INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION



Section / Department: Municipal Contracts, Franchises and Technology Section

2006 ANNUAL REPORT

by

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INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION
Municipal Contracts, Franchises and Technology Section

2006 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 Jim Abshier, Patrick Whitnell, Judy Zeider, John Pestle and Nancy Skancke. The Author also thanks and acknowledges the authors and contributors to IMLA's monthly updates.

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 by topic.

This report does not repeat any information contained in *Municipal Lawyer* magazine articles of interest written by section officers. The January/February 2006 issue contains an article entitled "The Energy Policy Act of 2006" by Nancy Skancke and another on "Federal Broadband Legislation: Municipal Concerns" by John Pestle. Both articles are available form IMLA.

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 benshoff@ci.concord.nc.us for inclusion in next year's report.

The cases are summarized by topic as follows:

Telecommunications Related Cases

(Telecomm not an essential Service)

Florida Dept. of Revenue v City of Gainesville, 918 So. 2d 250 (Fl 2005)

Gainesville provided telecommunication services via fiber optic cable and leased various municipal properties to private telecommunication providers. Gainesville obtained the necessary permits from the Public Services Commission under Florida law. In the legislation that allows municipalities to offer telecommunications as a proprietary use, municipalities must pay ad valorem taxes "on property owned and used exclusively by the municipality to provide telecommunications". Gainesville challenged the requirement as unconstitutional. The applicable section of the Florida constitution provides that "all property owned by a municipality and used exclusively by it for municipal or public purposes shall be exempt from taxation." Art.

VII, § 3(a), Fla. Const. The Supreme Court concluded that providing telecommunications services does not as a matter of law always serve municipal or public purposes, ad valorem taxation of a municipality's telecommunications facilities is not facially unconstitutional. The Court found that telecommunications services are essential services. Rather, the Court found "that in providing these services, regardless of circumstances such as the availability of the same services through other providers, a municipality does not as a matter of law engage in an activity essential to the welfare of the community."

(Mootness and Taxes v. Rent)

Qwest Corp. v City of Surprise, 434 F. 3d 1176 (9th Circuit 1/13/2006)

Surprise and four other Arizona cities charge Qwest a fee comprised of a percentage of gross revenues for using either the rights-of-way, or providing telecommunications services or both. The Ninth Circuit granted summary judgment to the cities involved in this litigation over Qwest's claims that the cities' licensing and franchise ordinances were preempted by federal law. After the cities amended several ordinance provisions, Qwest's claims became moot. The court also held that the charges imposed by the cities for operating within the cities were taxes, and thus, the Tax Injunction Act deprived the district court of jurisdiction to invalidate the taxes. The City of Tucson was represented by Joe Van Eaton, of IMLA member law firm, Miller & Van Eaton. (Thanks to IMLA for this report.)

(Cell Tower Permits – Use of Rights-of-Way)

Sprint PCS Assets, LLC v City of La Canada Flintridge, 435 F. 3d 993 (9th Circuit 1/17/2006)
The court reversed a grant of summary judgment to the city, finding that under California state law, the city acted outside its authority in denying Sprint's applications to construct two cell towers in the city's rights-of-way. The city based its decisions on aesthetic considerations. According to the Ninth Circuit, however, California law did not allow a municipality to deny a permit application on the basis of aesthetics alone. Rather, there had to be an actual impediment to the use of the right-of-way. As the city did not submit any evidence dealing with such an impediment, its denial of the permits violated the federal Telecommunications Act
(Thanks to IMLA for this report.)

(Telecomm Franchise Ordinance – Interpreting §253 of the Telecommunications Act of 1996)

Qwest Communications, Inc. v. City of Berkeley, 433 F. 3d 1253 (9th Circuit 6/12/2006)
The city appealed a district court's ruling that its Interim Telecommunication Carriers Ordinance was preempted by the Telecommunications Act of 1996. The district court ruled that the ordinance was preempted because it imposed an onerous burden on telecommunications providers seeking entry into the telecommunications market in the city. Berkeley required either a " non-cost based fee" or compliance with "common carrier exemption procedure." Thereby seeking to avoid pre-emption under §253(a). Ultimately, the Court found that Berkeley's ordinance was preempted by §253(a).

The Berkeley ordinance's "common carrier exemption procedure" was described as a "very exhaustive process" that requires the applicant company to provide extensive information about the company and the specific project. Among other things, the applicant seeking exemption must

identify its qualifications to provide telecommunications services and to certify that it is in compliance with state and federal laws. This includes compliance with state environmental law as well as federal and state tariffing and detariffing requirements. Also, applicants must disclose to the City and the public the material terms of "any and all agreements, tariffs, or other documents relating to" telecommunications services provided by the applicant."

In addition, the applicant is required "to provide the City with an annual written report that includes the following information: (1) current rate information and information regarding terms and conditions "upon the services being furnished on or over the facilities located within the public rights-of-way;" (2) copies of all information made available to the public pursuant to the tariffing, detariffing, and related notice requirements of federal and state law, including copies of all negotiated contracts related to the provision of telecommunications services; (3) the name, address, and phone number of each person or entity to whom the telecommunications provider denied service, access to, or capacity over the facilities during the preceding year and reasons for the denial; (4) copies of any contracts effecting the transfer of the ownership, operation or control of the telecommunications company's facilities or systems."

Finally, the applicant must "allow the city "at any time, and from time to time, and upon reasonable notice" to audit the applicant's books and records to determine whether the applicant is "continuing to furnish requisite" services in conformity with federal regulations "to qualify for exemption from licensing, franchising, and related provisions of "and whether the applicant is acting within the scope of its certification." The Court found that these requirements "are patently onerous and have the effect of prohibiting Qwest and other telecommunications companies from providing telecommunications services."

