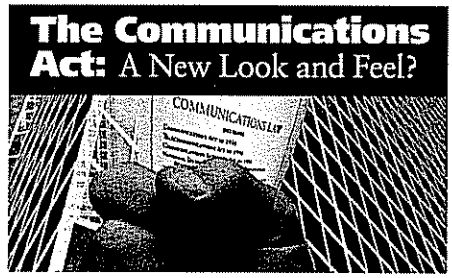
emerging telecommunications legislation

The Challenging Road Ahead

For the past year, local officials have been awaiting the "rewrite" of the Communications Act.[1] During that time, as local governments promote deployment of broadband services, they've been developing the core values[2] to be addressed in any rewrite, and have begun the process of educating elected officials who will determine the outcome. Some legislation has been introduced offering a picture of what many in the industry and Congress are trying to accomplish, and there are indications of other bills coming soon to a legislative hearing near you. However Congress has not yet introduced "the bill" that is anticipated to represent the comprehensive rewrite of the Communications Act.



Prior to the August Congressional recess, five bills were pending that would materially impact local government. Regarding municipal broadband, S. 1294 sponsored by Senators Lautenberg (D-NJ) and McCain (R-AZ) specifically authorizes the provision of broadband services by localities, and preempts state laws to the contrary. H.R. 2726, sponsored by Representative Sessions (R-TX) preempts any local provision of broadband.

BY KENNETH S. FELLMAN & BRETT D. CHARDAVOYNE, ESQ.

H.R. 3146 (Representatives Blackburn (R-TN) and Wynn (D-MD)) and S. 1349 (Senators Smith (R-OR) and Rockefeller (D-WV)) provide national franchises for video service providers. S. 1504 (Senators Ensign (R-NV) and McCain (R-AZ)) is much broader and Draconian in scope. This article will identify some of the highlights (or lowlights, as it were) of these bills, and others that may be coming. Readers are encouraged to review each bill for a fuller understanding of the implications.

H.R. 3146 and S. 1349 — Video Choice Acts

Both H.R. 3146 and S. 1349 differentiate between existing cable operators (as defined in the Cable Act) and a new description of "video service providers." Both bills retain existing regulation of cable operators and preserve current cable franchises, but exempt video services providers from local franchising requirements if that provider has a right under federal, state or local law to be in the rights of way (ROW) independent of a cable franchise. Most telephone companies have such authorization.

While the provisions are not identical, in both bills video service providers would pay a gross revenues based fee comparable to that of the cable operator and would provide the same number of Public, Education, and Government channels. If there is no cable provider, the video provider must provide *reasonable* PEG facilities. If either bill passes, what is "reasonable" and what constitutes "facilities" will likely be the subject of debate and litigation. Problematically, the bills do not address a locality's authorization to require financial support for PEG. While there is no build-out requirement, providers are prohibited from denying service to consumers on the basis of income. Rate regulation is prohibited. The video services provider is required to comply with the customer service standards as established by the FCC, yet there is no reference as to how those standards will be enforced. Local police powers to manage ROW would not be restricted, so long as the local ROW regulation does not amount to a de facto franchise.

S. 1504 – Broadband Investment and Consumer Choice Act

S. 1504 would terminate current cable franchises and prohibit future franchises. It would provide some compensation for the use of public ROW, but despite Senator Ensign's public statements that local governments would be held harmless, in reality, most communities would see revenues decrease substantially. The bill's definition of gross revenues is narrower than the definition in most cable franchises, and is followed by four pages of exceptions. Most significantly, the compensation is not the traditional rent for the use of public property but rather is limited to reimbursement for the costs incurred in managing the ROW. This will cause local governments to specify exact costs of managing ROW, and will inevitably result in litigation over whether the fees charged exceed ROW management costs.

S. 1504 prohibits build-out requirements, thereby allowing operators to cherry pick the most profitable areas in a community. There would be a maximum of four PEG channels made available to any community, with no provision for financial support of access channels. The FCC would create customer service standards for video services, and there would be no local enforcement. If a provider violates the federal standards, the aggrieved customer must file a complaint with the state PUC. If the PUC refuses to act, the customer must seek relief from the FCC. The bill creates substantial hurdles to localities seeking to promote broadband services, either directly or through public – private partnerships. Finally, while the bill purports to preserve local authority over ROW, it prohibits local governments from charging ROW permit fees to video providers.

House Commerce Committee Staff Draft

S. 1504 is not the comprehensive rewrite that was expected. Earlier this year, the Chairman and Ranking Member of the Senate Commerce Committee, Senators Stevens (R-AK) and Inouye (D-HI), held multiple, private "listening sessions" with representatives of the industry, and one meeting with local government. Indications are that they prefer to collaborate on a bill that will become the Senate version of the rewrite. Although to date such efforts have not yielded a bill, the work continues. House Commerce Committee staff recently circulated a draft ("staff draft"), seeking feedback on what may morph into legislation sponsored by Committee Chair Barton (R-TX) and Ranking Member Dingell (D-MI).

