capacity as a franchise-based EAS system, in part because the "local" areas it creates usually cover one or more (and sometimes many more) counties. It requires cable systems to carry national emergency alert messages, which preempt regular programming, but does not require them to cablecast emergency notifications issued by local authorities.

The Emergency Alert NPRM questions the effectiveness of the federal EAS system and suggests that the FCC may create a new national emergency alert system to replace the current federal EAS and all other alert systems, too. Such a development would be very bad news for LFAs. Because of the bureaucratic structure of the federal system, there is no direct local access to it — instead, permission must be obtained before a local emergency message is transmitted. Thus before sending an emergency message, municipal officials must first contact state EAS officials, who then determine whether the local emergency justifies issuing an alert to a wider area. Not only does this mediated access result in the loss of valuable time, state and federal EAS officials are often reluctant to utilize the system in this way at all. There are obvious advantages to a system that provides the police chief or mayor — who are more knowledgeable about local conditions in the first place — with direct access to the cable system to send an emergency message to residents.

Although the FCC has clearly stated in the past that the federal EAS system does not preempt local emergency alert systems, the new NPRM (while seeking comment on the most effective way to warn the

public of emergencies) completely ignores the critical role local, franchise-based EAS systems have historically played in transmitting local emergency information quickly and effectively.

In today's world, where local governments are expected to be "first responders" in emergencies, emergency alert issues are more important than ever. LFAs should check their franchise agreements for emergency alert requirements and, if there is such a requirement, should make sure the operator is in compliance. We have recently discovered several instances in which the cable operator has unilaterally determined to stop providing the local emergency alert capability required by the franchise agreement. The bottom line: do not be misled by misinformation or bad law provided by the operator. The Emergency Alert NPRM is FCC EB Docket No. 04-296. To see the NPRM and comments filed by LFAs and their representatives, including NATOA, go to <http://www.fcc.gov/eb/eas/>. ■

New Cable Television Franchise Transfers On The Horizon

Several cable operators are reported to be considering buying or selling cable systems, or swapping properties with other operators. Federal law provides that where a franchise agreement requires the approval or consent of the city, township or other local franchising authority (LFA) to transfer a franchise, the cable operator must obtain such approval. As a result, requests to approve such transfers may present a good opportunity to resolve outstanding franchise compliance or other issues with your cable operator. Unfortunately, although Federal regulations provide LFAs with procedural guidance, they do not specifically state which transactions require local approval. Therefore, the definition of "transfer" in the franchise agreement is the key to determining whether the LFA has the right to review and approve a proposed transfer.

Timely action and review of your franchise agreement are essential to the franchise transfer process. If community consent is required, the cable operator must provide the

LFA with an FCC Form 394 and any other information required by the franchise agreement or applicable law. If the local franchise authority has any questions regarding the information submitted by the cable operator, it must inform the cable operator within 30 days of receiving the information, or else the information is deemed accepted. The franchising authority has 120 days after receipt of the Form 394 and other required information within which to act on a cable operator's request. If the LFA fails to act on the operator's request within the 120 day period, the transfer application is deemed approved without action, under Federal law. Of course, the LFA and the cable operator can always agree to an extension of the 120 day deadline. Please note that cable operators nearly always submit a "model" ordinance or resolution approving the proposed transaction with the FCC Form 394. As a rule, these "model" instruments are drafted to heavily favor the interests of the cable operators over the interests of the community, and serve to prevent meaningful review of the proposed transfer and to waive local rights.

A request to transfer a franchise can be an LFA's opportunity to clear up any problems it may have with its current cable operator and negotiate better provisions with the new operator. If you have any questions regarding cable system transfers, please feel free to contact us. ■

Update on Adelphia's Sale Process

The sale process for bankrupt cable television operator Adelphia is progressing. Originally announced in August 2004, the company's deadline for bids for the purchase of the entire company or any of seven pre-determined clusters of systems was January 31, 2005. While the company could still emerge intact from bankruptcy and is continuing to pursue this "exit strategy," an eventual sale seems to be the most likely outcome.

