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Update on Recent FCC Decisions and Case Law Impacting Local Governments

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- Performance audit
- Technical review
- Financial audits
- Franchise fee audit
- Rate regulation
- Litigation
- Negotiation
- Ordinance drafting
- Non-profit access corporations
- Public, educational and governmental operations
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INTRODUCTION

This paper includes a broad range of subjects in the evolving and developing field of cable, telecommunications, and broadband Internet access. Because of the rapid growth and development both from a technical and service standpoint, but additionally from a legal standpoint, it is not possible to include all of the subject areas or all of the FCC or court cases that relate to cable and telecommunications. We have not attempted to do so. Our intent was to provide a paper that highlighted some of the most recent developments in the courts as well as the FCC and other developments that either currently or in the near future will likely impact local governments as well as their constituents.

LOCAL FRANCHISING AUTHORITIES AND RIGHT-OF-WAY MANAGEMENT

Charter Communications, Inc., et. al. v. County of Santa Cruz, 304 F.3d 927 (9th Cir. 2002); *Charter Communications Inc., et. al. v. Santa Cruz County,* 123 S.Ct. 1925, 2003 U.S. LEXIS 3245 (2003) (*solicitor general invited to submit brief expressing views of U.S.*)

In this September 2002 cable franchising case, the 9th Circuit held that a county's decision to withhold consent for transfer of a cable franchise did not constitute a material breach of the franchising agreement. The County of Santa Cruz, a local franchising authority, requested certain information from Charter Communications, and withheld approval for a transfer of the franchise when Charter balked at providing it. The 9th Circuit found for Santa Cruz County and overturned the district court's holding, which had found for Charter, had firmly rebuked the County, and had awarded attorney fees to Charter. *See Charter Communications, Inc. v. County of Santa Cruz*, 133 F.Supp. 2d 1184 (N.D. Ca 2001).

Charter Communications, LLC had an active cable television franchise with the County of Santa Cruz. In 1998, Microsoft co-founder Paul Allen sought to acquire Charter Communications, LLC's parent company, Charter Communications, Inc (CCI). Under the existing franchise agreement, the change of ownership required consent from the county – which under the agreement could not be unreasonably withheld -- before CCI could operate under the County franchise.

As part of the transfer negotiations, the County, concerned with CCI's financial viability, requested financial and other information from CCI. CCI provided some information, but refused to provide other information beyond what was compelled by Section 617 of the Cable Act. The county refused to approve the transfer, and CCI sued, arguing that the County unreasonably withheld consent to the transfer.

The basis for the 9th Circuit's decision finding for the County of Santa Cruz lies in the notion of legislative action, which, if reasonable, is deserving of deference by a reviewing court. The Court held that local franchising authority decisions concerning

franchise grants, renewals, and consents to rate increases -- because they involve policy decisions regarding the terms and conditions of the use of the public right of way -- are legislative acts. Accordingly, the dispute was not simply a matter of the County administering a contract consenting to transfer of ownership. "Under this deferential standard, the County's denial of consent should be upheld as long as there is substantial evidence for any one sufficient reason for denial." *Charter Communications, Inc.*, 304 F.3d at 933. The Court went on to emphasize the deference due to decisions of local franchise authorities: "We note that even if we thought the County had acted unreasonably, our view would be deferential not only because precedent so commands, but also because methods exist to promote self-correction in the future: citizens can vote out their local representatives and cable operators can refuse to enter into franchise agreements with notoriously difficult local franchise authorities." *Id.,* at 935.

In short, the 9th Circuit in the *Santa Cruz* case reinforced the power of local franchise authorities to impose conditions on and require production of information from franchise holders. So long as the local franchise authority articulates its actions and uses reasonable judgment, its actions are unlikely to be successfully contested (in the 9th Circuit, at least).

TCG New York, Inc. et al. v. City of White Plains*,* 305 F.3d 67 (2nd Cir. 2002); *cert. denied,* 2003 US LEXIS 2215, 123 S. Ct. 1582 (2003).

TCG, a subsidiary of AT&T Corporation, challenged the validity of an August, 1999 franchise proposal and an ordinance of the White Plains, NY municipal code on various grounds, the cumulative effect of which caused the ordinance and the proposal to be invalidated as a violation of the Telecommunications Act, 47 U.S.C. § 253(a).

