INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION



Section / Department: Municipal Contracts, Franchises and Technology Section

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by

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INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION
Municipal Contracts, Franchises and Technology Section

2005 Annual Report
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This Section Report summarizes key cases (mainly appellate cases), administrative and legislative activities affecting IMLA members over the last twelve months (since last year's report) in the area of municipal contracts, franchise agreements, and technology. The Author gratefully acknowledges the assistance of IMLA members who sent in contributions for this Report, especially Herbert Prouty and Nancy Skancke. The Author also thanks and acknowledges the authors and contributors to IMLA's monthly updates, the periodic updates from NATOA, and the American Bar Association's Section of Public Utility, Communications and Transportation Law for some of the information contained in this Report. Due to the Author's area of practice, this Report focuses predominantly on developments in the franchising, technology, and public utility areas.

To keep the Report to a reasonable length, the following discussions are brief and readers are encouraged to read the cases they believe to be in areas of interest. Of necessity, the Author has exercised his discretion to select cases believed to be important and with potentially broad implications and has organized them roughly in order of likely importance. Any Section member who has additional matters to bring to the attention of the IMLA membership should send them to Sophia Stadnyk at IMLA for inclusion in IMLA's monthly updates, sstadnyk@imla.org and to the Author at jwpestle@varnumlaw.com for inclusion in next year's report.

The cases are summarized by topic as follows:

Cable Related Cases

(Cable Modem Service an Information Service)

Brand X Internet Services v. FCC, 2005 U.S. LEXIS 5018 (U.S. Supreme Court, June 27, 2005), 125 U.S. 2688 (2005). The U.S. Supreme Court reversed the Ninth Circuit's decision and reinstituted the FCC's decision which had classified cable modem service as an "information service." The Supreme Court's decision was based upon traditional *Chevron* deference to agency expertise. By way of background, in 2002 the FCC had ruled that cable modem service is neither a cable service nor a telecommunications service but instead is an "information service." In 2004, the Ninth Circuit had reversed the FCC.

This case brings to an end a long saga where initially all parties viewed "cable" modem service as a cable service. The FCC's 2002 ruling that it fell in a separate category resulted in cable

companies stopping payment of franchise fees on cable modem service. In FCC and appellate proceedings, municipal groups contended that of the three possible classifications for cable modem service, that it was properly classified as a "cable service." The Supreme Court's ruling puts an end to such arguments. More importantly, the Supreme Court's ruling aids the FCC in classifying new services – in particular, so called Internet Protocol services – as information services and thus (it contends) outside the scope of traditional regulatory arrangements. This is a major development given that most new services appeared to be "Internet Protocol" based. IMLA and local government associations filed briefs in this case.

(Statewide Cable Franchise)

Texas Senate Bill 5 of 2005 Special Session. As of the writing of this Report, this Bill appears highly assured of becoming law and hence is included. In general terms, it awards a cable franchise that applies statewide to new video and cable providers (such as phone companies entering the cable and video business); allows certain existing small cable companies to convert to the statewide franchise; and allows existing cable companies to renew with a statewide franchise on the expiration of their current municipal franchise. The new state franchise is issued by the Texas PUC and the requirements to obtain it are minimal and (for renewals) conflicts with applicable provisions of the Federal Cable Act. Under the new state franchise, providers have to pay a franchise fee of 5% of gross revenues to municipalities plus an amount per subscriber equal to any existing cash contribution of the incumbent cable company to the municipality (switches to 1% of gross revenues when the incumbent's franchise expires). In general, a limited number of PEG channels (varying by community size) are provided for as well. Unlike conventional cable franchises, the legislation does not require cable companies to serve an entire city or all areas meeting a certain population density and providers can enter and leave the business at will (no long-term commitment to provide service).

This legislation is the first recent instance of shifting cable franchising from the municipal to state level, and was ostensibly done to assist telephone companies entering the cable business and is included due to the impact it may have on Federal legislation or legislation in other states.

(Virginia Statewide Cable Franchising Defeated)

In March legislation in Virginia which would grant a statewide cable franchise was defeated by the Virginia Assembly (see Virginia House Bill 2534 and related legislation). The bill was backed by Verizon and in general, abolished local franchising in favor of a standardized statutory statewide franchise. The bill included a 40-year initial term with an automatic 40-year renewal, allowing providers to use not just streets, but other public property (such as parks) for their wires and lessened customer service protections.

