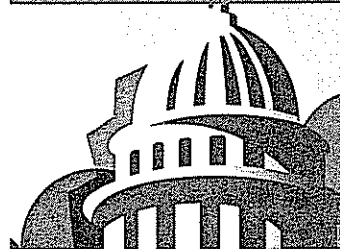


a baseball fan's assessment of the federal telecom legislation game

eing asked to comment on the national telecommunications legislative debate was an opening for a baseball analogy. Legislative battles are, after all, a lot like baseball. The game often ends after nine innings (or at the end of the legislative session), but sometimes we play extra innings. As many predicted, Congress adjourned for

elections without passage of telecommunications "reform" legislation. While the House passed H.R. 5252, the Communications Opportunities, Promotion and Enhancement Act ("COPE") overwhelmingly, the telephone companies and their allies could not quite seal the victory in the bottom of the 9th inning by getting the Senate version of H.R. 5252, the Advanced Telecommunications and Opportunity Reform Act ("ATOR") to a floor vote. The extra innings of the Congressional lame duck session start the second week of November.

**Legislative
Review: The
Communications Act**



BY KEN FELLMAN

A Baseball Fan's **Assessment**

In April, *Business Week* reported that in 2005 telephone companies spent \$60 million in lobbying in Washington alone, and that the federal video franchising campaign ranked second only to health care in the amount of money spent lobbying at the Capitol.

This article will not address the substance of the pending legislation. Rather, it is one player's perspective on process – how we got here, what arguments seem to be resonating (and not resonating) with Congress and what the game plan should be when we take the field again.

■ **"YOU CAN OBSERVE A LOT JUST BY WATCHING"**¹

COPE's passage by a vote of 321 to 101 indicates bipartisan support. In hindsight, everyone in the local government community can find something more they could have done in lobbying the local government position on this legislation. Still, many local government representatives spent a considerable amount of time trying to educate House members and their staff to no avail. It cannot be said that passage of COPE was the result of a lack of a focused local government lobbying effort, but we need to do more.

■ **"I MADE A GAME EFFORT TO ARGUE, BUT TWO THINGS WERE AGAINST ME – THE UMPIRES AND THE RULES."**²

So why did we lose in the House? There are arguably many reasons, but I will focus on two. First, we were up against Commerce Committee Chairman Joe Barton (R-Texas) and Subcommittee on Telecommunications and the Internet Chairman Fred Upton (R-Michigan). They want this legislation badly, and they wield considerable power (I express no opinion on whether such power is the result of the legislative equivalent of performance enhancing drugs). Attempts to educate and seek support from a broader base of the House membership led to the second major hurdle. After multiple communications with the two House members serving my community (both prior to and after the vote) I must conclude that Members of Congress show a disturbing willingness to accept information provided by industry lobbyists at face value, yet question the veracity of the facts presented by their own local government constituents.

Like many Colorado local officials, I spent considerable time working with both my Republican and Democratic House members (and their staff) on COPE. Prior to the vote, neither would commit, but both acknowledged the credibility of the local government concerns. After the vote, both were asked to explain their support of COPE, especially in light of the specific information they were provided by local governments

from their districts. The responses were instructive.

Do any of these sound familiar? "This bill will increase competition in the broadband markets." "Though franchise agreements are not the only barrier to new entrants, the national franchise agreement procedures established in the COPE Act offer incentives for providers, in addition to protections for consumers and local governments." "[COPE] advances the deployment of broadband networks that will bring increasingly innovative and competitive services to all of our constituents." "The current regulatory process imposed by local governments has been keeping prices for American consumers artificially high." Yes, the arguments that plaster the websites and the television ads of the Astroturf organizations funded by the telephone industry are being repeated almost verbatim by members of Congress communicating with their constituents.

The amount of money spent by the supporters of federal franchising is astronomical. It is the equivalent of a game between the N.Y. Yankees and the Tulsa Drillers (Class AA affiliate of my Colorado Rockies). In an August 2006 report titled "Wolves in Sheep's Clothing, Part II," Common Cause reported that just one of the many lobbying groups – the U.S. Telecom Association – spent almost \$6 million on television advertising in the first half of 2006. In April, *Business Week* reported that in 2005 telephone companies spent \$60 million in lobbying in Washington alone, and that the federal video franchising campaign ranked second only to health care in the amount of money spent lobbying at the Capitol. And these amounts do not include the millions being spent in state lobbying all over the country – like in Texas where SBC and Verizon retained more lobbyists than there are members of the Texas legislature. Clearly, the repetition of the telco mantra over and over again has resulted in the acceptance of its premise by many members of Congress – local governments are a barrier to entry that must be removed if we want competition, better service and lower prices.