Section 253(a) provides:[1]

> (a) In general. No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting

[1] The remainder of § 253 states:

> (b) State regulatory authority. Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.
>
> (c) State and local government authority. Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.
>
> (d) Preemption. If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b) of this section, the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

> the ability of any entity to provide any interstate or intrastate telecommunications service.

TCG had sought the local franchise to construct telecommunications facilities in the City of White Plains' public right-of-way. As such, it was subject to an existing rights-of-way ordinance and the requirements of a franchise agreement proposed by the City. TCG challenged both on a variety of grounds, including certain disclosures required by the ordinance, a unilateral ability of the City to reject telecommunications applicants outright based on "public interest factors," extensive delays in processing TCG's request, and most importantly, the fee provision in the franchise proposal requiring TCG to pay 5 percent of its annual gross revenues to the City. The incumbent, Verizon, had no such franchise agreement and was not required to pay any franchise fee (although it did provide free conduit space to the City).

The 2nd Circuit agreed with the FCC's interpretation of the leeway given to local regulations and requirements challenged as a barrier to entry under § 253(a):

> [T]he FCC has stated that, in determining whether an ordinance has the effect of prohibiting the provision of telecommunications service, it 'considers whether the ordinance materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.' *Cal. Payphone Ass'n,* 12 FCC Rcd 14191 (1997). We agree with these precedents.

305 F.3d at 76.

The Court concluded that the right-of-way ordinance as a whole, and its derivative franchise proposal, violated § 253(a) for a variety of reasons, but also had to consider whether any provisions could be saved by § 253(c), which observes the locality's legitimate interest in regulating uses of the public rights-of-way. That section preserves the government's authority to "require fair and reasonable compensation from telecommunications providers," so long as they are imposed "on a competitively neutral and nondiscriminatory basis." The Court in *White Plains* specifically said that franchise fees among multiple providers need not be equal. "The statute does not require precise parity of treatment. . . .Municipalities can take into account different costs incurred by different uses of the rights-of-way. They can also consider the scale of the use of rights-of-way. They also retain the flexibility to adopt mutually beneficial agreements for in-kind compensation." *Id.,* at 80.

However, because the City of White Plains had not imposed any franchise fee on the incumbent Verizon, TCG was able to successfully contest the franchise fee provision on grounds that it was competitively non-neutral and was discriminatory.

As for the disclosures challenged by TCG, the Court upheld their invalidation by the district court: "The disclosures mandated by the invalidated provisions were relevant

only for regulating telecommunications, which § 253 does not permit White Plains to do, not for regulating use of the rights-of-way, which White Plains may do." *Id.,* at 81.

The court also strongly condemned franchise provisions that purport to waive the franchisee's right to challenge illegal provisions of the franchise in court: "Requiring telecommunications providers to agree to not challenge the provisions of the franchise in court is a transparent attempt to circumvent § 253. The TCA does not create a collection of default rules that municipalities and service providers can contract around. The provision would have been completely unenforceable had TCG agreed to it, but it was improper for White Plains to even propose it." *Id.,* at 82.

See also, TC System, Inc. et. al. v. Town of Colonie, New York, 263 F.Supp. 2d 471 (N.D.N.Y. May 2003); *City of Rome, New York v. Verizon Communications, Inc.,* 240 F.Supp. 2d 176 (N.D.N.Y. Jan. 2003).

REGULATORY CATEGORIZATION OF ADVANCED SERVICES

Cable Modem Service & Wireline Broadband (DSL)

In March 2002, the FCC concluded that cable modem service was not a "cable service," but is an "interstate information service" subject to FCC jurisdiction. The FCC also said that cable modem service does not contain a separate "telecommunications service offering," and therefore is not subject to common carrier regulation. *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities,* Declaratory Ruling and Notice of Proposed Rulemaking, CS Docket 02-52, released March 15, 2002.

This conclusion differs somewhat from the FCC's tentative conclusion elsewhere that "wireline broadband Internet access" – such as DSL – is an information service that *does* have a telecommunications component (logically enough, as it rides over telecommunications facilities while cable modem service does not). Like cable modem service, however, wireline broadband services themselves are not "telecommunications services" subject to common carrier regulation. *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities,* CC Docket No. 02-33, Notice of Proposed Rulemaking, FCC 02-42 (rel. February 15, 2002).