It also held that the ordinance was not saved by the Act's "safe harbor" clause because the regulations that created this prohibiting effect did not merely regulate the public rights-of-way, but regulated the telecommunications companies themselves.

(The Portland Trilogy – Three Cases Involving Portland's Telecomm's Franchises and Portland's Telecomm "Business")

Time Warner and Qwest v. Portland and Qwest v. Portland, CV 04-1393-PA, CV 05-1386-PA, U. S. District Court for Oregon (3/8/2006)

Plaintiffs Time Warner, and Qwest sell telecommunications services in Oregon. Plaintiffs have franchise agreements with Portland that permit plaintiffs to install and operate telecommunications systems in City streets. The franchise agreements provide that the City may require "in-kind services" such as the use of the Plaintiff's duct banks. The City has neither requested nor received in-kind services from the Plaintiffs.

In this action plaintiffs claimed that their franchise agreements violate federal telecommunications law. Plaintiffs also claimed that the City illegally competes with them by providing telecommunications services to other governments and public schools.

Both parties moved for summary judgment. The Court concluded that the Telecommunications Act of 1996, 47 U.S.C. § 253, preempts the in-kind compensation provisions in TWT's franchise agreement and the most-favored-rate provisions in both franchise agreements. Section 253 does not preempt other provisions of plaintiffs' franchise agreements, or the City's sales of

telecommunications services to public schools and other governments. Section 253 encourages competition by government's in the telecomm markets as well as private companies.

Time Warner and Qwest v. Portland and Qwest v. Portland, CV 04-1393-PA, CV 05-1386-PA, U. S. District Court for Oregon (5/10/2006)

Qwest sells telecommunications services in Oregon. Qwest has a temporary revocable permit with the City of Portland (the City) that allows Qwest to install and operate telecommunications systems in City streets.

In this action against the City, Qwest claims that the City's operation of a fiber optic network, the Integrated Regional Network Enterprise (IRNE), violates federal law, and that the City illegally provides telecommunications services outside the City limits.

The court granted the City's motion for summary judgment.

Portland provides telecomm services only to other local governments and schools through INRE. About ten percent of the City's network was obtained through in-kind contributions. Qwest argued that in-kind services were "extortion" or "subsidies" and that they gave the City a non-competitive advantage. The Court found that nothing prevented Qwest from making similar cooperative agreements, and that in any case, the City paid for the in-kind services. Qwest argued that the City unfairly dominated the education-and-government market. The Court declined to define the market so narrowly. Finally, the Court said that Portland was permitted to provide telephone and other telecommunication services outside of its jurisdiction as no statute prevented it. (Oregon law specifically allows Portland to provide telephone and telecommunication services outside of its jurisdiction).

Time Warner and Qwest v. Portland and Qwest v. Portland, CV 04-1393-PA, CV 05-1386-PA, U. S. District Court for Oregon (7/7/2006)

In the last case in this series of three, one issue remained for decision: the City of Portland's counterclaim for breach of contract against Time-Warner. Time Warner stopped paying its five per cent franchise fees on its gross revenues from "co-location services" and "information services", arguing that they were not "telecommunications services" as defined in the franchise. The Court concluded that Time Warner "breached its franchise agreement with the City by failing to treat revenues from information and co-location services as "gross revenues."

(Telecomm Franchise Ordinance Fee Struck Down as Violating §253 of the TCA)

Liberty Cablevision v. Municipality of Caguas, No. 04-1597 (1st Cir. Aug. 9, 2005)
A cable provider challenged ordinances which imposed a 5% annual fee on its gross revenues for use of the municipalities' rights-of-way. In Puerto Rico, the Telecommunications Regulatory Board was designated by law as the local franchising authority in accordance with the Cable Communications Policy Act of 1984, 47 U.S.C. § 521, et seq. (1984). The plaintiff argued that the Cable Act necessarily preempted the ordinances because its use of the rights-of-way was already accounted for in the franchise fee paid to the Board. The First Circuit agreed: The ordinances imposing gross revenue fees for use of the rights-of-way, when similar fees were already assessed by the state "local franchising authority" in accordance with the Cable Act, conflicted with the federal statute and were therefore preempted. ***(Thanks to IMLA for this report.)***

Puerto Rico Telephone Co., Inc., vs. Guayanilla, P.R., (1st Cir. 6/7/2006), No. 05-1400

Guayanilla adopted Ordinance 40 pursuant to Puerto Rico Law 213. P.R. 213 was created in response to the 1996 Tele Communications Act (TCA). Ordinance 40 established a local gross receipts franchise fee and certification and reporting requirements. P. R. Law 213 states that "departments, agencies, public corporations, municipalities, and political subdivisions of the Government of Puerto Rico may charge reasonable fees for the use of their properties, rights-of-way and easements pursuant to the regulations of the Puerto Rico Telecommunications Regulatory Board and the federal laws and regulations applicable." The Court held that the allowance of a "reasonable fee" in Law 213 was intended to go hand in hand with the equivalent provision in the TCA. The Court found that the analysis to be made of the definition of what is a "reasonable fee" or a "fair and reasonable compensation" is identical under both Commonwealth and federal law. There was no Commonwealth precedent interpreting Law 213. PRTC brought this action to challenge Ordinance No. 40 under the Supremacy Clause. The parties focused their arguments on Sections (a) and (c) of 47 U.S.C. §253.[1]

47 U.S.C. § 253 subsection (a), limits the authority of state and local governments to regulate telecommunications providers, and subsection (c), a "safe harbor" provision that, notwithstanding the limits imposed by § 253(a), permits state and local governments to enforce regulations that require fair and reasonable compensation for the use of public rights of way. Section 253(a) preempts laws that "may prohibit or have the effect of prohibiting" the provision of telecommunications services. As the Federal Communications Commission ("FCC") has explained, "in determining whether an ordinance has the effect of prohibiting the provision of telecommunications services, it 'considers whether the ordinance materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.

