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by

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INTRODUCTION

Being a local government attorney having to deal with cable television and telecommunications law issues these days may bring to mind the famous Chinese curse: "May you live in interesting times." These are interesting times indeed for us, full of rapid changes in law and policy that are threatening local governments' ability to obtain for their residents the public interest benefits of local cable franchising, to preserve taxation authority over communications service providers, to manage communication providers' use of local rights-of-way, and to apply land use and other local police powers to such providers.

This paper surveys some of the recent developments in the field of cable television and telecommunications that most directly affect local governments. From local governments' perspective, the list of developments is not a happy one. It includes federal and state legislative initiatives to abolish local cable franchising authority and to restrict or eliminate the ability of local governments to tax communications service providers. On the other hand, developments relating to local government liability for damages and attorneys' fee awards in disputes with communications service providers are a brighter picture, but not a settled one. Ultimately, the lesson to be drawn is that if your local government is not already actively engaging in these developments to shape their outcomes, now is the time to start.

I. LOCAL FRANCHISING.

A. The Supreme Court's *Brand X* Decision.

On June 27, the U.S. Supreme Court announced its long-awaited decision in *National Cable & Telecommunications Association v. Brand X*, 125 S. Ct. 2688 (2005). The decision affirmed the FCC's classification of cable modem service as an unregulated "information service," rather than a common carrier "telecommunications service" or a "cable service" under the federal Communications Act. The upshot for local governments is that revenue from cable modem service cannot be included in the revenue base for the 5% cable franchise fee, nor can local governments perform many important consumer protection functions for cable modem service that they have traditionally practiced through the franchising of cable television services.

Brand X arose from the FCC's March 2002 *Cable Modem Declaratory Ruling*, 17 FCC Rcd 4798 (2002). In that ruling, the FCC declared that cable modem service was neither a "cable service" nor a "telecommunications service," but a single, integrated "information service." For local governments, the immediate result of that ruling was that cable operators, most of whom had been paying 5% cable franchise fees on cable modem service, stopped paying cable franchise fees on that service. That represents an estimated $300 million per year in lost cable franchise fee revenue for local governments nationwide.

Several parties appealed the *Cable Modem Declaratory Ruling*, including local governments, who argued that cable modem service is a "cable service," and ISPs and state public service commissions, who argued that cable modem service includes a separate "telecommunications service" component. The appeals were consolidated in the Ninth Circuit.

In October 2003, the Ninth Circuit rendered its decision. *Brand X Internet Services, et al. v. FCC*, 345 F.3d 1120 (9th Cir. 2003). In a per curiam opinion, the court concluded it was bound by its earlier decision in *AT&T v. City of Portland*, 216 F.3d 871 (9th Cir. 2000), where, in the context of striking down the City of Portland's "open access" requirement, the court had concluded that cable modem service was not a "cable service" but instead had separate "telecommunications service" and "information service" components.

The Solicitor General/FCC and the cable industry sought and obtained Supreme Court review of the *Brand X* decision. The Court, however, denied the conditional cross-petition filed by local governments on the "cable service" issue. *NLC et al. v. Brand X Internet Services*, 125 S. Ct. 664 (2004).

The technical legal issue before the Supreme Court in *Brand X* was whether the deferential "*Chevron*" standard of review of agency interpretations of statutes applies when a federal court interprets the statute before the agency does.[1] In other words, can an agency effectively overrule a federal court's interpretation of a statute by later adopting a contrary, reasonable, interpretation of the same statute?

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[1] *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

The Supreme Court held that an agency could effectively overrule a federal court's prior interpretation of a statute, rejecting the argument that once a court adopts an interpretation of a federal statute, *stare decisis* controls and *Chevron* deference to the agency no longer applies.

Applying *Chevron,* the Court found the FCC's interpretation of the "information service" and "telecommunications service" definitions to be reasonable and thus entitled to deference. The Court therefore reversed the 9th Circuit and upheld the FCC's interpretation of cable modem service as an information service with no telecommunications service component.