At the same time it made these tentative regulatory categorizations of broadband services, the FCC issued parallel Notices of Proposed Rulemaking to examine the ramifications, including whether there are legal or policy reasons why it should reach different conclusions with respect to wireline broadband and cable modem service, and the role of state and local franchising authorities in regulating cable modem service.

Whether cable modem service ultimately will be considered an information service, a telecommunications service, or something that includes both (with the FCC forbearing from redundant common carrier regulation), remains unclear. What is becoming certain, however, is that cable modem service is unlikely to be considered a "cable

service" for regulatory purposes. The FCC stated that revenues from cable modem service should not be used to compute the 5 percent franchise fee that local franchising authorities may impose on cable operators' gross revenue from cable service; accordingly, cable operators across the country have ceased collection and payment of franchise fees allocable to cable modem service.

The extent to which local authority remains regarding cable modem services will likely be clarified in the FCC's upcoming rulemaking, expected to be released in late 2003 or early 2004.

Voice-Over-IP

Simmering under the regulatory surface for quite some time, Voice-over-IP (VoIP) has over the past year evolved to a point where commercially viable services have caught the formal attention of relevant regulatory bodies, at both the state and federal level.

The regulatory status of VoIP providers, essentially, whether they are information service providers or telecommunications companies, is likely to be a big deal for state regulators and potentially local authorities as well. Local franchise and utility statutes, drafted with a typical right-of-way-using phone company in mind, may run into difficulties when presented with a "telecommunications company" (or whatever analogous term is used by the state or locality) that functions via a broadband Internet connection. This is particular true considering that Internet service frequently rides over another telecommunications company's facilities.

The VoIP models garnering the most regulatory attention involve either a conventional or modified telephone, and travel over the subscriber's broadband Internet connection. In the case of the "broadband phone" offering of Vonage, a high-profile VoIP startup based in New Jersey, the user runs a conventional telephone through an adapter, which then sends the voice signal through the user's broadband Internet connection for carriage over the Internet. At the destination end the call is dropped to the conventional public switched telephone network (PSTN) for termination, enabling any normal phone user to receive calls from Vonage users. In the SIP[2] model, employed by pulver.com's Free World Dialup and others, a special SIP configurable phone plugs into ethernet connection of a computer, rather than a conventional RJ-11 telephone jack, and users may only call other SIP users on that particular SIP network. VoIP under the SIP model does not touch the PSTN at any point. Importantly, both of these models are phone-to-phone, as opposed to one or both persons interfacing with a computer.

At the present time, most of the regulatory action is in the states. On August 13, 2003, Minnesota became the first state in the U.S. to conclude that Vonage provides a "telecommunications service," and as a phone company is subject to regulation as such. The Minnesota PUC staff's analysis of the issue focused heavily on the fact that the user experience was the same as if making a conventional telephone call. Vonage

[2] Session Initiation Protocol.

plans to fight the Minnesota PUC order, but other states are rapidly heading down a similar road.[3]

At the federal level, pulver.com and AT&T both have filed petitions with the FCC requesting an inquiry into the status of Internet telephony, pulver.com requesting a declaratory ruling that its Free World Dialup SIP phone service is neither telecommunications nor a telecommunications service, and AT&T similarly requesting that its phone-to-phone IP telephone service (which, unlike Vonage, Free World Dialup and others, uses the Internet for backbone transport only and the PSTN on both ends for end-user access) be exempt from access charges. *Petition for Declaratory Ruling that Pulver.Com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service,* WC Docket No. 03-45, filed February 5, 2003; *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Service Are Exempt From Access Charges,* DA No. 02-3184, Dkt. No. 02-361, filed October 18, 2002. The FCC is not expected to respond anytime soon to the pulver.com and AT&T petitions, nor provide any other firm guidance on the matter in the immediate future (although its hand may ultimately be forced by the states' tackling the issue.)