[1] (a) In general no State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service. …
(c) State and local government authority. Nothing in this section affects the authority of a State or local government to manage the public rights of way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights of way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

The Court found that Ordinance 40's gross revenue fee and certification requirements place a significant burden on PRTC. The district court found that PRTC established that Ordinance No. 40 "materially inhibits or limits the ability" of PRTC "to compete in a fair and balanced legal and regulatory environment."

The Court explained that §253(c) "take[s] the form of [a] savings clause[], preserving certain state or local laws that might otherwise be preempted under § 253(a)." However, the Court opined that § 253(c) could be interpreted in two ways.

One explanation is that Congress intended § 253(c) . . . to be a savings clause only. Under this interpretation, § 253(c) could only be used defensively, in the context of a § 253(a) challenge; the statute would simply not apply to local regulations that are not competitively neutral and nondiscriminatory but nonetheless do not constitute prohibitions on market entry. Alternatively, the exclusion of § 253(c) from § 253(d) [which provides for FCC preemption] might reflect Congress's selection of a forum for § 253(c) claims, limiting jurisdiction to federal or state courts instead of forcing municipalities with limited resources to defend rights-of-way regulations and fee structures before the FCC in Washington, D.C. If this interpretation were correct, it would become necessary to decide whether the proper cause of action for a § 253(c) claim is created by § 253(c) itself or arises from some other source.

Under the first interpretation of § 253(c), a telecommunications provider could not challenge an ordinance or regulation directly on the basis of § 253(c). The telecommunications provider would have to establish that the ordinance or regulation violates § 253(a), and then the burden would shift to the state or local government to establish that the safe harbor provision of § 253(c) applies. Under the second interpretation, § 253(c) could operate as an independent source of claim as well as a safe harbor provision. If a telecommunications provider brought an action challenging an ordinance directly under § 253(c), it would have the burden of establishing that the ordinance violated § 253(c).

The municipality raised two arguments regarding the application of § 253(c) in this case. First, PRTC did not established that ordinance 40 violates § 253(a). Therefore, the district court improperly placed the burden of proof for demonstrating that the fee was "fair and reasonable compensation" on the municipality. Second, Guayanilla argued that, assuming it does have the burden of establishing that the ordinance's 5% gross revenue fee on outgoing calls does fall under the safe harbor provision of § 253(c), they have met their burden.

The Court affirmed that Ordinance No. 40 violates § 253(a). The Court held that it only needed to decide whether the ordinance meets the § 253(c) safe harbor provision, not whether § 253(c) would provide an independent basis for preemption in this case. See *N.J. Payphone Ass'n*, 299 F.3d at 241

Guayanilla argued that the ordinance's 5% gross revenue fee on outgoing calls falls under the safe harbor provision of § 253(c) as securing "fair and reasonable compensation." Guayanilla argued that the 5% gross revenue fee applies only to outgoing calls that make use of public-rights-of way, thereby ensuring “an effective distribution of resources, whereby it collects compensation depending on the use a provider gives to the public rights-of-ways."

PRTC argues that the term "compensation" indicates that any fees imposed by state or local law must be limited to the recovery of costs (for maintenance and repair of public rights of way, such as sidewalk and street repair near telephone poles and equipment), which a gross revenue fee is not tailored to do. The municipality argued that the term "compensation" encompasses both cost recovery and the notion of "rent" for the use of public rights-of-way, and thus a gross revenue fee can be appropriate. The district court concluded that "the most favored interpretation requires that the fees charged by a municipality be related to the degree of actual use of the public rights-of-way, but need not be limited to recoupment of the added costs to the municipality resulting from such use." *P.R. Tel. Co. I*, 283 F. Supp. 2d at 543.

Among the courts that have reached the issue most have not found gross revenue fees or other non-cost based fees to be per se invalid under § 253(c). See, e.g., *Qwest Comms. Inc. v. City of Berkeley*, 433 F.3d 1253, 1257 (9th Cir. 2006), *TCG Detroit*, 206 F.3d at 624-25

The Court did not decide whether fees imposed on telecommunications providers by state and local governments must be limited to cost recovery. Guayanilla presented no evidence of the municipality's costs of maintaining the public rights of way. "Section 253(c) requires compensation to be reasonable essentially to prevent monopolistic pricing by towns. Without access to local government rights-of-way, provision of telecommunications service using land lines is generally infeasible, creating the danger that local governments will exact artificially high rates." *TCG N.Y., Inc.*, 305 F.3d at77-78.

The Court found it could not determine whether the Ordinance results in fair and reasonable compensation as opposed to monopolistic pricing. *P.R. Tel. Co. II*, 354 F. Supp. 2d at 113. The municipality argued that, despite the lack of information about the costs of maintaining the public rights of way, it has nonetheless ensured that the ordinance's fee is "fair and reasonable compensation" because the fee applies only to revenue generated from calls that the providers certify are using public rights-of-way. The Court found two problems with this argument. First, the 5% fee applies to the entire revenue derived from calls that use any portion of the rights of way, regardless of whether the call traverses over one inch or 100 feet of the public rights of way. The fee charged does not directly relate to the extent of actual use of public rights of way. Second, Guayanilla provided no rationale for why it is "fair and reasonable" for the Municipality to charge 5%, as opposed to another percentage, of the revenue generated from these calls. The municipality provided no information or estimates regarding the amount of fees that they expect to collect through the ordinance.