The Supreme Court's opinion has potential implications on issues of great interest to local governments:

a. Although the legal issue in *Brand X* is a somewhat technical point of administrative law, the decision went to great lengths to validate the reasonableness of the FCC's decision in what it understood as "a first step in an effort to reshape the way the Commission regulates information-service providers." 125 S. Ct. 2702. As such, the decision may make the courts of appeals (especially those other than the D.C. Circuit) more hesitant to overturn FCC decisions in the broadband and Internet arena.[2]

Moreover, the decision may embolden the FCC in its efforts to deregulate all forms of Internet Protocol, or IP-based services. We may see impacts in the FCC's pending *Cable Modem NPRM* (on the argument, for example, that the Cable Act preempts any local non-cable franchise fees on cable modem service), the *IP-Enabled Services NPRM* (on, *e.g.,* SBC's argument that its IPTV isn't a "cable service"), and the *CALEA NPRM* (on the argument that CALEA can apply to IP-based services even if they are not "telecommunications services").[3]

b. We have already seen the FCC's first notable action in response to the *Brand X* decision: On August 5, the FCC announced in a press release that it would apply the same rationale to reclassify DSL service and other forms of telephone company-provided broadband Internet access from a "telecommunications service" to an "information service." *FCC Eliminates Mandated Sharing Requirement on Incumbents' Wireline Broadband Internet Access Services: Decision Places Telephone and Cable Companies on Equal Footing*, FCC Press Release (August 5, 2005).

c. Although arguably dicta, the *Brand X* majority suggests that the FCC may indeed have authority under its Title I ancillary jurisdiction to impose an "open access" requirement on cable modem service and telco-provided broadband Internet access, even if they are not a "telecommunications service." But the Court is only suggesting that the FCC may have authority to do so if, in its discretion, the FCC so decides. The chances of the FCC deciding to impose a meaningful open access obligation on its own, however, are not very promising.

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[2] The majority's *Chevron* analysis would likely have led it to uphold the FCC had the FCC gone the other way -- that is, had it gone either the "telecommunications service" route or the "cable service" route. The majority's analysis also leaves the FCC free to change its mind on the classification issue in the future (as long as it provides a reasoned explanation for the change). But the odds of that seem exceedingly slim.

[3] A fuller description of these FCC rulemakings is included in my 2004 presentation to IMLA.

d. If there's a silver lining for local governments in the *Brand X* decision, it is that it should greatly lessen the cable industry's interest in any change to the current law. With luck, that may reduce the odds of the cable industry getting together with Verizon, SBC and BellSouth (the "Bells") on nationwide franchising in the federal Communications Act rewrite legislation (*see* Part I(B)(1) below). Had the decision gone the other way, in contrast, the cable industry would have desperately needed legislation to undo the Court's decision, which would probably have meant that the cable industry would have been eager to reach agreement with the Bells on nationwide franchising, and to do so quickly, to get legislation passed. Instead, the Court's decision has created a different group that now desperately needs legislation: The independent ISPs like EarthLink.

B. Cable Franchising Legislation.

In the past several months, legislation has been introduced in Congress and in some state legislatures that would eliminate local cable franchising authority entirely.

1. Federal Assaults on Local Cable Franchising Authority.

Three bills that would eliminate local cable franchising and replace it with a form of "nationwide" cable franchising have been introduced in Congress. The bills are promoted by the Bells, which would prefer not to have to obtain local cable franchises as they roll out their new multichannel video services.

a. House and Senate Nationwide Franchising Bills.

A House bill providing for nationwide franchising of "competitive video services providers" (CVSPs), H.R. 3146, was introduced by Representatives Blackburn (R-TN) and Wynn (D-MD). A similar Senate bill, S. 1349, was introduced by Senators Rockefeller (D-WV) and Smith (R-OR).

Although the bills contain some differences, the major components of the bills are similar. At the core of each is a prohibition of a so-called "redundant franchise," which is defined as

> a franchise in order to provide any video programming, interactive on-demand services, other programming services, or any other video services in any area where [a] provider [already] has any right, permission, or authority to access public rights-of-way independent of any cable franchise . . . or pursuant to any other Federal, State, or local law.

The intent of the provision is clear: To allow telephone companies to provide cable services over their local networks without obtaining a cable franchise from the local government, as the federal Cable Act would otherwise require them to do. The wording is clumsy, ignoring, for example, that a telephone company's certificate of public convenience is not a cable franchise and does not grant a telephone company the right to use local public rights-of-way ("PROW") to

provide cable services. But the intent is clear: To ban localities from requiring that phone companies obtain local cable franchises to provide video service.