The FBI, however, is pressing the issue of VoIP regulation at the FCC for purposes of the Communications Assistance for Law Enforcement Act (CALEA).[4] U.S. Department of Justice, Federal Bureau of Investigation, *Notice of Ex Parte Presentation Memorandum*, Wireline and Cable Modem Broadband Internet Access Proceedings, CC Docket Nos. 02-33, 95-20, 98-10 and CS Docket No. 02-52, submitted July 11, 2003.

According to the FBI, the FCC's classification of Internet telephony or Internet access as an "information service" would implicitly place IP telephony out of reach of government surveillance. "Any classification of Internet access as an information service would implicitly classify broadband telephony delivered via Internet access as an 'information service', thus raising doubts about whether those access providers are 'telecommunications carriers' for purposes of CALEA." *Id.*

Seeking "CALEA-standardized broadband intercept capabilities," the FBI argues that phone-to-phone VoIP of the type offered by Vonage and others is already subject to CALEA, because it may be considered a "telecommunications service" under the FCC's

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[3] Alabama, Colorado, Florida, Illinois, Ohio, North Carolina, Pennsylvania, and Virginia all are investigating the regulatory status of phone-to-phone VoIP.

[4] Enacted in 1994, the Communications Assistance for Law Enforcement Act – CALEA - is an effort to ensure that, while telephony technologies change and advance, law enforcement continues to possess the ability to execute surveillance on telecommunications systems. It does not apply to Internet service providers insofar as they provide Internet access, as opposed to telecommunications services.

According to the FBI, "the purpose of CALEA is to require telecommunications carriers and their vendors to develop intercept solutions for lawful electronic surveillance while protecting the privacy of communications and without impeding the introduction of new technologies." U.S. Department of Justice, Federal Bureau of Investigation, *Notice of Ex Parte Presentation Memorandum*, Wireline and Cable Modem Broadband Internet Access Proceedings, CC Docket Nos. 02-33, 95-20, 98-10 and CS Docket No. 02-52, submitted July 11, 2003.

usual definition of the term. (The FCC has not yet so held.) The FBI goes further, however, and says that any sort of IP-based telephony, whether using a computer, a phone, or a combination, should be subject to CALEA on the basis of a CALEA provision that enables the FCC to categorize a service or technology as a "telecommunications service" – for CALEA purposes only – if the technology comprises a substitute for a substantial amount of local switched telephony traffic. 47 U.S.C. 1001(7)(B)(ii).

The FBI also is concerned with situations where the Internet access provider does not itself offer, market, or provide telephony services for a fee. The FBI request argues that CALEA should nonetheless apply to an Internet access provider – deeming it a "telecommunications carrier" for CALEA purposes -- when it "enables the broadband telephony service as part of the Internet access service." This is undoubtedly a tricky request for the FCC to consider, especially considering that CALEA specifically does not apply to "information services" as they are defined for Communications Act purposes.[5]

PUBLIC ACCESS PROGRAMMING

Leach v. Mediacom, 240 F.Supp2d 994 (S.D. Iowa, 2003)

In *Leach v. Mediacom,* the cable company, Mediacom, was sued by a producer of public access programming. The programming, which contained graphic depictions of aborted fetuses as well as unidentified but identifiable women entering abortion clinics, was aired by Mediacom, but Mediacom blurred the objectionable content.

The producer of the programming alleged that Mediacom's actions amounted to illegal editorial control under a section of the Cable Communications Policy Act, 47 U.S.C. § 531(e), which states in relevant part:

> . . .a cable operator shall not exercise any editorial control over any public, educational, or governmental use of channel capacity provided pursuant to this section, except a cable operator may refuse to transmit any public access program or portion of a public access program which contains obscenity, indecency, or nudity.

The gist of the decision, however, did not concern the merits of the § 531(e) allegation, but instead turned on whether the producer had standing to bring a private action under the Cable Act. The court held that he did not, due to the lack of an express right of action in the Cable Act, together with recent Supreme Court decisions that have limited the availability of implied rights of action in federal courts. The enforcement mechanism for § 531(c), noted the court, lies instead with the local franchising authority, according to Congressional intent. 240 F.Supp at 998.

[5] The DoJ's request specifically says that such an entity would *not* properly be considered a "telecommunications carrier" for Communications Act purposes.

