Introduction

Federal law establishes cable franchising as a matter of local jurisdiction and clearly recognizes that local governments can best identify the needs of their local community. However, as the result of consolidation, the cable industry's current way of doing business reflects a national corporate model, which often conflicts with local franchising authority's (LFA) rights with respect to franchising issues. This is evident in the dramatic increase in litigation between local governments and cable operators. Whether the subject is franchise renewal, transfer or enforcement, cable operators and local governments are now more than ever, in court seeking judicial resolutions to issues that in the past were successfully negotiated between the parties.

Historically, local governments have successfully negotiated franchise agreements with local cable operators. In fact, almost all renewals were conducted under the informal renewal process. However, during the past five years, the equilibrium has shifted as local cable systems have merged into large media conglomerates and local government is frequently dealing with a national multi-billion dollar company rather than a local cable company. Consequently, the bargaining positions have changed and as a result these Multiple System Operators (MSOs) are trying to force local governments into their national corporate models, which in many cases fail to recognize the needs of local communities.

Local governments can however, negotiate beneficial cable franchise agreements in the face of this massive cable consolidation. LFAs need to spend more time and resources preparing for the negotiation and be prepared to be more aggressive in order to realize the benefits to which they are entitled, including when appropriate, invoking the

formal renewal process provided for under Federal law, which may ultimately result in litigation. In order to resolve cable franchise disputes efficiently and cost-effectively, LFAs should consider using alternative dispute resolutions (ADR) such as mediation and arbitration to avoid the time and cost of protracted litigation. In most jurisdictions, Federal and state judges, if not the law, require parties to participate in mediation or arbitration prior to going to trial. Thus, engaging in ADR earlier in the process may save all parties time and money, however, either or both parties may be reluctant if relevant provisions are not included in the franchise agreements.

Background

The Cable Communications Policy Act provides local governments with the authority to negotiate cable franchise agreements, which provide a realistic and adaptable regulatory structure, while recognizing the needs of local government, subscribers and cable operators. Furthermore, franchise procedures and standards are intended to promote the advancement of cable systems while assuring that the needs and interests of local communities are addressed by cable systems (47 USCS §§ 521 et seq.).

The Communications Act gives state and local governments the authority to grant franchise agreements to cable operators to provide cable service within their jurisdiction (47 U.S.C. § 541). Moreover, cable operators may be required to assure that they have the technical, financial or legal capabilities to provide cable service (§541(a)(4)(B)).

Cable System Transfers

In the past ten years, the cable industry has undergone a surge of ownership transfers through merges and acquisition, system exchanges and outright sales. The consolidation of multiple system operators has created several cable giants that control the bulk of the nation's subscribers.[1]

Furthermore, within these large corporate structures, operators have formed regional clusters of cable systems that control large geographic areas rather than individual cities or counties. As a result, the cable operators are enjoying "de facto monopoly" status within a given area. The effects of consolidation are that political influence is maximized while the potential for the overbuilding of one system by a competing operator is minimized, thereby, increasing the cable operator's market power.[2]

Franchising authorities, pursuant to the 1996 Act, maintained some degree of authority to approve the sale or transfer of cable systems. Franchise authorities, according to the FCC, must approve or deny transfer requests within 120 days or the request is automatically granted, assuming the franchising authority and cable operator did not agree to an extension of time (47 U.S.C.S. § 537, and 47 C.F.R. § 76.502 (1999)).

Traditionally, cable transfers were approved at the local level without litigation, however the case of *Charter v. Santa Cruz* has now changed the landscape for transfers. In this case, Charter Communications petitioned the U.S. Supreme Court to review a franchise transfer dispute in which the Ninth Circuit Court ruled in favor of Santa Cruz,

[1] According to the May 16, 2003, Leichtman Research Group's Press Release, the top five cable operators were as follows: (1) Comcast (2) Time Warner (3) Cox (4) Charter (5) Cablevision, *available at:* http://www.leichtmanresearch.com/press/051603release.html.

[2] "The Senate Report accompanying the 1992 Cable Act noted that concentration of ownership had increased dramatically: by 1990, the five largest cable operators served nearly half the country's cable subscribers" (47 U.S.C. §521 (a)(5); S. REP. at 32). Note: Since the rank and percentage of cable ownership varies annually, the most current statistics are available on the FCC's website, *available at*: http://www.fcc.gov.

CA, which held that the County acted reasonably and lawfully in denying the transfer of its franchise from Charter to CCI. Moreover, Charter argued that the County requested information, which exceeded the scope of what the law permitted (*Charter Comm. v. County of Santa Cruz*, 133 F. Supp. 2d 1184 (N.D. Cal., 2001)).

The *Charter* case is illustrative of a large MSOs attempt to minimize, if not negate local government's right to exercise due diligence prior to approving a transfer. While the Appellate Court has ruled that the County acted reasonably and lawfully in denying the transfer of the franchise based on the lack of information provided by the operator, Charter, by continuing to pursue litigation and withholding information is attempting to pressure the County into approval and challenge the rights granted to the County by Federal law.