(Cable Franchise Fees not a Tax, Statute of Limitations)

Kowalski. v. City of Livonia, 2005 WL 1753628, ___ Mich App ___, ___ N.W. 2d, ___ (Mich Ct App, July 26, 2005); ***Morgan v. City of Grand Rapids***, 2005 WL 1753311, ___ Mich App ___, ___ N.W. 2d, ___ (Mich Ct App, July 26, 2005). These two cases resolved many purported

class actions challenging cable franchise fees as an illegal tax under the Michigan Constitution. The lawsuits generally claimed that to the extent the municipality's cable franchise fees were not used for cable purposes, that they were an illegal tax under the Michigan Constitution. In Morgan v. Grand Rapids, the Court ruled that if there was a tax, then the cable company was the taxpayer and as a result, the cable customer who was the Plaintiff was subject to the one-year statute of limitations applicable to challenges by other than the taxpayer, that the statute began running at the time the franchise was adopted, that the Plaintiff had filed too late, and thus dismissed Plaintiff's claim. In Kowalski v. City of Livonia, the Court held that the franchise fees at issue were not a tax because they were a contract price (and the contract price for a governmentally owned commodity such as space in the right of way could never qualify as a tax). The Court also ruled that Plaintiff did not demonstrate that Livonia charged any more than a constitutionally permitted fee (which is separate from a tax) because the franchise fee in question was voluntary, was proportionate to the cost of service, and served a regulatory rather than a revenue raising purpose.

(Cable Modem Contract Claim does not Arise under Federal Law)

City of Chicago. v. Comcast Cable, 384 F.3d 901 (7th Cir., 2004). Comcast's cable franchise with the City of Chicago required it to pay 5% of its gross revenues for any service it provided. Following the FCC's 2002 ruling that cable modem service was an information service, not a cable service, Comcast like other cable operators stopped paying franchise fees on cable modem services. It argued that if cable modem service was not a cable service, its receipts in its role as an internet service provider could not be included in the revenues on which franchise fees are paid as this would give the City a franchise fee exceeding the 5% cap allowed under the Federal Cable Act, 47 U.S.C. Section 542 (b). Chicago argued that non-cable services were outside the scope of the statute, such that cities could impose fees on revenue from other services which were provided. The Seventh Circuit ruled that the case did not arise under Federal law and remanded the matter to State Court. The Court of Appeal's decision remanding the case vacated the District Court's ruling that 47 U.S.C. Section 542 limits franchise fees from cable companies to 5% of "cable" revenues, even if the cable company also provides noncable (telephone, broadband) services over its system.

(Emergency Alert System Notice of Proposed Rule Making)

In August 2004, the FCC issued a Notice of Proposed Rule Making on Emergency Alert Systems, *In Re Review of the Emergency Alert System,* Notice of Proposed Rulemaking, FCC 04-189, released August 12, 2004. Municipalities and municipal groups including IMLA filed comments in general noting that the FCC should not and statutorily can not preempt cable franchise based local alert systems. Such local alerts are used by municipalities to alert residents regarding <u>local</u> emergencies as to which there is no alert on the Federal Emergency Alert System, either because they are more localized (gas leak, sudden road closure) or are less severe and are thus not appropriate for the Federal system whose alerts go out over <u>all</u> radio stations, TV stations, and cable systems in one or more counties. Municipalities noted that because such alert systems are provided for in cable franchises, the FCC does not have a statutory authority to

preempt them. Municipalities also opposed attempts by TV stations to prevent local emergency alerts from appearing on those cable channels which carry local television stations.