The court did not address the interesting notion that the producer may have standing to bring an action under state law as a third-party beneficiary to the franchise, on the grounds that the franchise requires Mediacom to maintain a public access channel on a nondiscriminatory basis.

INTERNET TAXATION

Internet Tax Non-Discrimination Act of 2003 (H.R. 49, S.150)

Congress appears to be on the verge of passing, and the President signing, Internet tax legislation with a potentially significant impact on local governments. The bills (HR-49 and S-150) would make permanent a moratorium – originally enacted in 1998 and due to expire in November, 2003 – on Internet access taxes and on "multiple or discriminatory" taxes on e-commerce.

Ban on Internet Access Taxes

The current moratorium on Internet access taxes prohibits any "taxes on Internet access," and would, for instance, prohibit a tax imposed on a monthly subscription to an Internet service provider (ISP). The law explicitly states that Internet access does not include telecommunications service. Internet Tax Freedom Act, Oct. 21, 1998, P.L. 105-277, Div C, Title XI, 112 Stat. 2681-719; Nov. 28, 2001, P.L. 107-75, § 2, 115 Stat. 703 (codified at 47 U.S.C. § 151 note).

The new law, however, does more than simply make permanent the ban on Internet access taxes. As the National Governors Association and the National League of Cities point out, a specific modification of the definition of "Internet access" in the House bill adds the words "except to the extent such services are used to provide Internet access," to the existing exclusion of telecommunications carriers from the Internet access tax ban. Thus, the new Internet tax legislation could be interpreted as prohibiting any taxes on bundled telecom/Internet access services, such as DSL. It also could be read to prohibit gross receipts taxes on telecommunications providers, to the extent they provide Internet access service, and arguably to the extent they receive revenue from Internet access service. (Taxes on Internet access itself would be permanently unavailable).

If this is in fact the case, and the bills' language remains unchanged, local governments may see a long-term decline in revenue derived from any telecommunications taxes, as services formerly carried by a telecommunications network or a closed cable network migrate to a single broadband Internet connection. Said Senator Byron Dorgan, (D-N.D.), "I think the language is inexact and it's going to cost the states a lot of revenue." Senate Commerce Committee Chairman John McCain (R-Ariz.) reportedly promised further refinement of the bill's language to ensure that this would not happen.

A committee explanation for the change says that the new language would "supplement that definition of Internet access to ensure that all Internet access services are free from local and state taxes, regardless of the technology used to access the Internet."[6] A statement from a co-author of the House bill, Rep. Christopher Cox (R-CA), also sheds some light on Congress' rationale: "An estimated 62 million American households have Internet access, and already pay taxes on the cable or phone lines that carry their Internet service. Additional taxes on Internet access would amount to double taxation, and would further raise the cost barriers to Internet access for millions of Americans who do not yet have it." Press Release of U.S. Rep. Christopher Cox (R-CA), July 31, 2003.

Ban on "Multiple or Discriminatory" Taxes on E-Commerce

The 1998 moratorium, like the new law making it permanent, prohibits "multiple or discriminatory taxes on electronic commerce." 47 U.S.C. § 151 note. "Electronic commerce" is defined as "any transaction conducted over the Internet or through Internet access, comprising the sale, lease, license, offer, or delivery of property, goods, services, or information, whether or not for consideration, and includes the provision of Internet access." *Id.,* at § 1104(3).

Fundamentally, the objective of this ban is to ensure that states do not impose a tax applicable only to Internet purchases, nor impose an additional tax on top of or instead of conventional sales tax. While sales taxes are permissible for sales by a business in the same state as the buyer and therefore not an outright ban on sales tax for Internet sales, its practical effect is to do just that, since as a constitutional matter, states cannot collect sales taxes on out-of-state companies.

Proponents of the law argue that it treats Internet sales no differently than mail-order catalog sales. The co-authors of the law, Rep. Christopher Cox (R-CA) and Sen. Ron Wyden (D-OR):

> ... were quick to emphasize that the bill doesn't prohibit jurisdictions from levying sales taxes against Internet companies, as the Internet Tax Freedom Act was misunderstood to do. The new bill does require states and other taxing jurisdictions to treat Internet sales the same way they treat other non-local sales, such as catalog and telephone sales. States are currently barred from collecting sales taxes on retailers not within their borders.[7]

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[6] *States Fret Over Senate Ban On Net Taxes*, Keith Ferrell, TechWeb News, August 4, 2003 (quoting statement from committee).