Franchise Renewals

One of the stated purposes of the Communications Act is to "establish an orderly process for franchise renewal which protects cable operators against unfair denials where operators' past performance and proposal for future performance meet the standards established by the Communications Act" (47 U.S.C. §521(5)). However, a proposal for renewal must be granted if it is "reasonable to meet the future cable-related community needs and interests, taking into account the cost of meeting such needs and interests" (47 U.S.C.S. § 546(c)(1)(D)).

In *Union CATV, Inc. v. City of Sturgis*, 107 F. 3d 434 (6th Cir. 1997), the Court reinforced a franchising authority's right to determine its future cable-related needs and interests for renewal purposes. Pursuant to the Cable Communications Policy Act of

1984, 47 U.S.C.S. §§ 521-559, CATV, Inc. challenged the decision by the City to deny the cable operator's proposal for franchise renewal. The Court affirmed the lower Court's summary judgment ruling since the City provided sufficient evidence in support of their decision that the cable operator's proposal was not reasonable in meeting the City's cable needs and interests. The U.S. Court of Appeals concluded that the Cable Act provides for limited judicial review of a franchising authority's identified cable-related community needs and interests.[3]

Furthermore in *Midwest, Inc. v. City of Brunswick, Ohio*, 117 F. Supp. 2d 658 (N.D. Oh. 2000), the Court held that in denying a renewal, a City did not have to follow an administrative hearing officer's decision. However, the critical conclusion was that with respect to past compliance, a material, substantial breach of the cable operator's franchise agreement is a sufficient basis to deny a renewal. The *Brunswick* case also outlined the standard of judicial review of a community's denial decision giving deference to the needs and interests of the community interests.[4]

Both *Union* and *Brunswick* illustrate that assuming a franchise authority is willing to pursue a denial via a formal process, there is likelihood that it may be able to defend a well-grounded rejection of an incumbent cable operator successfully. As the equilibrium continues to favor the cable operator because of their size and deep pockets, local franchising authorities need to be more aggressive in order to realize the benefits to which they are entitled, recognizing that they should be prepared to invoke a formal process, which may ultimately result in litigation. However, in order to avoid a lawsuit,

[3] See *Union CATV, Inc. v. City of Sturgis*, 107 F. 3d 434 (6th Cir. 1997)
[4] See *Midwest, Inc. v. City of Brunswick, Ohio*, 117 F. Supp. 2d 658 (N.D. Oh. 2000)

the parties should consider alternative dispute resolutions, such as mediation or arbitration and possibly realize significant savings in time and money.

Most recently in *Comcast v. City of San Jose*, the cable operator sought declaratory and injunctive relief to preclude the City from proceeding with a formal cable franchise renewal process under 47 U.S.C.§ 546 of the Communications Act. Comcast claims that the City's franchise renewal process violates the Federal Cable Act, 42 U.S.C. § 1983, the U.S. Constitution, the California Constitution and the San Jose Municipal Code. Specifically, Comcast alleges that the City violated the Federal Cable Act by granting authority to a third party hearing officer to decide on the issue of renewal, claiming that San Jose's formal renewal process would cause Comcast to suffer significant irreparable harm.

This case represents the cable operator's attempt to limit local government in using the franchise renewal process to require that a portion of broadband networks serve the public interest. Historically, cable operators typically agreed to support community public service broadcasting in franchise agreement negotiations. However, the *San Jose* case illustrates that Comcast is opposed to maintaining a channel location for the City's PEG channels, arguing that by doing so would have "an adverse impact on Comcast's editorial decisions about what type of programming to carry on its system and in what order those channels will be presented." The decision in the *San Jose* case may effect how large cable operators negotiate franchise agreements with local communities across the country.

In contrast to some of the above referenced cases now in litigation, the law firm of Leibowitz & Associates, P.A. was able to complete a franchise renewal after 5 years of

continuous negotiations on behalf of the City of Miami and AT&T. In part, the complexity of this renewal arose due to the existence of an antiquated physical plant and the unwillingness on behalf of the original operator, TCI, to recognize the associated problems and to commit to upgrade the system. The negotiations were further complicated by transfers to MediaOne and ultimately AT&T during this period. Ultimately, the City of Miami and AT&T agreed to enter into a comprehensive regulatory Ordinance and a 50-page Franchise Agreement which among other terms and conditions, required an immediate system upgrade, the obligation to maintain state-of-the-art technology throughout the new franchise and substantial fines for non-compliance. In addition, specific customer service standards and enforcement provisions were agreed to, and millions of dollars were made available to the City to support its cable related interests, including the government access channel. Perhaps most importantly, the Firm worked with the City of Miami to enter into the first cable internet agreement with any MSO, without litigation, which provided for the development of cable internet service, most-favored treatment for competitive internet providers, and the inclusion of cable internet fees within the gross revenue definition on which franchise fee calculations are based. This negotiation illustrates the potential for resolving such disputes without litigation. However, today with the availability of mediators and arbitrators experienced in cable issues, the matter might be resolved even more expeditiously.