(Verizon May Build Combined Cable/Phone Network Without Cable Franchise; Must Obtain Franchise Prior to Providing Cable Service)

Joint Petition of Town of Babylon, Cable Telecommunications Association of New York, et al., "Declaratory Ruling on Verizon Communication, Inc. Build out of Its Fiber to the Premises Network", (New York Public Service Commission, June 15, 2005) (Case Nos. 05-M-0250; 05-M-0247). Several municipalities and the New York Cable Telecommunications Association filed for a declaratory ruling that Verizon, which was constructing a fiber optic joint cable and telecommunications systems to individual homes, was building a cable system and therefore had to obtain a cable franchise from each municipality in which Verizon seeks to provide service prior to constructing its system. The Public Service Commission ruled that although Verizon could not construct a stand-along cable system without first obtaining a cable franchise under state law, it held that this case involved the application of state law when Verizon was upgrading a preexisting telecommunications network to ultimately provide multiple services, including cable. The Commission ruled that the fiber to the premises upgrade was authorized under existing New York State telephone statutes because it furthers the deployment of telecommunications and broadband services, such that Verizon already had the necessary authority to use rights of way to provide telecommunications services over its existing network. However, the Commission ruled that Verizon must first obtain cable franchises from each municipality before it installs plant or equipment in its network that is to be used exclusively for cable service or if it seeks to offer cable programming.

The preceding case is important due to Verizon's nationwide expansion into cable service by building a new system with fiber optic wires to the home over which cable, telephone, and broadband service will be provided. Verizon's uniform contention has been that it can build the system as a Federal Communications Act Title II "telecommunications facility" without first obtaining a local cable franchise. The ruling appears to affirm this part of Verizon's contention but reaffirms that it must obtain a conventional cable franchise prior to providing cable service.

(National Cable, Telecommunications, Broadband Legislation)

The U.S. House held hearings in the spring of 2005 on adopting new legislation setting a national framework for cable, telephone, broadband, and Internet Protocol provided services. Bills have since been introduced in Congress in this regard. See, for example, S 1504 (Ensign broadband bill), HR 3146 (House video choice bill), and S 1349 (Senate video choice bill). The leaders of the House and Senate Commerce Committees have stated they expect to propose comprehensive legislation shortly. Whether it will be acted on in 2005 or this session of Congress is unclear.

(Cable Company Cannot Challenge Formal Renewal Process Procedures Until Conclusion of Proceeding)

Comcast of California II LLC v. City of San Jose, CA, 2004 WL 3080347, (N.D. Cal. 2004). Comcast sued the City of San Jose which was conducting a formal proceeding as specified by the Federal Cable Act to consider the renewal or denial of Comcast's cable franchise. Comcast argued (among other things) that the City's request for proposals under the formal process, its needs assessment under that process, and the renewal process itself violated the First Amendment, the Fourteenth Amendment, the California Constitution, the City's Code, and the Federal Cable Act. The Court dismissed the case on mootness and ripeness grounds because among other things, the renewal process was under way, not near completion and renewal had not been denied, and as Comcast was continuing to operate its cable system in the City, its claims were premature. The substance of Comcast's objections appeared to be the City's request for franchise provisions relating to public, education and government channels, financial support for such channels, and institutional networks, which Comcast felt were excessive. The Court ruled that Comcast could not challenge these items until they have actually been included in a decision by the City at the conclusion of the franchise renewal process. Thus, a challenge would only be appropriate after the formal renewal process is complete.

This case is important (and lead to amicus briefs from several national municipal groups) because it was viewed as an attempt by cable companies to upset the renewal process specified under the Federal Cable Act by allowing them to go to Court on substantive and procedural matters prior to a municipality having concluded that process and reached a decision on the franchise terms that the cable company would have to comply with.

(Kentucky Broadband Legislation Replacing Franchise Fees)

Kentucky House Bill 272 of 2004, 2005 KY Act 168. In 2005, Kentucky passed House bill 272 which in the most general terms eliminates franchise fees on cable and communication services as of December 31, 2005. Instead, Kentucky imposes certain excise and gross revenue taxes which will be placed in a fund which the bill states will be distributed so that local governments will be held harmless based upon their historical franchise fees with a certain growth factor added to it.