To be sure, each bill contains provisions ostensibly designed to ameliorate local governments' loss of cable franchising authority. The bills, for example, would permit local government to impose a fee on CVSPs equal to the cable franchise fee imposed on the incumbent cable operator, would require a CVSP to set aside the same public, educational and governmental ("PEG") capacity as the incumbent, and would permit localities to regulate PROW use by CVSPs. But each bill would eliminate financial and in-kind support for PEG access and institutional networks ("I-Nets"). And, perhaps most importantly, the removal of local franchise authority negates any possible enforcement mechanism for those limited benefits to local governments that the bills purport to preserve. A local government would lack, for example, any authority to audit and collect fees owed to it. The bills would also preempt local governments' authority under the Cable Act to impose build-out requirements on CVSPs to achieve universal service.

b. Ensign Communications Act Re-Write Bill.

An effort at a much broader re-write of the federal Communications Act is also being staged. Senator Ensign (R-NV), with Senator McCain (R-AZ) as a co-sponsor, recently introduced S. 1504, a comprehensive communications law re-write bill. The Ensign bill contains many provisions that would harm municipal interests, including the elimination of local cable franchising and a restriction on municipal provision of communications services.

Some of the main provisions of the Ensign bill of concern to municipalities include:

- All current local cable franchising authority would be eliminated, and all currently existing cable franchises would be preempted, unless they are consistent with the requirements of the bill.

- The bill would eliminate the current cable franchise fee of 5% of gross revenue and replace it with a new fee that has a 5% ceiling but which also must be "reasonable" and limited to compensation for PROW management costs. (This is, among other things, an obvious prelude to industry's planned efforts at telecommunications tax reform early next year. *See* Part II below.)

- The gross revenue base permitted to be used for determining the new fee's 5% ceiling would be considerably smaller than the current permissible cable franchise fee base, meaning that even if a locality could charge 5% under the new bill, it would still receive substantially less fee revenue than it currently does.

- Public, educational and governmental (PEG) access channel capacity would be limited to no more than four PEG channels.

- Any PEG capital or other support over and above the 5% fee would be eliminated.

- Cable franchise provisions requiring cable operators to build institutional networks (I-Nets) for governmental use would be preempted.

- Local governments would be prohibited from setting or enforcing cable customer service standards.

- Video service providers would be immune from any system buildout requirements, meaning that providers would be free to serve only the more profitable and desirable neighborhoods.

- The application to communications service providers of any state law that is not generally applicable to all businesses would be vulnerable to preemption.

- Local governments would be prohibited from assessing any fee over and above the cost-based 5% fee for PROW construction permits.

- Local governments would be required to issue PROW construction permits in a timely manner, as determined by the FCC.

- Current federal law protections against preemption of local land use and zoning decisions concerning wireless tower siting would be eliminated.

- Municipalities and their utilities would be prohibited from entering the communications service market without first giving the private sector an effective right of first refusal.

2. State Assaults on Local Franchising Authority and Municipal Provision of Service.

A move to abolish local cable franchising authority has begun at the state level as well. On August 10, the Texas legislature passed a bill, S.B. 5, eliminating local cable franchising and replacing it with statewide video franchises. The bill's provisions are similar to those in the House and Senate nationwide franchising bills discussed above, although the Texas bill is not quite as harsh on local governments as the bills pending in Congress. Similar measures have been proposed in New Jersey, Virginia, North Carolina, and California.

Other states are moving to ban municipal provision of communications services in competition with private communications companies. Pennsylvania made headlines last year when it banned new entries into municipal provision of broadband service. At least fifteen other states have some level of legal barrier to municipal provision of one or more communications services. And in *Nixon v. Missouri Municipal League*, 541 U.S. 125 (2004), the U.S. Supreme Court held that municipal provision of telecommunication services is not protected by Section 253 of the Communications Act, 47 U.S.C. § 253(a), which preempts state laws that "prohibit or have the effect of prohibiting the ability of any entity" from providing telecommunications services.

II. PROPOSALS FOR FEDERAL PREEMPTIVE REFORM OF STATE AND LOCAL TELECOMMUNICATIONS TAXES.

The telephone and cable industries have been vigorously pushing legislation to limit state and local taxation authority over communications service providers and their services. With about $20 billion a year in state and local tax revenues at stake, the potential fiscal risks for state and local government associated with such legislation are high.