The staff draft addresses Broadband Internet Transmission Services (BITS – your new telecom acronym of the season), Voice Over Internet Protocol (VOIP) and Video Services. BITS is defined as packet switched service, regardless of the facilities used, and includes features, functions, facilities, and equipment used to transmit packetized information. Video programming is excluded from this definition. Broadband Video Service (BVS) is defined as two-way, interactive service, regardless of facilities used, that integrates a real-time customizable video programming package with voice and data features, and integrates the capability for subscribers to select Internet content of their choosing.

The staff draft federalizes BITS, VOIP, and most regulation of BVS. There would be no regulation of BITS or VOIP providers (i.e., rates, conditions of entry, etc.). Authority to manage right of ways and recover compensation from BITS providers is preserved, but the draft does not state whether "compensation" is rent or limited to cost recovery. E911 services must be provided to VOIP subscribers under rules to be adopted by the FCC, and E911 fees are limited to expenditures to support E911 services.

---

[1] For an excellent discussion setting the stage for rewrite, see, Hon. Marilyn Praisner & Gerard L. Lederer, "The 109th Congress: On the Road to a Rewrite?", *NATOA Journal of Municipal Telecommunications Policy*, Winter 2004.

[2] The NATOA Core Values statement may be found on NATOA's website *www.natoa.org* under the policy/advocacy sub-heading.

Regardless of which bills end up moving through the hearing process, now is the time for local elected officials to become educated about these issues.

Regarding video, after the FCC notifies the local franchising authority (LFA) that a federal registration statement has been accepted, a local franchise becomes effective 15 days after the LFA's receipt of any required bond payments, the provider's agreement to offer PEG capacity that is designated by the LFA, and the designation of a local agent. LFAs are limited to designation of PEG capacity that is consistent with what other cable or BVS operators provide locally.

LFAs may assess franchise fees on BVS providers of 5% of the draft's definition of gross revenues. Authority to manage local rights of way is preserved. The FCC will resolve all disputes arising under the video section of the staff draft. The staff draft requires the FCC to ensure that providers do not deny access to services on basis of income. There is no language yet on build-out obligations – only a blank to be filled in later. The staff draft provides that the FCC will develop national consumer protection standards for BITS, VOIP and BVS. Localities have no enforcement role – state commissions or the FCC will enforce.

Regarding municipal broadband, the staff draft adopts language similar to the Lautenberg-McCain legislation, which allows "public providers" to offer BITS, VOIP and broadband video, and preempts state laws that prohibit or have the effect of prohibiting these services.

Local government provided feedback to Committee staff at a recent meeting. Among the issues of concern raised were the draft's failure to address the "fees versus rent" issue when it speaks of compensation for the use of rights of way; requiring consumers to seek assistance from a state or federal agency that will not be equipped to address local consumer needs; build-out of systems and provision of advanced services to all citizens; forcing all local rights of way disputes to be resolved at the FCC; and the need for PEG support above the requirement to provide channel capacity. By the time this article is published, a bill could already be introduced that may not even resemble the staff draft that was circulated for comment.

Conclusion

Regardless of which bills end up moving through the hearing process, now is the time for local elected officials to become educated about these issues. Many Congressional offices have made honest efforts to understand local government concerns. Local officials are in the best position to articulate to Congressional representatives the importance of the core values at stake. All legislation should be studied carefully, keeping the following in mind:

1. The importance of local control over rights of way cannot be understated. Some pending bills limit local authority.
2. Eliminating local involvement in consumer protection is terrible public policy. There can be no reasonable expectation that consumers will be well served if the primary mechanism to resolve their issues is to dial 1-800-CALL-FCC.
3. Local revenue impacts may be substantial. Local taxing authority and the ability to recover fair compensation for the private use of public property should not be sacrificed to achieve competitive goals. Doing so can amount to a taking of local property, imposition of unfunded federal mandates, and the questionable policy of the federal government forcing state and local government to subsidize the telecommunications industry.
4. While the federal regulatory scheme must address convergence, it should not abandon the notion that providers using public property (whether that be rights of way or spectrum) owe social obligations to the public. Those obligations must continue to be met by insuring that these networks are available for, and can be used effectively by, PEG communities.
5. Local authority to provide broadband services must be recognized. As the United States falls further behind other nations in broadband deployment, why would any legislation purporting to promote deployment, restrict a governmental entity from assisting in that national effort?

When all is said and done, no matter how compelling the arguments may be to federalize and deregulate significant segments of the communications industry, the fact remains that all deployment (like all politics) is local. In a streamlined, deregulated federal system, there are still important roles that local governments must play. Our challenge is to stay actively involved in the legislative process, and insure that our Congressional representatives understand our message. ■