(Municipal Right of Way Fees Preempted by Cable Act and Section 253)

Liberty Cablevision of Puerto Rico, Inc. v. Municipality of Caguas ___ F.3d ___, 2005 WL 1870023 (1st Cir., 2005). Liberty challenged fees for the use of rights of way imposed by ordinances of the Municipality of Caguas and other municipalities. The result was two conflicting District Court decisions, one upholding such fees, the other invalidating them. The cases were consolidated on appeal. Liberty's challenge was that the Federal Cable Act preempts Caguas' right of way fees because a Commonwealth agency, the Telecommunications Regulatory Board of Puerto Rico has been designated by the Commonwealth as the franchising authority pursuant to the Federal Cable Act. Thus, Liberty argued that the Cable Act preempts the local ordinances because Liberty's use of the rights of way are already accounted for in the cable fee which Liberty pays the state Board. The Court of Appeals held that on these facts, the Cable Act preempted the local right of way fees; the fees did not fall within an exception to the Cable Act for fees of "general applicability", and the fees were not allowed under Section 253 of

the Federal Act because that pertains to telecommunications services, and Liberty was providing (in addition to cable service) cable modem service which earlier this year had been decided by the U.S. Supreme Court to be an information service (not a telecommunications service).

(Adelphia, Comcast Franchise Transfer Request)

In early summer 2005, the cable companies Adelphia, Time Warner, and Comcast started the process of obtaining local approvals for Comcast's and Time Warner's purchase of all of Adelphia's cable systems and the related swap of cable systems between Comcast and Time Warner. Applications were filed with many of the some 2,000 municipalities involved (being those who franchises or local ordinances require municipal approval for changes in the cable franchisee or whoever controls it). Such transfers in general will largely be complete by early fall due to the 120-day time limit to consider transfer under Federal law (unless such time limit is appropriately challenged or extended). The transfers are complicated by the possible concurrent jurisdiction of the Bankruptcy Court (Adelphia is in bankruptcy and its systems are being liquidated and sold as part of the bankruptcy proceeding).

(New Cable Company Can Use Incumbent Company's Wires in an Apartment Building)

Time Warner Entertainment v. Everest Midwest Licensee, 381 F.3d 1039 (10th Cir., 2004). In a case interpreting FCC regulations on competing cable companies' ability to use apartment building wiring to serve customers, the Court ruled that where the incumbent (Time Warner) only had the right to use its wires to a particular unit when that apartment unit was receiving service from Time Warner, that on that unit terminating service then the incumbent provider must either remove, abandon, or sell the wire. As a practical matter, due to the cost involved, the providers abandon the wiring in place, making it available to competing providers. This case is of importance because apartment buildings are some of the most attractive customers for cable companies. The inability to readily access wiring to individual units classically has been a barrier to competition in cable services. This decision and potentially others like it may assist in encouraging competition from multiple cable companies to provide service.

Cellular Towers

(Section 1983 Claims not Available for Federal Cell Tower Zoning Violations)

City of Rancho Palos Verdes, Cal. v. Abrams, (U.S. Supreme Court, March 22, 2005) 125 S.Ct. 1453. In this case the U.S. Supreme Court resolved the long standing issue of whether damages and attorney's fees are available under Section 1983 for violations of the cellular tower zoning provisions of Federal law, 47 U.S.C. Section 332 (c). The Supreme Court adopted the position advocated by municipalities, ruling that Section 1983 was not available. In particular, the Court rejected the Ninth Circuit's conclusion that Section 332's remedial scheme was not sufficiently comprehensive to preclude Section 1983 relief. The Supreme Court also disagreed with the Ninth Circuit's conclusion that the savings clause in the 1996 Telecommunications Act (which added 332(c)) demonstrated Congress's affirmative intent to preserve Section 1983 remedies for violations of Section 332.

(Section 253 Generally Preempts Cellular Tower Zoning Ordinance)