[7] Grant Gross, *Internet Tax Moratorium Bill Gains Support*, InfoWorld, March 31, 2003.

On July 16, 2003, the House Judiciary Committee approved H.R. 49, the House legislation to make permanent the existing Cox-Wyden moratorium on Internet taxes. It is reportedly scheduled for a vote by the full House in early September 2003. The Senate version, S.150, was unanimously passed by the Senate Commerce Committee on July 31, 2003.

WIRELESS NUMBER PORTABILITY

More of an economic opportunity than an interesting regulatory issue, the upcoming wireless number portability deadline should provide a chance for local governments not under long-term bulk mobile phone contracts to shop around, let their users keep their mobile phone numbers, and potentially save substantial money. As of the FCC's November 24, 2003 deadline, users should be able to take their numbers with them.

Commentators expect new, tempting calling plans from mobile phone service providers as they attempt to poach subscribers from competitors.[8] In the meantime, existing providers will probably try hard to procure long-term contracts for those who do not already have them (50 percent of wireless customers have no contract or less than a year's contract to run, although larger entities with bulk contracts more likely have a longer-term contract). In any event, local governments should take the opportunity after November 24 to shop around, and would be wise to not sign any long-term contracts in the meantime.

SECTION 253(a) "ANY ENTITY" LITIGATION

In a case of crucial importance to municipalities that seek to provide communications services, the U.S. Supreme Court has agreed to hear arguments on whether the term "any entity" in 47 U.S.C. 253(a) – which prohibits states from inhibiting the provision of telecommunications service by "any entity" – includes municipalities.

In *Missouri Municipal League v. FCC*, 2002 WL 1842319 (8th Cir., August 14, 2002), the U.S. Court of Appeals for the Eighth Circuit, disagreeing with the FCC and the D.C. Circuit, found that municipalities are commonly considered to be "entities" and that courts must assume that when Congress used the modifier "any" in an expansive, unrestricted way, it intended that the term modified be given its broadest possible scope. The Missouri Attorney General and the FCC petitioned the Supreme Court for certiorari, and the Court agreed to hear the case. Briefing on the merits for *Nixon v. Missouri Municipal League,* Nos. 02-1238, 02-1386, 02-1405, is scheduled for September and October, 2003, with oral arguments in late 2003 or early 2004.

[8] Roger Entner, Yankee Group, in *Cell Number portability to send users shopping,* Milwaukee Journal Sentinal, June 30, 2003, online at http://jsonline.com/bym/tech/news/jun03/151851.asp.

Previously, a federal district court in Virginia had found that "*any* entity" in Section 253(a) does cover municipal utilities and invalidated Virginia's former barrier to public entry. *City of Bristol, VA v. Earley*, 145 F.Supp.2d 741 (W.D.Va. 2001) (vacated as moot following enactment of corrective state legislation). In the *Missouri* case, the 8th Circuit cited *Bristol* twice with approval.

The Nebraska Supreme Court, in a case involving Lincoln Electric Service of Lincoln, NE, found that Nebraska's barrier to entry violated federal law under Section 253(a). *In re Application of Lincoln Electric System,* 655 N.W. 2d 363 (Neb. 2003). Two other state courts have deferred to the FCC's restrictive interpretation of Section 253(a) in its *Texas* decision, as affirmed by *Abilene*. *Municipal Elec. Auth. of Georgia v. Ga. Pub. Serv. Comm'n*, 241 Ga. App. 237, 525 S.E.2d 399, 403 (1999), *cert*. *denied*, *Municipal Electric Authority of Georgia v. Georgia Public Service Comm'n* (Ga. 2000); *Iowa Tel. Ass'n v. City of Hawarden, IA*, 589 N.W.2d 245, 252 (Iowa 1999).