The attack on state and local taxes rests primarily on two fallacious arguments:

(1) The telecommunications industry claims it is taxed heavily relative to other businesses. A recent study by Ernst & Young, commissioned by AT&T, concluded that the telecommunications industry's effective tax rate "is 2.5 times higher than the average rate for all industries."[4] Yet the same study showed that the telecommunications industry is actually taxed at a substantially *lower* effective rate than other utilities – 11.79% for telecommunications versus 17.97% for other utility industries. In other words, relative to the most closely analogous industry, telecommunications taxes are actually *low.*

(2) The telecommunications industry argues that state and local telecommunications taxes are based on an outdated assumption of monopoly provision of services, which is not in accord with the current context of an increasingly competitive communications market. But whether or not telecommunications services, or other utility services, are provided competitively or monopolistically, there are sound tax policy reasons for imposition of special taxes and fees on their consumption.

Special telecommunications taxes are warranted by the need for special services in the telecommunications sector (*e.g.*, funding 911 call centers), and by the special benefits that state laws typically bestow on telecommunications service providers that other businesses do not enjoy (*e.g,.* use of PROW, extension of eminent domain powers). There are also important distributional effects of taxing utility services like telecommunications services at a higher rate than other goods and services. Since businesses are heavier consumers of telecommunications and other utility services vis-à-vis residential consumers, utility taxes have the effect of shifting the overall tax burden away from residential consumers and toward businesses. In addition, consumption of utility services tends to be fairly inelastic, at least on the downward end, providing a more stable source of tax revenue than many other general sales and consumption taxes.[5]

Despite the factual and policy shortcomings of the telecommunications industry's arguments in favor of reduced state and local telecommunications taxes, the idea is gaining traction among policy-makers. In November 2004, Congress passed legislation that extended the

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[4] *Total State and Local Taxes Paid by the Telecommunications Industry, Fiscal Year 2004* (July 18, 2005).

[5] I do not mean to suggest that state and local governments necessarily should tax telecommunications service providers at a higher rate than other non-utility businesses. I do mean to suggest, however, that many state and local governments do so, that there are perfectly legitimate policy justifications for doing so, and that there is accordingly no basis for federal preemptive intrusion into state and local telecommunication tax policy in this area.

Internet taxation moratorium and expanded its reach to include a broader range of communications services. Representative Sununu (R-NH) has repeatedly introduced and pushed legislation that would preempt all state and local taxation of voice over Internet protocol (VoIP). And the telecommunications industry is drafting legislation that it hopes to introduce in Congress next year that would preemptively limit state and local taxation of telecommunications and cable services to the same level as that of other "general businesses."

There are several concerns that local governments need to carry forward into the coming debates over telecommunications taxes. First, there is a danger in being too "voice-centric" about telecommunications taxes. More than half of all telecommunications traffic today is non-voice (i.e., data), and that is expected to grow in the years ahead. Thus, if tax reform is designed only to try to preserve taxes on voice services, that will result in local governments receiving an ever-shrinking piece of the telecommunications tax pie over time and deprive local governments of growth in the non-voice portion of the potential telecommunications tax base -- which is where most, if not all, of the future growth will be.

In addition to this general "voice-centric" concern, there is the related concern of being too "VoIP-centric." Because VoIP is just an Internet application and not a transmission service (VoIP can be located at servers literally anywhere in the world, and a VoIP call has no fixed origination and termination points), local governments and states will have increasing difficulty securing adequate jurisdictional nexus over VoIP services to tax them, even assuming such services are not subject to the Internet tax moratorium. Moreover, because VoIP is just an application, its prices will be low and thus offer a far smaller potential tax revenue base than traditional transmission services have historically provided.

The solution should be obvious: What local governments really need is the ability to tax "last mile" transmission services, whether that's narrowband (*e.g.,* plain old telephone services ("POTS") or traditional cellular service), or broadband (whether that's cable service, cable modem service, DSL, T-1, DS-1, DS-3 or wireless broadband). Local governments will always have a tax jurisdictional nexus over such last-mile transmission services, and a local governments' residents and businesses will always be charged for such last-mile transmission, either as a standalone service or as part of a charge bundled with other services. Industry realizes this too, and that's precisely why trying to sweep these services into the definition of "Internet access" was one of their major goals in the Internet tax moratorium legislation.