The First Circuit rejected the Sixth Circuit's "totality of the circumstances" test. *TCG Detroit*, 206 F.3d at 625. Under the "totality of the circumstances" test, courts examine "the extent of the use contemplated, the amount other telecommunications providers would be willing to pay, and the impact on the profitability of the business" to determine whether a fee scheme is "fair and reasonable." *City of Santa Fe*, 380 F.3d at 1272-73 (citing *TCG Detroit*, 206 F.3d at 625). In articulating this test, the Sixth Circuit approached § 253(c) as providing a direct cause of action for a telecommunications provider to challenge a regulation or ordinance, not as a safe harbor provision for a state or local government to save its regulation or ordinance once preemption under § 253(a) had been established. See *TCG Detroit*, 206 F.3d at 625.
In any case, even if the First Circuit adopted the Sixth Circuit's test, Ordinance No. 40 would not fit within § 253(c)'s safe harbor. As interpreted by the First Circuit, nothing in the record indicates that the ordinance accounts for the actual use of public rights of way.

Second, the municipality fails to point to any telecommunications providers who have been willing to pay the requested fee. Third, the fee would represent a significant increase in PRTC's costs, undermining the profitability of its operations.

Congress enacted the TCA in an attempt to maintain "the balance . . . necessary to effectuate its intent to enhance competition and eliminate local monopolies while leaving room for reasonable regulation of issues of particular state and local concern." *N.J. Payphone Ass'n*, 299 F.3d at 245. Ordinance No. 40 disrupts this balance.

(Tower Siting – "Substantial Evidence")

Omnipoint Communications, Inc. v. City of White Plains, No. 04-3286 (2d Cir. Dec. 2, 2005) A cellular telephone provider sued the City of White Plains and its planning board, alleging violations of the Federal Telecommunications Act (TCA), 47 U.S.C. § 332, arising from the denial of its application for a special permit to build a 150-foot communications tower on a local golf course. The district court ruled, on a motion for summary judgment, that the board's decision was unsupported by substantial evidence and therefore, violated the TCA. On appeal, the Second Circuit reversed, concluding that substantial evidence supported the board's decision. The board credited expert testimony that the tower's adverse visual impact (e.g., that a 150-foot tower could not effectively be disguised as an evergreen in a neighborhood where the tallest evergreen was 51 feet high) would impact property values, and it was an available inference from the facts presented to the board that other cell companies served the area in which Omnipoint had its gap. Even if the board's decision was unsupported by substantial evidence, the court held it was required to vacate the district court's damages award (which relied exclusively on Section 1983), given the Supreme Court's intervening decision in *City of Rancho Palos Verdes v. Abrams*, 125 S. Ct. 1453 (2005).
(Thanks to IMLA for this report.)

Sprint Telephony PCS v. County of San Diego, 377 F.Supp. 2d 886 (S.D. Cal. 2005)
In Sprint Telephony PCS, the court held that the county's zoning ordinance relating to wireless telecommunications facilities violated the federal Telecommunications Act of 1996. Sprint challenged the ordinance pursuant to 47 U.S.C. § 253(a), which bars all state and local regulations that "prohibit or have the effect of prohibiting" the ability of an entity to provide interstate or intrastate telecommunications service. The court found that the ordinance's permit regulations, taken together, had the effect of prohibiting the provision of telecommunications services. The court was especially concerned with two aspects of the ordinance. One provision would have permitted other carriers to co-locate on Sprint's facilities, even thought the ordinance was unclear as to what the terms and conditions of the co-location would be. The other provision provided that the county's Director of the Department of Planning and Land Use could require the applicant to provide "any additional information" on the project. The court found this provision to be overbroad, with no limit on what and how much additional information the Director could require from the applicant. One bright spot in the opinion, however, is that the court found that section 253(a) did not provide a private right enforceable through 42 U.S.C. § 1983. The court's holding echoed that of the recent case of *City of Rancho Palos Verdes v. Abrams*, 125 S. Ct. 1453 (2005), where the U.S. Supreme Court held that a plaintiff could not enforce limitations on local zoning authority set forth in section 332(c)(7) through section 1983.
(Thanks to John Pestle for this report.)

(Telecommunications Ripeness of Challenge to Municipal Entry into Market)

KCCP Trust v. City of North Kansas City, No. 05-2265 (8th Cir. Dec. 29, 2005)
The court of appeals held that it lacked jurisdiction to hear a suit seeking to enjoin the city from building a fiber optic network. The city was engaged in reviewing the feasibility of constructing a fiber optic network when a subsidiary of Time Warner Cable sued under a state statute which prevented local governments from owning or operating a cable system without holding a referendum. The court held that the activities of the city did not amount to owning or operating a cable system, and that the case was not ripe for review. (Thanks to IMLA for this report.)

(State Legislation Eliminating Local Video Franchising Authority)

The bill adopted by the N.C. General Assembly during its last session is presented as one example of a state preemption of local cable franchising. Given the likelihood of federal pre-emption of the field, no attempt is made in this report to present a survey of all jurisdictions.

"AN ACT to promote consumer choice in video service providers and to establish uniform taxes for video programming services." North Carolina Session Law 2006-151 House Bill 2047

This new legislation, effective January 1, 2007, repeals the existing authority of local governments to franchise cable television services within municipalities and places the franchising authority exclusively with the Secretary of State. Companies will file a notice of franchise with the Secretary of State and thereby become entitled to "construct and operate a cable system over public rights-of-way within the area to be served."

Once the act is effective, existing franchise holders are entitled to terminate their local franchise, and all responsibilities under the franchise, essentially as soon as a competitor provides a service line that goes by any household for which the franchise holder has a service line.