Sprint Telephony PCS v County of San Diego 377 F. Supp. 2d 886, 2005 WL 1691326 (S.D. Cal. 2005). Sprint filed suit with a facial challenge to the county's entire cellular tower zoning ordinance. The case is notable because the challenge was filed not under 47 U.S.C. Section 332(c) which imposes certain Federal limits on local zoning of cellular towers. Instead, the challenge was filed under 47 U.S.C. Section 253 (a) which applies to right of way matters. Sprint argued that the zoning ordinance was prohibited under the literal language of Section 253 (a) which bars all state and local regulations that "prohibit or have the effect of prohibiting" the ability of any entity to provide interstate or intrastate telecommunication services. In a ruling that appears to be the first of its kind, the Court ruled in Sprint's favor with the Judge stating that the clear words of Section 253 mandated this result. The decision was based in part upon Ninth Circuit decisions that Section 253 not only preempts regulations that in fact prohibit the provision of services but also preempt those that "may have" the effect of prohibiting service (*City of Auburn v Qwest Corp* 263 F.3d 1160, 1175 (9th Circuit, 2001)). Among the reasons the Court stated for its decision was that in substance the zoning process was too burdensome and left too much discretion with municipal officials (such as requiring the location, size and design of towers to be "compatible" with adjacent uses). The Court refused to apply exemptions in Section 253 (c) because the zoning ordinance applied to private property not just to public rights of way. The Court attempted to reconcile Section 253 with Section 332 (c) (which were passed by the Congress in the same statute) by stating that Section 253 allows facial challenges to zoning ordinances whereas Section 332 (c) applies to individual zoning decisions. The Northern District of California may be poised to follow this ruling. See *Metro PCS v City and County of San Francisco*, 2005 WL 1692631 (N.D. Cal 2005).

This decision is notable for its invalidating all of the County's cellular tower zoning regulations. It appears to be part of a national effort by cellular companies to use a new approach – Section 253 – to preempt most if not all cellular tower zoning. If other courts follow this ruling, cellular tower zoning regulations throughout the country may be in jeopardy, as well as other state and local statutes applicable to telecommunications companies.

(Lack of Timely Action Leads to Approval of Multiple Towers)

Tennessee EX REL. Wireless Income Properties v. City of Chattanooga, 403 F. 3d 392 (6th Cir. 2005). Wireless applied for permits for several cellular towers in Chattanooga following which the City imposed a moratorium on such permits and then amended its zoning ordinance. After the moratorium and amendments, Wireless' applications did not comply with the newly amended ordinances. City officials advised Wireless of the changes so that it could amend its applications to comply with the new ordinance, but did nothing to approve or deny the applications. Wireless never made the necessary corrections and filed suit under the cellular tower zoning provisions of the Communications Act, 47 U.S.C. Section 332 (c). The Sixth Circuit ruled that the City had informally denied the applications in violation of the Federal law requirement that any such decision be "in writing" and "supported by substantial evidence." Most

importantly, the Sixth Circuit ruled that the appropriate remedy was injunctive relief requiring the City to grant the cellular tower zoning permits as applied for.

This case illustrates the most significant risk that municipalities face under the Federal cellular tower zoning requirements, namely that although the substantive provisions are quite favorable to municipalities, courts may rule that even a minor error results in the zoning requests being granted as applied for.

(Gap in Coverage Analysis for Cellular Tower Zoning Focuses on Gap in Particular Provider's Service)

MetroPCS, Inc. v. City of San Francisco, 400 F.3d 715 (9th Cir., 2005) (Case No. 03-16759. MetroPCS argued that the City's denial of its application to construct a cellular antenna was not in writing, not supported by substantial evidence, unreasonably discriminated between providers, created a gap in coverage and was improperly based on concerns regarding radio frequency emissions. All of the claims were filed under the cellular tower zoning provisions of Federal law, 47 U.S.C. Section 332(c). The Court rejected the in writing, substantial evidence, and RF emissions claims. However, the Court ruled that in determining whether there is a gap in service, the Court must examine whether the particular provider had a gap in coverage, and did not adopt the ruling of some other circuits that there was no "gap in service" if <u>any</u> provider could provide service in the area in question. The Court remanded for further proceedings on the unreasonable discrimination and gap in service claims, indicating the provider must show that the antenna is "least intrusive" on the values the City's denial sought to serve. IMLA filed an amicus brief in support of San Francisco in this appeal.

(City Challenge to Cell Towers on State Property Rejected - Telecommunications Act a Shield not a Sword)

Crown Communications v. Department of Transportation 4 N.Y. 3rd 159, 79 N.Y.S. 2d 494 (N.Y. 2005). New York State Agencies entered into a contract with a tower company giving it the exclusive right to construct and operate telecommunications towers on state-owned land and rights of way. The provider could license space on towers to municipalities and private companies and the state retained the right to locate its antennas on the towers. The City sued, contending that the towers were subject to local zoning laws and contended that the state immunity from local zoning should not extend to the installation of private antennas on towers. The New York Court of Appeals rejected the claim that municipal regulation overroad state interests where competing interests exist. It said the towers continued to be owned by the state although constructed and operated by the provider. Putting governmental and private antennas on the towers served an important public interest and income from the wireless providers did not undercut the public interest being served. Thus, the exemption state-owned towers had from local zoning restrictions extended to the private antennas installed on them. 47 U.S.C. Section 332 (c) did not change this result.