While local governments are stuck with the Internet tax moratorium for the next two years, it is important that any deal with industry not cut local governments off from taxation of last-mile broadband transmission services when the moratorium expires. The Mobile Telecommunications Sourcing Act, 4 U.S.C. §§ 116-126, enacted in 2000, provides a possible positive model. That Act allows a local government to tax a customer's entire wireless bill, but only at one location -- the customer's "primary place of use" -- despite calls that may have origination and termination points in multiple jurisdictions. The model has the potential of solving nexus problems associated with imposing state and local taxes on non-wireless telecommunications and Internet services where similar difficulties in locating the source or end point of communications may be posed.

Another industry goal in telecommunications tax reform is to move authority to impose and collect taxes away from local governments to the state level. The risks for local governments here are several fold:

(a) the state has no incentive to spend state budget resources on auditing and enforcing whether providers are accurately paying taxes that will go only to local governments;

(b) when state budgets are tight, there will always be a temptation for the state to divert the tax revenue away from local governments to itself; and

(c) a state-based scheme, particularly one with a single tax rate, deprives local governments of the fundamental ability to tailor their tax rate and revenues to each local government's own, unique tax revenue needs.

To the extent that industry proposes a single tax for all providers (both landline and wireless), and to have it replace PROW fees, that creates at least two potential problems. First, assessing the same rate on both landline and wireless providers devalues use of the PROW, because wireless providers would be paying the same rate even though they're not using the right of way. That, in turn, would "underprice" the PROW as an economic input and encourage overinvestment in PROW telecommunications facilities vis-à-vis wireless facilities (e.g. excessive and inefficient investment in street cuts). Second, if PROW fees are eliminated, and wireless and landline providers are subject to the same tax rate, that tax structure might be subject to challenge by wireless providers under state law prohibitions against discriminatory taxes, on the ground that wireless providers don't get the same special benefits from the government as landline providers (use of PROW).[6]

III. MUNICIPAL LIABILITY FOR DAMAGES AND ATTORNEYS FEES UNDER THE FEDERAL COMMUNICATIONS ACT.

A. Potential Municipal Damages and Attorneys Fee Liability Under 47 U.S.C. § 332(c)(7).

Perhaps the brightest spot for local governments in the communications area in the last year was the Supreme Court's decision in *City of Rancho Palos Verdes v. Abrams*, 125 S. Ct. 1453 (2005). That case presented the question of whether a claim for damages under 42 U.S.C. § 1983, and a correlative claim for attorneys fees under 42 U.S.C. § 1988, can be brought for a local government's violation of the wireless siting provision of the federal Communications Act, 47 U.S.C. § 332(c)(7).

Section 1983 was passed by Congress at the time of adoption of the 14th Amendment to provide a remedy for infringements of rights contained therein. But in 1980, the Supreme Court held that the statute's authorization of "an action at law, suit in equity, or other proper proceeding" applies to federal statutes as well as the Constitution. *Maine v. Thiboutot*, 448 U.S.

[6] Some state laws imposing a 5% tax on DBS to "equalize" with the 5% cable franchise fee have been attacked by DBS providers on precisely this ground.

1 (1980). To prevail in an action for damages § 1983, the Court has held that there must be an individually enforceable federal right, *Blessing v. Freestone*, 520 U.S. 329 (1997), and, in addition, a lack of a comprehensive remedial scheme that evidences an intent to foreclose use of § 1983 for enforcement of the right, *Middlesex County Sewerage Authority v. National Sea Clammers Assn.*, 453 U.S. 1, 19-20 (1981).

In *Abrams,* the Supreme Court assumed the presence of an individually enforceable right in § 332(c)(7), but held that § 332(c)(7)(B)(v) provides a comprehensive enforcement scheme that establishes that Congress intended to preclude additional and inconsistent relief under §§ 1983 and 1988. Specifically, the Court noted that that § 332(c)(7)(B)(v) "limits relief in ways that § 1983 does not" by requiring judicial relief to be sought within 30 days after a final action by a local government and requiring the court to rule on an "expedited basis." 125 S. Ct. at 1459-1460. The Court also noted that "[l]iability for attorney's fees would have a particularly severe impact in the § 332(c)(7) context, making local governments liable for the (often substantial) legal expenses of large commercial interests for the misapplication of a complex and novel statutory scheme." The Court refused to attribute to Congress an intent to subject local governments to such mammoth potential liability absent clearer evidence of such intent in the statutory language. 125 S. Ct. at 1460. The Court thus concluded that § 1983 damages and § 1988 attorneys fees are not available to a disappointed wireless tower siting applicant claiming a violation of § 332(c)(7).