The new G.S. 105-164.44I protects existing local government franchise revenues by giving cities and counties a share of the state sales taxes on covered services. (It has been estimated that this scheme will provide more money state-wide than is received under existing franchise taxes.)

Several specific provisions regarding city rights with respect to cable and competitive systems are included:

- G.S. 66 – 351(b) refers to Chapter 160A for the regulation of public rights-of-way by a city. G.S. 160A-296(a)(6) was also amended to include the following: "To the extent a municipality is authorized under applicable law to impose a fee or charge with respect to activities conducted in its rights-of-way, the fee or charge must apply uniformly and on a competitively neutral and nondiscriminatory basis to all comparable activities by similarly situated users of the rights of way."
- State-franchised companies are required to provide annual reports to the Secretary of State on the extent of their services, and copies of these reports must be filed with each city and county within the company's service area.
- Section 66-356(d) provides that no build-out requirements apply to cable service providers under state franchises.

- Each city will be entitled to 2 or 3 PEG channels, depending on population size, or more if the city has more than its minimum entitlement under existing arrangements. Section 66-357(c) provides, "A city with a population of at least 50,000 is allowed a minimum of three initial PEG channels…" The legislation also proves standards by which a city may become entitled to further PEG channels up to seven, and establishes standards for the operations of such channels. A grant fund is established using money from the state-shared taxes to create grants for the PEG channel capital costs.
- Upon written request by the municipality, a State-franchised provider must provide free cable service to any public building within 125 feet of the provider's cable system.

(Thanks to VaLerie Kolczynski, Deputy City Attorney, Concord, NC for this report.)

(Gas and Electric Utility Franchise Fees MAY be a Tax)

Kragnes vs. Des Moines, IA, 714 N.W.2d 632; 2006 Iowa Sup. LEXIS 75, (5/26/2006)

A citizen of the city of Des Moines brought an action against the city alleging the franchise fees the city assessed in its franchise agreements for gas and electric power services are illegal taxes. Both parties moved for summary judgment on this issue. The district court found the franchise fees were illegal taxes and enjoined the city from collecting the fees. The Supreme Court held that any franchise fee charged by a city must be reasonably related to the city's administrative expenses in the exercise of its police power, "including the costs associated with any incidental consequences of the franchised services" in order not to constitute an illegal tax, and cited with approval prior Iowa precedent noting that the "incidental consequences" often are the most important. As is well known to municipal attorneys, the costs associated with premature street degradation due to utility lines is one such substantial "incidental consequence" of utility usage of public rights of way. The Court also found a genuine issue of material fact as to whether all or part of the franchise fees are related to administrative and incidental costs. The district court's ruling was reversed. The case was remanded for further proceedings.

(U.S. Pre-emption of Pipeline Safety)

Olympic Pipeline Co. vs. Seattle 04-35307 U.S. Ninth Circuit (2/8/2006)

Olympic operates an interstate petroleum products pipeline. A "lateral" pipeline traverses the City of Seattle. In 1999 a portion of the main pipeline in Bellingham, WA exploded, killing three people and causing extensive environmental damage.

Olympics franchise with Seattle expired on 12/31/2000. Before renewing the franchise, Seattle asked Olympic to perform safety tests. Olympic refused. Seattle then stated that it would "suspend operation" of the "Seattle Lateral" until adequate financial assurances were received and the safety tests performed. Olympic filed an action seeking injunctive relief to prevent closure of the lateral, and a declaratory judgment that the Pipeline Safety Improvement Act of 2002 (PSA) 49 USC § 60101 preempts Seattle's attempts to regulate "safety, design, construction, testing or operation" of the pipeline, and termination of the franchise is a violation of the Commerce Clause and the franchise fees sought by Seattle are "arbitrary and unreasonable". The district court granted Olympic an injunction and found that the PSA preempted Seattle's ability to regulate pipeline safety.

On appeal the Court first considered the issue of, "whether the PSA preempts a municipality's attempt to impose safety standards on a hazardous liquid pipeline?" The Court found that the PSA entirely preempts the field of pipeline regulation. States may regulate intrastate pipelines by agreement with US DOT. Washington had such an agreement, but Seattle did not. The Court did find that a municipality could regulate pipeline safety by contract if "in entering into the Franchise Agreement, the City acted as a municipal proprietor rather than a regulator." Both courts found that Seattle acted only as a regulator rather than a "private market participant". Seattle argued "that Olympic waived the right to argue that the safety regulations are preempted when it entered into the Franchise Agreement and Indemnity Agreement…" The Court found that the doctrine of federal preemption is not a Constitutional right available to individuals, but rather a power of the federal government to be used solely at the discretion of the government. Seattle also claimed that if Seattle's safety regulations were not upheld, Olympic and others "will continue to enter into contracts they know to be unenforceable." The Court deferred to Congress' public policy in this regard, stating that it is necessary to have uniform national standards for the safety of pipelines so that the regulatory burden is not onerous and confusing. The Court noted that hazardous liquid pipelines run through 21 states. The Court also notes that it was by no means clear that Seattle's requirements are better than those of the US or State. The decision of the panel was unanimous.

(Waste Removal - Exclusive Franchise Agreement)

Southern Waste Systems v. City of Delray Beach, No. 04-13035 (11th Cir. Aug. 16, 2005)
After an open tendering process, the city and BFI entered into a contract, subsequently codified by ordinance, that provided that BFI would be the exclusive waste hauler in the city. Southern Waste Systems (SWS) did not submit a bid, but sued the city and BFI seeking a declaratory judgment that the agreement was unconstitutional, and an injunction against its enforcement. It argued the exclusive franchise violated the Commerce Clause by excluding all other companies (interstate and intrastate) from waste collection, and that the city could not constitutionally require its residents to use a single hauler unless it eliminated the waste hauling market entirely by providing those services to its residents using public funds. The district court entered partial summary judgment for SWS. On appeal, the Eleventh Circuit reversed, finding that the agreement was constitutional. The Commerce Clause did not forbid such exclusive franchise agreements so long as the bidding process was open to all and there was no requirement that local interests be favored in the performance of the contract. Second, on the "forced business transaction" argument, the fact that BFI billed customers directly and rebated a fee to the city did not transform an otherwise constitutional exclusive waste hauling contract into an unconstitutional forced business transaction. The critical issue was not whether direct billing by BFI constituted a forced business transaction, but whether the award of the contract discriminated in any way against non-local interests. (Thanks to IMLA for this report.)