■ **"THE GAME ISN'T OVER UNTIL IT'S OVER"**³

We must expand our strategy in the trenches to attack this problem, and I'll suggest how in a moment. But first, it's the fifth inning and we're down by 6 runs, so let's move to the Senate.

For over a year Republican Senator Ted Stevens (AK) and Democratic Senator Daniel Inouye (HI), the

co-chairs of the Senate Commerce Committee, held private "listening sessions" in an attempt to gather information leading to a bipartisan telecom reform bill. Local government participated in one of those sessions, and engaged in substantive discussions with the Senators, but a bipartisan bill was not to be.

Thanks to a home run resulting from the hard work of the national local government associations, and the willingness of Senator Stevens' staff to work with us, local governments obtained the Senator's support for a number of amendments that made the franchising and rights of way sections of ATOR more palatable than COPE. The national associations agreed not to oppose the bill (although individual local governments certainly could) in return for Senator Stevens' agreement to keep our amendments intact through the Senate process and in a subsequent conference committee. But that agreement fell apart when amendments preempting local government taxation authority were added to the bill during markup.

The controversy over Internet neutrality and to a lesser extent, universal service, kept ATOR from a floor vote. To be sure, these are issues of importance to local governments, but not as critical as federalizing the franchising process, limiting control of rights of way, and preempting local taxing authority. Net neutrality was arguably the Senate error that allowed local government's tying runs to score. Senator Stevens is still short of Senator Frist's requirement of 60 favorable votes (the number necessary to cut off debate) before the bill is scheduled for a floor vote.

■ "THE SECRET OF MANAGING IS TO KEEP THE GUYS WHO HATE YOU AWAY FROM THE ONES WHO ARE UNDECIDED."¹

Supporters of local control must recognize how hard the telcos were pushing prior to the recess, because it gives an indication of the struggle to come. In August I met with the legislative staff of my two Senators. Neither sits on the Commerce Committee, and neither planned to focus on ATOR unless it was coming to a floor vote. Both Senators (and presumably, the other 98 as well) were being pressed so hard by telco lobbyists that staff was receiving requests for meetings *multiple times* each week. Think about it. Not a meeting a week from one ATOR supporter. Multiple meetings, every week, from multiple companies and organizations – all seeking support for a vote to close debate and pass ATOR. We have our work cut out for us.

■ "I TRY NOT TO BREAK THE RULES, BUT MERELY TO TEST THEIR ELASTICITY."⁵

While we prepare for the extra innings of the Congressional ballgame, remember the FCC is waiting in the wings. The Commission appears poised to take action to limit local authority if Congress does not. While it is far from clear that there is any legal authority under the Cable Act for the Commission to preempt elements of local franchising, Chairman Martin has given indications that he believes otherwise. In other words, "let's play two."⁶

■ "WHAT ARE YOU GOING TO DO? ADMIT TO YOURSELF THAT THE PITCHERS HAVE YOU ON THE POINT OF SURRENDER? YOU CAN'T DO THAT."⁷

Whether the game ends in a lame duck session or continues with introduction of new legislation next year, we can strengthen our advocacy in at least two ways. We must do a better job at presenting our position (and the fallacies of the opposing arguments) publicly. That means meetings with editorial boards, discussions at televised Council meetings, presentations at the Chamber of Commerce and service clubs, and letters to the editor. When the telcos score first with the "local government as barrier to competition" argument, it is difficult playing catch up. Moreover, we need to demand accountability from our Members of Congress. We know how relentless the industry lobbyists are. When Members of Congress regurgitate the telco mantra, we cannot let them off the hook. Demand answers. Which cities have been barriers? What is the source of your information? What have you done to verify it? The responses (or failures to respond) should in turn be discussed publicly. I don't always agree with my Congressional delegation, but they all ought to expect, as we do in local government, that the bases of their decisions will be vetted in the court of public opinion.

If local officials leverage their ability to educate the public with the truth about local control, and demand accountability from our federal officials, we'll have a much better sense of direction than Yogi Berra, when he advised, "when you get to a fork in the road, take it." ■

Notes on Quotes

How many did you know?

1. Yogi Berra
2. Leo Durocher
3. Yogi Berra
5. Bill Veeck, Jr.
6. Ernie Banks
7. Lou Gehrig