One cautionary note is warranted. The Court declined to address the question of whether compensatory damages might be available directly as a form of relief under § 332(c)(7)(B)(v), noting that "the lower courts are seemingly in disagreement on this point." 125 S. Ctr. at 1459.[7] But to the extent that Justice Scalia's opinion for the *Abrams* Court reveals any lean on that issue, it appears to be a slight lean in local governments' favor. *See id.* (stating that the remedies "perhaps do not includes compensatory damages"). Nevertheless, the risk of damage claims directly under § 332(c)(7)(B)(v) cannot be totally discounted.

B. Potential Municipal Damages and Attorneys Fee Liability Under 47 U.S.C. § 253.

It is not yet settled whether §§ 1983 and 1988 attorney fees and damages are available for a local government's violation of the "barrier to entry" provision of 47 U.S.C. § 253. Because the *Abrams* decision was based exclusively on the *Sea Clammers* ground that there existed a "comprehensive remedial scheme" under § 332(c)(7) that precluded § 1983 relief, the Court did not address the alternative argument that § 332(c)(7) creates no right enforceable under Sec. 1983 (the *Blessing* issue). Such an analysis would have cast more light on the § 253/§ 1983 question.

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[7] *Compare Prime Co Pers. Communs. v. City of Mequon*, 352 F.3d 1147, 1152-1153 (7th Cir. 2003) (damages presumptively available), *with Omnipoint Communications MB Operations, LLC v. Lincoln*, 107 F. Supp. 2d 108, 120-121 (D. Mass. 2000) ("[T]he majority of district courts . . . have held that the appropriate remedy for a violation of the TCA is a mandatory injunction").

The § 253 question is a bit harder one than in the case of § 332(c)(7) because the text of § 253 contains no specific remedial provision like § 332(c)(7)(B)(v). Thus, the *Sea Clammers* argument will be weaker and the *Blessing* argument more important.

The two concurring opinions in *Abrams* -- one by Justice Breyer joined by Justices O'Connor, Souter and Ginsberg, and the other by Justice Stevens -- provide a few hints, but nothing decisive. Justice Breyer wrote separately to emphasize that he thinks that there still is a strong presumption in favor of a § 1983 remedy, and that it took something as explicit as § 332(c)(7)(B)(v) to overcome that presumption. That suggests that he and the other three Justices who joined him would likely be a very tough sale for extending the *Abrams/Sea Clammers* rationale to § 253 claims.

Justice Stevens wrote separately to make clear that he, unlike Justice Scalia, thinks legislative history is quite important in resolving the question whether a § 1983 remedy was intended, especially where the "dog doesn't bark" -- *i.e.*, where Congress doesn't talk specifically about whether it intends a § 1983 remedy and where implying such a remedy would "have potentially disastrous [financial] consequences" on local governments. *See Abrams*, 125 S. Ct at 1465. Likewise, one could argue that allowing attorney fees awards in the context of § 253 actions would have equally disastrous financial consequences, "making local governments liable for the (often substantial) legal expenses of large commercial interests for the misapplication of a complex and novel statutory scheme." 125 S. Ct. at 1460.

Justice Stevens' opinion is therefore potentially helpful on the § 253/§ 1983 question. But given that the four Justices who seem to agree with him on the relevance of legislative history (Justices Breyer et al.) seem inclined in most cases to infer a § 1983 remedy, while at least some of the Justices who seem disinclined to infer a § 1983 remedy also tend to disdain legislative history as a tool for interpreting statutes, how this splintering would play out in a case presenting the § 253/§ 1983 question is impossible to predict.