(Towing Restrictions and Preemption)

Tillison v. Gregoire, No. 04-35539 (9th Cir. Sept. 19, 2005)
A tow truck operator challenged a Washington Code provision regulating towing as preempted by the Federal Aviation Administration Authorization Act of 1994 (FAAAA). The Code provision, Section 46.55.080(2), restricted patrol and non-consensual towing. For tows without the vehicle owner's permission, it required that a towing company obtain written authorization from the private property owner before towing a vehicle from the private property, or from a public official before towing a vehicle from public property. It also required the private property

owner or the public official be present for the tow and prohibited the towing company from serving as an agent for the private property owner or the public official. The State argued that the applicable Code sections were not preempted because the provisions: (1) were enacted and enforced pursuant to the safety regulatory authority of Washington State, (2) were not related to "route" or "service," or (3) were related to the price of nonconsensual towing. The Ninth Circuit reviewed several towing cases and their holdings before concluding that the Code section was not preempted.
(Thanks to IMLA for this report.)

(Government Whistleblowers First Amendment Protection)

Ceballos v. Garcetti, 361 F.3d 1168 (9th Cir. 2004), cert. granted, 73 U.S.L.W. 3513 (U.S. Feb. 28, 2005) 126 S. Ct. 1951 (May 31, 2006)

Note: This case that was argued twice, in October, 2005 and March 2006. Rehearing the case allowed Justice Samuel Alito to weigh in on the case. Alito voted in the majority along with Justices Thomas, Roberts, Scalia and Kennedy, the author of the majority opinion.

The case involves a Los Angeles County district attorney ("calendar attorney) who claimed he was transferred, demoted and otherwise suffered retaliation after first arguing to his superiors in a disposition memo that a deputy sheriff may have lied to obtain a search warrant and then testifying at the hearing of the defense motion challenging the warrant. "The issue presented by the case is: Should a public employee's purely job-related speech, expressed strictly pursuant to the duties of employment, be cloaked with First Amendment protection simply because it touches on a matter of public concern, or should First Amendment protection also require the speech to be engaged in "as a citizen," in accordance with this Court's holdings in *Pickering v. Board of Education*, 391 U.S. 563 (1968), and *Connick v. Myers*, 461 U.S. 138 (1983)?" The majority found that when public employees make statements pursuant to their official duties, such employees are not speaking as private citizens for First Amendment purposes, and thus the First Amendment does not prohibit managerial discipline of such employees for such speech.

The Court found that government employees who make public statements outside the course of performing official duties retain some possibility of First Amendment protection. "Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen." However, government employers have sufficient discretion to manage their operations, particularly by enforcing discipline as to official behavior and speech. "Rather, the controlling factor is that Ceballos' expressions were made pursuant to his official duties. That consideration distinguishes this case from those in which the First Amendment provides protection against discipline. Ceballos wrote his disposition memo because that is part of what he was employed to do."

The majority found that a contrary rule would commit state and federal courts to a "new, permanent, and intrusive role involving judicial oversight of communications among government employees and their superiors in the course of official business". Finally, plaintiff's allegation of unconstitutional retaliation failed, for the deputy had spoken (a) not as a private citizen, but (b) pursuant to his official duties as a prosecutor fulfilling a responsibility to advise his supervisor about how best to proceed with a pending case.

In dissent, Justice Stevens expressed the view that (1) a government employee's supervisor could, consistent with the First Amendment, take corrective action when the employee's speech was inflammatory or misguided, but not when such speech was merely unwelcome; and (2) with respect to public employees, there was no categorical difference between speaking as a citizen and speaking in the course of one's employment.

Justice Stevens also joined Souter and Ginsburg expressing the view that (1) private and public interests in addressing official wrongdoing and threats to health and safety could outweigh the government's stake in the efficient implementation of policy; (2) a public employee commenting on subjects in the course of duties ought not to prevail on a First Amendment retaliation claim unless the employee (a) was speaking on a matter of unusual importance, and (b) satisfied high standards of responsibility in so speaking; and (3) because the attorney's action had alleged retaliation not only for submitting the memorandum, but also for making other statements--not all of which would have been made pursuant to official duties in any obvious sense--it would be open to the Court of Appeals, on remand, to consider any retaliation shown for those other statements.

Finally, Justice Breyer expressed the view that (1) the First Amendment sometimes authorized judicial actions based on a government employee's speech that (a) involved a matter of public concern, and (b) took place in the course of ordinary job-related duties; (2) this was so only in the presence of (a) augmented need for constitutional protection, and (b) diminished risk of undue judicial interference with governmental management of the public's affairs; and (3) these conditions were met in the case at hand.