Over forty companies or investment firms reportedly expressed interest in bidding on Adelphia cable properties. At least two joint bids for the entire company — one by Comcast and Time Warner Cable and the other by investment firms Kohlberg Kravis Roberts & Co. (KKR)

and Providence Equity Partners Inc. — were received by the deadline. Sources familiar with the process report that a number of bids for individual clusters of Adelphia systems were also received. Adelphia has indicated that it expects to make a decision concerning the bids by the end of March 2005; a sale would likely be completed around the end of the year.

Should an Adelphia sale proceed, it will be important for LFAs to be able to identify any defaults by Adelphia under the current franchise agreement. For that reason, Adelphia communities should carefully review Adelphia's compliance with franchise obligations as soon as possible. We will keep you updated on developments in the Adelphia bankruptcy and sale process. ■

Supreme Court: No Franchise Fees on Cable Modem Service Revenues

The United States Supreme Court has declined to revisit the issue of whether cities and other local franchise authorities should be able to collect franchise fees from cable operators for revenues received from the provision of cable modem Internet access services. You will recall that most cable operators paid franchise fees on cable modem service revenues until March 2002, when the FCC determined that cable modem service was not really a cable service at all, but was purely an "interstate information service" exempt from local regulation and from franchise fee obligations. That determination was appealed to the Ninth Circuit Court of Appeals, which affirmed the finding that cable modem service is not a cable service, but reversed the FCC in part, finding that cable modem service is not purely an information service, but rather includes a telecommunications service component as well. *Brand X Internet Services v. FCC* (9th Cir. 2003), 345 F.3d 1120.

The FCC appealed the adverse portion of the Ninth Circuit's decision to the United States Supreme Court, which in late 2004 agreed to hear the case. In connection with the FCC's appeal, a group representing local government interests filed a petition asking the Supreme Court to review the Ninth Circuit's (and the FCC's) determination

that cable modem service is not a cable. On December 3, 2004, the U.S. Supreme Court denied the local government petition. This unfortunate action means, absent some legislative change, that cable modem service is not a cable service under the Communications Act and that local franchise authorities cannot regulate it or collect franchise fees on cable modem revenues. The Court will soon hear oral arguments concerning the "information service versus telecommunications service" issues, and is expected to issue a decision in mid-2005. ■

FCC: VoIP Telephony Is Not Subject to State or Local Regulation

The FCC on November 12, 2004 issued an Order concerning the nature of Voice over Internet Protocol (VoIP) telephone services which takes such services outside the regulatory authority of states and their political subdivisions. This decision was the result of a long battle between Vonage, one of the first and most-recognized providers of VoIP telephony, and the State of Minnesota. The Minnesota Public Utilities Commission (MPUC) in 2003 sought to require Vonage to comply with state laws and regulations relating to the provision of telephone service. In response, Vonage sued the MPUC in Minnesota Federal District Court, and at the same time petitioned the FCC, asking that it preempt the MPUC order and declare that the VoIP service it provides is an "information service" under the Communications Act that is free from state regulation. The Minnesota District Court in October 2003 agreed with Vonage. The MPUC appealed to the Eighth Circuit Court of Appeals in early 2004, while the FCC continued to consider Vonage's petition.

In its "Vonage Order," the FCC determined that VoIP is interstate in nature, which means (1) that states do not have exclusive jurisdiction over its regulation; and (2) that the FCC has exclusive jurisdiction to determine the policies and rules that govern the interstate aspects of VoIP. The FCC did not decide, in the Vonage Order, whether VoIP is purely an information service. Nevertheless, in December 2004 the Eighth Circuit Court of Appeals dismissed the MPUC's appeal of the lower court

decision, finding that the MPUC's proposed requirements were preempted.