Lower courts are split on whether § 253 (a) or (c) can be enforced pursuant to § 1983, with resulting potential damages claims and attorney fees under § 1988. The 10th Circuit recently held that § 253 does not confer private right of action enforceable pursuant to § 1983. *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1266-67 (10th Cir. 2004); *see also Cablevision of Boston, Inc. v. Pub. Improvement Comm'n of the City of Boston*, 38 F. Supp. 2d 46, 55 (D. Mass. 1999) (finding that § 253(c) does not confer a private right of action enforceable pursuant to § 1983). But other courts have found that either § 253(a) or (c), or both, do create an individual right that is enforceable under § 1983. *See, e.g., Pac. Bell Tel. Co. v. City of Hawthorne*, 188 F. Supp. 2d 1169, 1172 (C.D. Cal. 2001) (finding that § 253(c) but not § 253(a) confers a private right of action); *NextG Networks of N.Y., Inc. v. City of New York*, 2004 U.S. Dist. LEXIS 25063 (D.N.Y. Dec. 10, 2004) (provider entitled to maintain § 1983 action for alleged violations of § 253(a), and (c)); *Sprint Telephony PCS, L.P. v. County of San Diego*, 311 F. Supp. 2d 898, 916 (S.D. Cal. 2004) (finding that § 253(a) confers private right of action enforceable pursuant to § 1983).

C. Municipal Damages Immunity Under the Cable Act, 47 U.S.C. § 555a.

The Cable Act bars suits for damages against local governments for actions they take in the cable franchising field. 47 U.S.C. § 555a states:

> (a) Suits for damages prohibited
>
> In any court proceeding pending on or initiated after October 5, 1992, involving any claim against a franchising authority or other governmental entity, or any official, member, employee, or agent of such authority or entity, arising from the regulation of cable service or from a decision of approval or disapproval with respect to a grant, renewal, transfer, or amendment of a franchise, any relief, to the extent such relief is required by any other provision of Federal, State, or local law, shall be limited to injunctive relief and declaratory relief.

The limitation of enforcement actions to "to injunctive relief and declaratory relief" should be sufficient to prevent an award of attorneys fees and costs as well. *See Abrams,* 125 S. Ct. at 1460 n.4 ("Absent express provision to the contrary, litigants must bear their own costs.").

Given the clarity of 555a, there is no dispute that damages and costs are unavailable under the Cable Act. But under the Ensign bill discussed above, Section 555a would effectively be repealed, and it would likely be inapplicable to CVSPs in the case of the two nationwide franchising bills. Thus, § 555a's damages immunity for local governments may also be at risk in Congress.

CONCLUSION

The upshot of all these developments is that the legal and regulatory environment governing communications services is changing, and, absent vigorous lobbying and regulatory participation efforts, local governments are likely to be on the losing side of many of the changes. Accordingly, local governments should consider taking the following actions:

First, you should monitor and, as necessary, participate in FCC proceedings and court cases that affect your cable franchising authority, PROW management authority, and taxation authority.

Second, individual local governments should join and assist in municipal lobbying and advocacy efforts in Washington and in your state capital. Municipal advocacy efforts before Congress, the FCC and in state legislatures should focus on preserving local authority in seven core areas that are coming under increasing assault:

- Local taxation authority, including telecom/utility taxes, sales and use taxes, other gross receipt taxes, and property taxes;
- Local right of way management and compensation authority;

- Local land use, zoning, building and safety code authority;
- Full and effective 911/E911 participation and contribution by all providers;
- The authority of municipalities and municipal utilities to provide communications services;
- General police powers, including consumer protection and safety regulations, to telecom, cable, Internet, wireless and broadcasting providers; and
- Preserving local video franchising authority.

In the coming debates, the national local government associations, including IMLA, the National Association of Telecommunications Officers and Advisors, the American Public Power Association, the National League of Cities, the U.S. Conference of Mayors and the National Association of Counties, will be working diligently to represent municipal interests and positions before the courts and in Congress. But ultimately the most important contribution will often be an individual local government's own local story and experience that can cast a more revealing light on the actual real world effect of various proposals on a particular local government's ability to act in and promote the public interest.

Third, both to contribute analysis to legislative advocacy and to help plan for the future, you may wish to analyze the impact on your local government if it were to lose its cable franchising authority. This will mean planning for how to close budget gaps, as well as investigating other legal means for preserving necessary public interest regulation of video providers, such as anti-redlining, PEG access, and I Net requirements.

Finally, for some communities, the new challenges posed by the impending limits on municipal authority over communications service providers may increase the attractiveness of municipal provision of advanced communications services. A number of municipalities and municipal utilities are now providing such services, including broadband over powerline, publicly owned fiber to the home networks capable of providing phone, video and Internet service (referred to as "triple play"), municipal wireless Internet systems, and more. Entering this arena is a complex and serious decision that should not be taken lightly. A well planned municipal system may, however, enable a community to receive better service at lower cost while ensuring a flow of funds to the municipality.

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