(Whistleblowers – Political Appointee Not an Employee or Authorized Representative)

Anderson v. U.S. Dept. of Labor, No. 03-9570 (10th Cir. Sept. 2, 2005)
The plaintiff was appointed by the mayor to represent Denver citizens on the Board of the Metro Wastewater Reclamation District (Metro), a political subdivision of the State of Colorado that provides wholesale wastewater treatment to municipalities and sanitation districts. The plaintiff alleged that after she opposed the Board's plan to treat certain effluents because they contained plutonium and other radio nuclides, the Board discriminated against her for speaking out and she was not reappointed after her term expired. She brought a whistleblower action against Metro pursuant to various environmental statutes that prohibit discrimination against "any employee or any authorized representative of employees." The Administrative Review Board of the Department of Labor concluded she was not an employee or authorized representative of Metro and, therefore, determined she lacked standing to sue. On appeal, the Tenth Circuit agreed. (Thanks to IMLA for this report.)

(Solid Waste Ordinance – Commerce Clause)

Nat. Solid Wastes Mgmt. Ass'n v. Davies County, No. 04-6498 (6th Cir. Jan. 24, 2006)
The defendant county enacted an ordinance that provided all franchise agreements entered into under the ordinance required the franchisee to dispose of the municipal solid waste collected at the county landfill or transfer station; that non-exclusive franchises would be granted to all haulers that were properly registered and in compliance with applicable laws; and that no hauler would be allowed to collect municipal solid waste in the county unless granted a franchise. An industry group sued, alleging that the ordinance was unconstitutional. The district court agreed and enjoined its enforcement. On appeal, the Sixth Circuit affirmed. The plaintiff had standing,

and the ordinance was facially discriminatory against interstate commerce. By forcing the plaintiff's members to use the county disposal and transfer facilities, the ordinance prohibited these members from using other in-state and out-of-state facilities. The court declined to adopt the Second Circuit's public/private ownership distinction with respect to the dormant Commerce Clause, as set out in *United Haulers Assoc., Inc. v. Oneida-Herkimer Solid Waste Mgmt. Authority*, 261 F.3d 245 (2d Cir. 2001).
(Thanks to IMLA for this report.)

(Solid Waste Disposal and Commerce Clause)

IESI AR Corp. v. Northwest Arkansas Reg'l Solid Waste Mgmt. Dist., No. 05-1299 (8th Cir. Jan. 5, 2006)
The Eighth Circuit held that a waste management district's regulation – requiring waste be disposed of at landfills either within one of the eight counties located within the district, or out-of-state – did not violate the Commerce Clause. See (Thanks to IMLA for this report.)

(Public Policy Voids Exculpatory Agreement in Connecticut)

Hanks v. Powder Ridge Restaurant Corp., SC 17327 (Conn. Nov. 29, 2005)
The adult plaintiff (new to snowtubing) injured himself snowtubing while using the defendants' ski, snowboard and snowtube facility. Patrons were required to sign a "Waiver, Defense, Indemnity and Hold Harmless Agreement, and Release of Liability," which the plaintiff read and signed. The defendants moved for summary judgment, claiming that the agreement barred the plaintiff's negligence claim as a matter of law. The plaintiff argued that the agreement was unenforceable because it violated public policy – specifically, that a recreational operator could not, consistent with public policy, release itself from liability for its own negligent conduct where the operator offered its services to the public generally, for a fee, and required patrons to sign a standardized exculpatory agreement as a condition of participation. The Connecticut Supreme Court reviewed case law from other jurisdictions and agreed. Considering the totality of the circumstances, the court pointed to factors such as: the operators' care and control of the facilities, equipment, and safety gear; that patrons were under the care and control of the recreational operators as a result of an economic transaction; that the plaintiff was unable to negotiate the agreement terms, nor was he offered the option of procuring protection against negligence at an added cost; and that while the plaintiff had the option not participating, the defendants had a bargaining advantage under such circumstances.
(Thanks to IMLA for this report.)

(Public Policy Voids Exculpatory Agreement in New Jersey)

Hojnowski v. Vans Skate Park, New Jersey Supreme Court (7/17/2006) 2006 N.J. LEXIS 1080

Twelve-year-old Andrew Hojnowski was injured while skateboarding at a facility operated by Vans. Andrew's mother executed a release on Andrew's behalf, which was required in order for Andrew to enter the skate park. The exculpatory release contained a clause agreeing to submit any claims against Vans to arbitration, as well as provisions limiting Vans' liability for injury.

The trial court granted Vans' motion for summary judgment, dismissing the Hojnowski's complaint without prejudice and ordering arbitration. The trial court did not rule on the validity of the liability release, finding the issue for the arbitrators to determine.

The Appellate Division affirmed the validity of the arbitration provision. The majority determined that a pre-injury release of liability executed by a parent on behalf of a minor child violates public policy and is, therefore, unenforceable. The dissent argued that the court should have deferred to the parent's decision to enter into the agreement and, hence, should have enforced the waiver.

The Supreme Court held that a parent may agree to bind a minor child to an arbitration provision, which in essence constitutes a choice of forum, a parent may not bind a minor child to a pre-injury release of a minor's prospective tort claims resulting from the minor's use of a commercial recreational facility. The Court clearly ruled on the public policy grounds that the State has a duty to protect those unable to care for themselves under the *parens patriae* doctrine. Business owners owe invitees a duty of reasonable or due care to provide a safe environment because it is the business owners who are in the best position to control the risk of harm. The risk of loss should fall on the party best suited to avert injury. The operator of a commercial recreational enterprise can inspect the premises for unsafe conditions, train staff in respect of the facility's proper operation, and regulate the types of activities permitted to occur. The business operator can also obtain insurance and spread the costs of insurance among its customers. Children are not in a position to discover hazardous conditions or insure against risks. In addition, the expectation that a commercial facility will be reasonably safe is especially important where the patron's are minors. To permit waivers of liability would remove a significant incentive for operators of these types of facilities that attract children to take reasonable steps to protect their safety.