TOWER SITING/PUBLIC SAFETY

Anne Arundel County, MD Interference Ordinance Preemption: *In the Matter of Petition of Cingular Wireless L.L.C. for a Declaratory Ruling that Provisions of the Anne Arundel County Zoning Ordinance are Preempted as Impermissible Regulation of Radio Frequency Interference Reserved Exclusively to the Federal Communications Commission,* WT Docket No. 02-100, Memorandum Opinion and Order, DA 03-2196 (released July 7, 2003)

Anne Arundel County, Maryland was faced with a difficult problem. Beginning in the late 1990's, its public safety personnel (police officers, firefighters, etc.) noticed an alarming number of "dead spots" in which they could not receive essential wireless services. The culprit, apparently, was radio frequency interference resulting from private wireless providers' cellular tower signals (Nextel and Cingular, specifically).

In January 2002 Anne Arundel sought to combat the problem by enacting a zoning regulation that required telecommunications service providers in the county to certify that their facilities would not interfere with the public safety system. Responding to a petition from Cingular Wireless, however, the FCC found that Anne Arundel's zoning ordinance amounted to an impermissible regulation of radio frequency, was not in the manner of a traditional zoning ordinance, and was therefore preempted.

Radio frequency regulation is a field over which the FCC retains exclusive jurisdiction. In field preemption, "the federal interest is so dominant that the federal system is presumed to prohibit enforcement of state laws on the same issue." Memorandum Opinion and Order, at ¶ 12. The Commission and the federal courts have consistently found that the Commission's authority in the area of RFI is exclusive, and any attempt by state or local governments to regulate in the area of RFI is preempted." *Id.,* at ¶ 13.

The FCC strongly encouraged Cingular and Nextel to cooperate with the county to minimize or eliminate interference problems, and required the companies to report on interference mitigation efforts. This particular dispute occurs against the backdrop of cumbersome and ongoing negotiations concerning the wholesale relocation of public safety wireless frequencies out of the 800 MHz band. *See Improving Public Safety Communications in the 800 MHz Band,* Notice of Proposed Rulemaking, 17 FCC Rcd 4873 (2002).

Anne Arundel County on August 6, 2003 filed an Application for Review of the FCC's order preempting its zoning ordinance. Interested parties may file comments with the FCC on or before September 26, 2003.

FCC TRIENNIAL REVIEW COMPETITION ORDER

Of preeminent importance to communications companies and state telecom regulators, the FCC recently issued (after a six-month delay) a 576-page Report and Order that fundamentally alters the rules by which telecommunications companies compete. The new rules will inevitably face years of litigation, and any impact on municipal governments – which typically leave telecommunications regulation to the state – will not be immediate.

In a vastly simplified nutshell, the ruling preserves most of the unbundled network element platform (UNE-P) that requires telecommunications carriers to share their facilities with competitors, but it eliminates the sharing requirement for new broadband buildouts (the theory being to provide incentive for the incumbents to deploy broadband facilities).

The full Order is available online at www.fcc.gov. *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers. . .,* CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, FCC 03-36 (released August 20, 2003).

PRIVACY AND SERVICE PROVIDER LIABILITY

DMCA Subpoena Power: ***In Re Verizon Internet Services, Inc.*** *Subpoena Enforcement Matter,* 240 F.Supp.2d 24 (D.D.C. 2003); 2003 WL 1946398, No. 03-MS-0040, slip. op (D.D.C. Apr. 24, 2003).

The Digital Millennium Copyright Act of 1998 created a subpoena power for copyright owners, codified at 47 U.S.C. § 512(h), that enables the copyright owner to acquire from the service provider the identity of allegedly infringing subscribers, presumably to initiate copyright infringement claims against them. As the *RIAA v. Verizon* case described below makes clear, the DMCA subpoena power is not limited to acquiring the identity of subscribers who store information on the service provider system (such as websites or other hosting services), but may also be used to acquire the identity of any

allegedly-infringing subscriber who uses the system even as merely a passive conduit. So far, courts have held that the 512(h) subpoena provision can apply to any entity that meets the DMCA's definition of "service provider."[9]

Section 512(h) subpoena power is a powerful tool. No judicial review of the subpoena is required prior to its issuance. Rather, the statute states that the clerk of the court – any federal district court in the U.S. – upon receiving a properly executed subpoena request (described further below, but essentially consisting of a prima facie copyright infringement allegation), "shall expeditiously issue and sign" the proposed subpoena. In turn, the service provider receiving a properly executed subpoena "shall expeditiously disclose" the information requested by the subpoena. It is important, therefore, to ensure that the process, as well as the contents of the subpoena and its supporting documents, is in exact compliance with the statute.