In addition to deciding some of the issues put before it in Vonage's petition, the FCC took the opportunity presented by the Vonage Order to clarify that VoIP telephony services that may be provided by cable operators, too, would be exempt from state regulation. Further, the FCC indicated that it would address several other critical issues raised by VoIP services, such as universal service requirements and consumer protection issues, in the context of the IP-Enabled Services Proceeding begun in Spring 2004. And finally, the Commission indicated that it would address the 911 emergency call issues attendant to VoIP services as soon as possible. The States of Ohio, California, Minnesota and New York have all filed appeals of the Vonage Order in their respective United States Circuit Courts of Appeal.

While the FCC's Vonage Order may not have any immediate effect on some cities, related issues such as 911 calling issues are obviously critically important to local officials. And to the extent that the Vonage Order reveals a continuing trend toward a "safe harbor" for all Internet Protocol-based services — which we have every reason to believe will soon include video programming that mimics or replaces cable television video programming — it is troubling indeed. Stay tuned. ■

Coming Soon To a Town Near You: Cable TV From Your Telephone Company (Sort Of)

Both SBC and Verizon have recently indicated that they will immediately invest to deploy fiber optic cables in their communications networks to greater extent than ever before, and to utilize the capabilities of these upgraded networks to deliver a bevy of new services including ultra-high speed Internet connections and video programming that would compete with the programming provided by cable operators. BellSouth is reported to be pursuing a similar path. SBC's fiber-to-the-node (FTTN) program — which SBC says will begin offering service before the end of 2005 and will pass 18 million homes by the end of 2007 — is called "Project Lightspeed."

Verizon's fiber-to-the-premises (FTTP) program — projected to pass 3 million homes in 9 states by the end of 2005 — is called "FiOS" (apparently an acronym for Fiber Optic Services). Both companies apparently intend to compete with the cable industry's "triple play" of video, telephone and Internet access data services with their fiber programs, but there's a twist: video would be provided over a digital, Internet Protocol-based platform (in fact, both companies have announced they will use Microsoft's IP-TV product).

Clearly, the regulatory status of IP-enabled services is critical to whether units of local government will have the ability to franchise and regulate the telephone companies' provision of such video programming. SBC has taken a hard-line position that under the rationale of the Vonage Order, it will not be required to obtain local franchises to provide multi-channel video services over IP, and will not be required to pay franchise fees upon revenues from doing so. And it has specifically asked the FCC to declare that cable rules and regulations will not apply to IP-video. The Commission is expected to rule on SBC's petition by early May 2005.

Verizon, on the other hand, has negotiated cable franchise agreements with several communities (including Beaumont, California and Texas communities Sachse, Westlake, Wylie and Keller) in connection with deployment of its FiOS TV product. But at the same time, Verizon has sought to change applicable franchising requirements. In Virginia, for example, Verizon has backed legislation that would implement a scheme of statewide, rather than community-specific, franchises. As of early February, that legislation thankfully appears stalled.

We will keep you abreast of developments on this front as we become aware of them, and would appreciate your letting us know if you hear of Verizon or SBC making moves in your area. ■

New Initiatives Would Restrict The Provision of Telecommunications by Municipalities

Across the country, the last few months have brought the introduction of several new legal and legislative initiatives that seek to restrict the ability of municipalities to provide telecommunications services.

Ohio

In Ohio, House Bill 591 was introduced late in 2004. H.B. 591 would amend Ohio Revised Code Chapter 1332, the so-called "Fair Competition in Cable Television" statutes, to include new prohibitions on the provision of telecommunications services by a municipality. Unfortunately, H.B. 591 does not address or define broadband services and therefore may be broad enough to include traditional telecommunications services within its scope, as well as with new technologies such as Wi-Fi services. The Bill would prohibit any municipality from favoring its own telecommunications system over a private system, and if such favoritism occurred, the same preference or benefit would be required for any private telecommunications system in the city. Separate financial accounts for the telecommunications system along with published annual reports would be required. Before beginning to offer telecommunications services, a municipality would be required to give public notice to current and pending telecom providers in the municipality. And once the services are actually in place, the Bill would restrict the city-owned service's ability to serve customers outside of municipal boundaries.