<u>Telecommunications</u>

(Voice Over Internet Protocol Telephone Service Not Subject to State Regulation)

Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission, Memorandum and Opinion and Order, _____ FCC Record Rcd ____, FCC 04-267, (Nov 12, 2004). The FCC ruled that voice over internet protocol (VOIP) telephony services such as those of Vonage are an interstate service, not subject to state regulations governing telephone companies. The order preempts Minnesota regulations and statutes and those of other states that would attempt to place regulatory requirements on Vonage and other VOIP providers. The FCC reached this result because it concluded that VOIP services should not be subject to dual state and Federal regulatory regimes and that the differences between state and Federal rules could impede the rollout of certain new services.

This ruling is important because many new services are based on "Internet Protocol" telephony. The FCC's interstate commerce/not burdening rollout arguments are being used in subsequent cases and in Federal legislation to argue for similar Federal preemption of state and local jurisdiction.

(Section 1983 Does Not Apply to Section 253 Right of Way Cases; Ordinances as Applied Invalid under Section 253)

Qwest Corporation v. City of Santa Fe, 380 F.3d 1258, 2004 WL 1879940 (10th Cir., 2004). Qwest filed a broad challenge to the City of Santa Fe's telecommunications right of way ordinance as violating 47 U.S.C. Section 253. The Tenth Circuit ruled that Qwest did not have a cause of action under Section 1983 (and thus for damages and attorneys fees) for its preemption claim under Section 253. This appears to be the first Court of Appeals case addressing this issue. The Court held that neither legislative history or statutory language showed the required clear Congressional intent to create a Section 1983 claim.

On the substantive aspects of Section 253, the decision upholds municipal positions in general, although finding against Santa Fe on some of the specifics of its ordinance as applied. The Tenth Circuit rejected the telecommunications industry's attempt to limit right of way fees to costs but held that the ordinance in question violated Section 253 because of the unduly broad discretion the ordinance gave the City and because of the substantial increase in costs resulting from the ordinance. The Court ruled that the validity of such fees has to be based on the totality of the circumstances and adopted a somewhat narrow view of the municipal right of way management authority which is preserved under Section 253.

(Claim and Issue Preclusion, Individualized Analysis on Telecommunications Franchise Fees)

Qwest v. City of Portland, 385 F.3d 1236 (9th Cir., 2004). Qwest argued that Section 253 of the Federal Communications Act, 47 U.S.C. Section 253, preempted the city's ordinance pursuant to which franchise fees were imposed on telecommunications companies. The District Court had ruled that the ordinance and various franchise agreements imposing a 5% franchise fee were not preempted. On appeal, the Ninth Circuit remanded because the District Court failed to conduct

an individualized preemption analysis under Section 253 for each ordinance and had misapplied the Ninth Circuit's prior case of *City of Auburn v. Qwest*, 260 F.3d 1160 (9th Cir., 2001). However, it affirmed the District Court's ruling that Qwest's challenge to gross revenue based fees was barred by claim and issue preclusion.

This case is important to municipalities as it is one of a continuing series of cases on whether and what extent to Section 253 limits franchise fees imposed by municipalities on telecommunication companies.