Franchise Enforcement

Although, the issue of renewal may only effect a small percentage of local governments at any given point in time, all franchising authorities have a responsibility to enforce franchise agreements. Many communities rely on enforcement provisions,

including the imposition of fines against cable operators for violations of local ordinance or franchise agreements. In the past, cable operators cured violations, paid fines, or settled disputes, however, the *Comcast v. Modesto* case appears to mark a turning point in the relationship between the cable operator and LFAs. Modesto City officials concluded that Comcast was in breach of its contract for their failure to protect its subscribers from potential electric shock. Pursuant to the franchise agreement, the City was entitled to penalize the cable operator at $5,000 plus $100 per day per violation. As a defensive strategy, Comcast sued the City.

In contrast to the *Modesto* case, the City of Jacksonville was recently in a similar situation, having imposed substantial fines on the cable operator for failure to comply with franchise requirements. Assisted by the law firm of Leibowitz & Associates, P.A., the City of Jacksonville successfully negotiated a resolution with the cable operator. The City had experienced a history of bad customer service from the cable operator, receiving anywhere from fifty to one thousand complaints per month. Furthermore, the original Ordinance and Franchise agreement did not address many of local government's needs. The negotiations were further complicated by the transfer of several cable systems. The City finally consulted the State Attorney General's office and initiated the revocation process, which forced the parties to the table to resolve these issues. Ultimately, the City and the cable operator agreed to enter into a comprehensive regulatory Ordinance and Franchise Agreement, which among other terms and conditions, addressed specific customer service standards, and enforcement provisions which imposed fines for non-compliance. Most importantly, the Firm worked with the City and the cable operator to

facilitate in negotiations, which resulted in a win-win result for both parties and avoided litigation.

With respect to the *Modesto* case, the cable operator has referred to this lawsuit, as a defense mechanism from a legal point of view, however from a practical point of view, Comcast is in a position to hypothetically avoid curing violations and avoid paying fines until a court issues a decision, consequently forcing the City to suffer the time and expense of litigation. Clearly, reaching a resolution through negotiations, as was the case in Jacksonville is the better option. Thus, local government should consider instituting the negotiation process for resolving cable franchise disputes efficiently and cost-effectively by using alternative dispute resolution mechanisms such as mediation and arbitration to avoid the time and cost of protracted litigation.

A Strategy for Avoiding Litigation: Arbitration and Mediation

As large MSOs continue to enjoy the benefits of their "*de facto"* monopoly status, to the detriment of local communities, and increasingly rely on litigation as a substitute for negotiation, local governments need to be prepared to mediate and arbitrate cable franchising disputes in the most time and cost efficient manner, or risk the loss of substantial benefits to their constituents. Whether mandated by contract, ordered by a court, or voluntarily agreed to by the parties, virtually every dispute between a local government and a cable operator will be subject to mediation or arbitration.

Hundreds of communications and telecommunications cases fill the dockets of State and Federal Courts, while thousands of matters await decisions from the Federal Communications Commission, Public Service Commissions, or Public Utility

Commissions and local government bodies. Cable franchising matters will increasingly account for a substantial proportion of such cases. Many of these matters could go unresolved for years, costing the local government involved valuable time, benefits, services and money and, in some cases, causing irreparable harm to the partnership between a local government and the cable operator.

However, in order to resolve cable franchising disputes efficiently, local governments and cable operators require access to mediators and arbitrators who possess the knowledge and experience needed to understand the unique issues raised in a cable franchising disputes, and craft viable solutions designed to meet the needs of the parties. Experience has shown that mediators and arbitrators lacking the specific experience in the cable industry are not in the best position to facilitate resolution of cable franchising disputes.[5]

Arbitration and mediation services can resolve most, if not all, franchising issues, including, but not limited to, rebuild, upgrades, customer service, enforcement, franchise fees, institutional network agreements, leased access, municipal operations, overbuild issues, PEG, rate regulation, renewal, technical compliance transfers, and modifications. The business of communications and telecommunications, and cable franchising in particular is unique. Unlike most other industries, the rapid evolution of technology constantly creates challenges and imbalances with the law, and existing regulation and policy. Rapid technological changes frequently undermine historical business models. Further, the cable industry has its own language. Understanding the technology and the

[5] Matthew L. Leibowitz, Esq. is the President and CEO of Communications Dispute Resolutions (CDR) and Ila L. Feld, Esq. is Senior Vice President of CDR. CDR is the first and only alternate dispute resolution group conceived and operated exclusively for the communications and telecommunications industry.

vernacular is, therefore, prerequisite to fairly and efficiently mediating or arbitrating a cable-franchising dispute. Accordingly, local governments should ensure that, once a dispute with the cable operator reaches mediation or arbitration, the mediator or arbitrator has the experience and knowledge to efficiently facilitate the resolution of a cable franchising dispute.

Conclusion

As a general rule, the consolidation of cable companies has placed local governments in an unequal bargaining position with respect to negotiating franchise transfers, renewals and enforcement. The formal renewal process and litigation give the appearance of bringing the parties into equilibrium but in reality the lengthy time frame and high cost of litigation works only to benefit the cable operator. Local governments should recognize that it is in their best interest to incorporate provisions in their ordinances and franchise agreements that require the parties to engage in some form of alternate dispute resolutions prior to the commencement of litigation.