Indiana

An even more restrictive bill is under consideration in Indiana. Indiana House Bill No. 1148 would flatly restrict municipalities from offering cable, telecommunications, or information services, unless no private company is providing the desired services or intends to provide the services within nine months. No provision is made to permit the offering of municipal communications services under other circumstances, such as overpricing or quality of service considerations. There are no repercus-

sions should a potential competitor promise, but not deliver, services within nine months. Municipalities, on the other hand, must wait for nine months in each instance, to determine their ability to offer services themselves. The municipalities must go through a specific process in order to offer the services, including holding a public hearing and publishing costs and financial reports. A competing company may file a complaint concerning the services and any proposal approved by the municipality would be stayed pending the outcome of the complaint and any subsequent court proceedings, further delaying the municipal services.

Missouri

A lawsuit filed in Missouri threatens to further weaken municipal telecommunications services in that state. In August 2004, North Kansas City, Missouri moved forward with plans to install a city-owned fiber optic network. Currently, the City plans to provide only phone and data services to its residents on the network but the network would be capable of providing cable television services in the future. In December 2004, Time Warner Cable sued North Kansas City in federal court, alleging that the city failed to obtain the approval "by a vote of the people" necessary by Missouri law to own or operate cable TV facilities as a municipality. Time Warner contends that submitting the matter to the voters at a later date, after \$10 million has been spent on the network, would virtually guarantee its passage and render the vote meaningless. Time Warner is asking the court to either (A) prohibit the use of the network for cable television services; or (B) force the city to hold a vote on the construction of the network for cable television services, before proceeding.

We will be monitoring these cases and initiatives closely in the coming months and will update you on their impact as they make their way through the courts and the legislatures. ■

Supreme Court Considers §1983 Damages Against Municipalities for Violations of Wireless Tower Zoning Provisions

The U.S. Supreme Court will soon determine whether wireless companies can seek §1983 damages and attorney fees for municipal violations of the wireless tower zoning provision of the 1996 Telecom Act. On January 19th, the Supreme Court heard arguments in *Abrams v. City of Rancho Palo Verdes*, 354 F.3d 1094 (9th Cir. 2004), cert. granted 159 L. Ed. 2d 856, 125 S. Ct. 26 (2004), in which the Ninth Circuit held that §1983 damages and attorney fees are obtainable under the 1996 Telecom Act because the Act provides no actual remedies, but only procedural rights. *Abrams* — which involves an amateur radio operator suing the city for denying him a variance for a 50-foot radio tower in his yard — has attracted considerable attention because the Ninth Circuit's ruling, if upheld, would allow cell phone companies to seek hundreds of thousands of dollars in damages and attorney fees whenever permission to erect a wireless cell tower is denied because of a municipality's zoning regulations. The Eleventh Circuit reached a similar decision in *AT&T Wireless PCS, Inc. v. City of Atlanta*, 210 F.3d 1322 (11th Cir. 2000), vacated on other grounds by 260 F.3d 1320 (11th Cir. 2001). On the other hand, the Third, Seventh and Tenth Circuits have held that §1983 damages are not available under the 1996 Telecom Act. See *Qwest Corporation v. City of Santa Fe*, 380 F.3d 1258 (Tenth Cir. 2004); *Primeco Personal Comm., L.P. v. City of Mequon*, 352 F.3d 1147 (7th Cir. 2003); *Nextel Partners Inc. v. Kingston Township*, 286 F.3d 687 (3d Cir. 2002).

During oral arguments several Justices reportedly questioned whether Congress really intended to create a system in which municipalities could no longer afford to enforce their zoning provisions. Hopefully this question will be answered sensibly. We will keep you updated. ■

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

*Cable
&
Telecom*

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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 East Ninth Street, Suite 3500
Cleveland, Ohio 44114-1821
216.781.1212
216.575.0911 fax
www.walterhav.com