(City's Franchise, Franchise Fees Generally Upheld Against Telecommunications Act Challenge)

City of Portland, Oregon v. Electric Lightwave, Inc., ___ LEXIS ___, ___ Westlaw ___, (District Oregon, 2005) (Case No. 3:03-CV-00538-AS, May 6, 2005). Electric Lightwave is a competitive telecommunications company with a franchise from the City of Portland. Portland sued Electric Lightwave after Lightwave suspended franchise fee payments, contending that much or all of the franchise and fee provisions were invalid under Section 253 of the Federal Communications Act 47 U.S.C. Section 253. In a lengthy opinion, the Court upheld the City's 5% gross revenue franchise fee and almost all the standard franchise requirements (provision of maps, relocation of facilities, insurance and indemnification, etc). This is the first decision to discuss at length how cities are <u>not</u> limited to recovery of costs under 47 U.S.C. Section 253 and how a gross revenue based fee is fair, reasonable, and nondiscriminatory under that Section. The Court preempted and severed franchise provisions requiring Lightwave to provide the City with telecommunications services at the best rate it gave comparable customers and a requirement to provide the City with in-kind facilities such as conduit. Thanks to Ben Walters, Deputy City Attorney for this case and summary.

(Municipal Wireless Legislation)

There has been a flurry of legislation, originally starting in Pennsylvania, on barring municipalities from providing wireless or other telecommunication services see e.g., Pennsylvania Acts, Act No. 2004-183, P.L. 1398. Similar legislation has been introduced in many other states. Going the other way, Senators Lautenberg and McCain have introduced legislation (S. 1294, the Community Broadband Act of 2005) to specifically allow municipalities nationwide to provide broadband and capability and services and preempt all state laws to the contrary.

(Utility Must Pay Relocation Costs)

City of Taylor v. Detroit Edison, 263 Mich App 551; 689 NW.2d 482 (2004). As part of a major road construction project the City of Taylor passed an ordinance requiring all overhead lines in the area to be relocated underground and to be done at the expense of the utility in question. Detroit Edison filed suit challenging the requirement that it pay for the cost of relocation, contending on appeal that primary jurisdiction should lie with the Michigan Public Service Commission, not the Court. The Court of Appeals ruled in favor of the municipality, ruling that

the rights of way issues involved (in contrast to utility rate structures or tariffs) did not involve the Public Service Commission's specialized knowledge. Instead it involved municipal authority, and thus the case properly resided in the courts. On the substance, the Court rule reaffirmed and applied the long-standing rule of Michigan law that relocation costs must be paid by the utility if occasioned by municipalities' discharge of a governmental function, while the expenses are born by the municipality if due to its discharge of a proprietary function. Applying this rule, the Court held that the project in question was a governmental function to relieve transportation burdens, traffic congestion, and improve traffic safety and the like, and rejected the utility's claim that it was merely a beautification project and was otherwise, preempted by Public Service Commission regulations. The Court also rejected a claim that an MPSC regulation required any undergrounding costs to be paid by the municipality in question.

This case is important because utilities nationwide are attempting more and more to shift relocation costs to municipalities, and this decision rejects such attempts in this instance.

(For Criminal Statute "Computers" Include Those in Radio Systems)

US v. Mitra, 405 F.3d 492, 2005 WL 94908 (7th Cir., 2005). Mitra was prosecuted for intentional interference with computer related systems under 18 U.S.C. Section 1030(a)(5). Mitra had jammed a control channel used for a City's computer-based radio system for police, fire, EMS, etc. The control channel determined which of 20 frequencies were used for any particular call. Mitra challenged his conviction on the grounds that the statute did not include the radio system in question. The Court upheld his conviction ruling that the radio system was a "protected computer" because it contained a computer-type chip even if it was part of a radio system. The Court rejected a challenge that the statute should not apply because the usage of computers had expanded greatly since the passage of the statute on the grounds that the statute was clear on its wording, even if the application of computers had increased.

Contracts

(Requirement for Contractors to Provide Five-Days Paid Jury Duty Upheld)

Burns International Security Services v. County of Los Angeles, 123 Cal. App. 4th 162, 19 Cal.Rptr.3d 776 (2004). Municipal ordinances required their contractors to pay their employees for at least five days of jury duty per year to increase the number of potential jurors. Burns sued, alleging that the ordinances violated extra territorial provisions of the California Constitution (because it applied whether employees would be providing service in the municipality or elsewhere). The California Court of Appeals affirmed the ordinance as an exercise of the municipality's contractual power. The penalties were simply contractual and the municipality was simply "specifying the type of employer with which it wishes to do business"; and there was no indication the Legislature intended to occupy the field of "employee leave" for jury duty.