In the recent and first substantial judicial consideration of the Digital Millennium Copyright Act's §512(h), the Recording Industry of Association of America (RIAA) on two separate occasions sought the identity of "an anonymous user of the conduit functions of Verizon's Internet service who is alleged to have infringed copyrights by offering hundreds of songs for downloading over the Internet." *In Re Verizon Internet Services, Inc., Subpoena Enforcement Matter,* 240 F.Supp. 2d 24 (D.D.C. 2003). Verizon claimed that because RIAA's subpoena related to material transmitted over Verizon's network, rather than stored on it, it fell outside the scope of the subpoena power authorized by § 512(h). The Court disagreed with Verizon, and construed the subpoena power in § 512(h) to apply to all "service providers" under the DMCA. In a later decision, the Court found that § 512(h) did not violate Article III of the U.S. Constitution because the function of the clerk in issuing the subpoena is ministerial, rather than judicial, and that it did not violate the First Amendment rights of Internet users. *In Re Verizon Internet Services, Inc., Subpoena Enforcement Matter,* 2003 WL 1946398, No. 03-MS-0040, slip op. (D.D.C. Apr. 24 2003).

Since the Verizon decisions, the RIAA has embarked on a large-scale effort targeting large-scale file traders who it says violate music industry copyrights. It has issued several hundred DMCA subpoenas thus far. A few universities contested the subpoenas on procedural matters.[10] The underlying law has met with substantial

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[9] A fundamental determination under the DMCA is whether the system qualifies as an online "service provider." "Service provider" is defined under the DMCA, for most purposes, as "a provider of online services or network access, or the operator of facilities therefor." § 512(k)(1)(B). But, to the extent the entity is acting as a passive conduit or seeks to take advantage of the "passive conduit" safe harbor, [9] "service provider" is defined as "an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing, without modification to the content of the materials as sent or received." § 512(k)(1)(A).

[10] An effort is afoot between the higher education community and the recording industry to establish some sort of partnership or joint project addressing the distribution of music on college campuses. See http://www.educause.edu/asp/doclib/abstract.asp?ID=CSD2945

criticism, in part because any person alleging a copyright violation can fill out a form, and conceivably obtain the identity of an Internet user from a service provider without judicial review.

Carafano v. Metrosplash.com, 2003 U.S. App. LEXIS 16548, No. 02-55658 (9th Cir. August, 2003)

In this case involving "a cruel and sadistic identify theft" and the immunity of service providers for postings by third parties, the 9th Circuit Court of Appeals determined the extent to which a computer matchmaking service – Matchmaker.com -- could be legally responsible for false content in a dating profile provided by someone posing as another person. The Court held that the service provider is statutorily immune from the claim, pursuant to 47 U.S.C. § 230(c), which states:

> (c) Protection for "Good Samaritan" blocking and screening of offensive material.
>
> (1) Treatment of publisher or speaker. No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.
>
> (2) Civil liability. No provider or user of an interactive computer service shall be held liable on account of—
>
> (A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or
>
> (B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1) [subparagraph (A)].

The Court said of § 230(c), "[t]hrough this provision, Congress granted most Internet services immunity from liability for publishing false or defamatory material so long as the information was provided by another party. As a result, Internet publishers are treated differently from corresponding publishers in print, television and radio. *See Batzel v. Smith*, 333 F.3d 1018, 1026-27 (9th Cir. 2003)." At *8.

As for Matchmaker.com and its alleged liability for identity theft in the *Carafano* case, the Court reasoned that "the selection of the content was left exclusively to the user. The actual profile 'information' consisted of the particular options chosen and the additional essay answers provided. Match-maker was not responsible, even in part, for associating certain multiple choice responses with a set of physical characteristics, a group of essay answers, and a photograph. Matchmaker cannot be considered an 'information content provider' under the statute because no profile has any content until a user actively creates it." At *13. Section 230 "would . . . bar Carafano's claims unless Matchmaker created or developed the particular information at issue." At *15.