(Insurance Policy does not Cover Unauthorized Acts)

Oak River Insurance Company v Truitt, 390 F.3d 554 (8th Cir., 2004). Voters approved a sales tax for the expansion of an existing jail but County Commissioners instead used the funds to build a new jail. After Court rulings that this was an unauthorized use of the funds from the tax, County Commissioners filed suit against Oak River which had issued an errors and omission policy to cover County employees for wrongful acts committed during their service. The Eighth Circuit held that the County Commissioners acts in question fell within policy exclusions for both wrongful acts arising out a tax assessment, disbursement or the like, and the exclusion for willful violations of law.

(Payment in Lieu of Tax Exceeding Actual Tax Due Approved)

Anderson Street Associates v. City of Boston, 442 Mass. 812, 817 NE.2d 759 (2004). The Massachusetts Supreme Judicial Court approved a contract whereby an urban development corporation made certain payments in lieu of taxes. The Court approved the payments against a challenge due based on the fact that due to changes in law since the contract had been signed, Plaintiff's current payments exceeded the actual taxes which would have been due had the property been taxable.

(No Contract, No Conflict of Interest when Authority in Question was Statutory)

Citizens for Des Moines, Inc. v. Petersen, 125 Wash. App. 760, 106 P.3d 290, (Wash. App.) 2005 WL 341705, (2005). Petersen was majority shareholder, president, and an employee of a towing company routinely used by the City of Des Moines, Washington, although it had no contract with the City. After his election to City Council, suit was filed to have him removed due to a conflict of interest under applicable law prohibiting municipal officers from being beneficially interested in any contract under their supervision. The Court of Appeals ruled there was no contract and hence no conflict of interest. There was no contract because it was state law (not a contract) which gave the towing company statutory authority to recover fees from the vehicle owner. Hence, any economic benefit to the company and thence to Petersen was based on the statute and not on any exchange with a city officer or employee.

(No Standing to Sue on Restrictions on County Grantees)

Frank Krasner Entertainment v. Montgomery County, 401 F.3d 230 (4th Cir., 2005). Montgomery County amended its code to prohibit the County from providing financial or in-kind support to facilities that displayed or sold guns. The Agricultural Center, a nonprofit corporation, received funding from the County and after passage of the code amendment, declined to allow a gun show promoter and exhibitor to use its facility. The promoter and exhibitor sued the County but not the nonprofit. The Court ruled that the promoter and the exhibitor could not meet either the causation or redressability of the four-part Article Three constitutional test for standing and dismissed the case.

(Landowner Lacks Standing to Challenge Town's Contract with Developer)

Bochese v. Town of Ponce Inlet, 405 F.3d 964 (11th Cir., Apr. 7, 2005). The Town rescinded its contract with a private developer for the construction of a condominium complex because the developer had falsely represented that it controlled all of the properties for the project. Plaintiff/landowner owned one of the properties that would have been in the project and had anticipated the developer purchasing his property. The landowner sued the Town but not the developer. The Court dismissed the claim on standing grounds, as the Plaintiff was not party to the contract in question.

(Commission on Inmate Phone Calls Upheld)

Gilmore v. County of Douglas, 2005 WL 1005076, 406 F.3d 935 (8th Cir., May 2, 2005). Douglas County operated a jail and had a contract with a telecommunications company whereby the County received 45% of the gross revenue from inmate calls. Inmates called out collect, and collect calls were more expensive from the jail than normal collect calls. Plaintiff received collect calls from the jail and filed suit under the Equal Protection Clause challenging the commission as a tax and sought class action status. The Court of Appeals held that even assuming that the commission was a tax, it did not violate the Equal Protection Clause and that it could assume there was a rationale basis for defraying the costs of phone service at the jail.

(Minority Set Aside Requirement Rejected)

Western States Paving Company v. Washington State Department of Transportation, 407 F.3d 983 (Ninth Circuit, May 9, 2005). The Court of Appeals struck down a 14% minority set aside program affecting certain city and county projects and substantially financed by state and federal funds. To comply with the Transportation Equity Act requirements, the state mandated a 14% minority participation in these projects. Although rejecting a facial challenge to set aside, the Court of Appeals ruled that the State of Washington had not offered evidence of discrimination in its own contracting market and thus failed to show that its set aside requirement was narrowly tailored to further a compelling remedial interest.

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