(Conflicts of Interest Imputed to City Legal Department)

City and County of San Francisco v. Cobra Solutions, Inc., No. S126397 (Cal. June 5, 2006)

A company seeking contracts for IT services to the city retained a private law firm. Two attorneys in that firm provided various services to the company, advising it about doing business with the city. Fifteen months later, one of those attorneys was elected as the city attorney. Before taking office, the new city attorney announced a blanket policy that he would personally not participate in any case involving a client of his former firm, regardless of whether he had a conflict in any particular matter. At that time, the city's investigation was already underway. Fifteen months after the new city attorney was sworn in, his office named the company as a defendant in a complaint seeking damages for the city on allegations of fraud, statutory violations, and breach of contract. An "ethical screen" was used but, nonetheless, the company sought to disqualify the city attorney's entire office, arguing that, as its former attorney, the city attorney had obtained confidential information about it that precluded him and his office from representing the city against it. In support, the company submitted a bill showing a charge for four-tenths of an hour attributable to the attorney's review of a city contract. The trial court disqualified the city attorney and his office, and ordered the city to retain outside counsel on the basis that the personally-conflicted counsel was the head of the office. The Court of Appeal upheld the ruling, and on further appeal, the California Supreme Court affirmed. "Individuals who head a government law office occupy a unique position because they are ultimately responsible for making policy decisions that determine how the agency's resources and efforts

will be used. Moreover, the attorneys who serve directly under them cannot be entirely insulated from those policy decisions." The dissenting justice's opinion argued a case-by-case determination was more appropriate than a "rigid rule [that] needlessly burdens the public," particularly as the ABA Model Rules rejected automatic disqualification because "the government's ability to function would be unreasonably impaired," and "attorney mobility and firm mergers have increased exponentially."
(Thanks to IMLA for this report.)

(Due Process Notice(s) Required in Ad Valorem Tax Sales)

Jones v. Flowers, U.S. Supreme Court No. 04-449, 2006 WL 1082955 (Apr. 26, 2006)

ISSUE: Is a government is required to make additional efforts to locate a property owner when a notice of a tax sale or property forfeiture is returned undelivered.

Jones, the property owner, separated from his wife and moved elsewhere in the same city. His wife continued to live in the home. Jones failed to notify the tax collector of his new address. The property taxes were paid by the mortgage company, but once the mortgage was paid off, the taxes went into arrears. The taxing authority, the Arkansas Commissioner of State Lands, mailed Jones a certified letter (which required a signature) at Jones' last known address, as contained in the Commissioner's records, being the property address. The letter advised that unless the taxes were paid and the property redeemed, it would be subject to a tax sale in two years. That letter was returned marked "unclaimed." (The state law required a taxpayer to furnish his or her correct address to the Commissioner.) Two years later, the Commissioner published a notice of public sale in a local newspaper, and a private sale was subsequently negotiated with the buyer, Flowers. Before the sale, the Commissioner mailed another certified letter to Jones at the property address, which was also returned unclaimed.

Jones filed a state court suit alleging that the Commissioner's failure to provide adequate notice resulted in the taking of his property without due process. Jones argued that the state should have made a reasonable search of public records to attempt to ascertain his actual address before selling the property. The trial court grated summary judgment in favor of Flowers and the Commissioner, finding that Arkansas' tax sale statute (Ark. Code Ann. § 26-37-301 (Repl. 1997)), which set out the notice procedure used, complied with due process. The Arkansas State Supreme Court affirmed. Relying on *Dusenbery v. United States*, 534 U. S. 161, 170 (2002), it held that attempting to provide notice by certified mail satisfied due process in the circumstances presented.

The U.S. Supreme Court reversed and remanded. The Court noted that it had never addressed whether due process entailed further responsibility when the government became aware, prior to the taking, that its attempt at notice has failed. While *Dusenbery* did not require actual notice, due process required the government to provide "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co*., 339 U. S. 306, 314 (1950). Here, the Commissioner was aware, by virtue of the notices being returned marked "unclaimed," that the notices were not reaching the intended – and affected– recipient.

Noting that "[w]e do not think that a person who actually desired to inform a real property owner of an impending tax sale of a house he owns would do nothing when a certified letter sent to the owner is returned unclaimed," the Court found it was unreasonable of the Commissioner not to follow up and take other steps to notify Jones. The Court declined to specify the form of service or notice that would be adequate beyond stating that what steps were reasonable in response to new information (e.g., the failed notice) depended upon what the new information revealed. In this case, since the unclaimed letter was consistent with Jones still possibly being at the address, one alternative would have been to resend him the letter by regular mail, which did not require a signature. Other alternatives would have been "to post notice on the front door, or to address otherwise undeliverable mail to 'occupant'" (both being measures with a "significant chance" that the occupants would alert the owner). However, although Jones had argued that the Commissioner was required to have searched for his new address in the phonebook and other government records (such as income tax rolls), the Supreme Court stated it did "not believe the government was required to go this far."

Chief Justice Roberts delivered the opinion of the Court, in which Justices Stevens, Souter, Ginsburg, and Breyer joined. Justice Thomas filed a dissenting opinion, in which Justices Scalia and Kennedy joined. Justice Alito took no part in the consideration or decision of the case.

(Notice of Demolition to Mortgagee Required)

Equity One v. City of Pittsburgh, No. 2:03CV1816, 2006 WL 1509334 (W.D. Pa. May 30, 2006) The plaintiff held a mortgage on a property which was subsequently transferred to the city for tax arrears. Its interest was on record prior to the time the city acquired the property. The city inspected and condemned the property, and recommended demolition. A demolition notice was posted on the property, but no other notice was given to the plaintiff. The plaintiff sued, alleging violations of procedural due process rights under the state and U.S. Constitutions. Referring to the U.S. Supreme Court's recent ruling in *Jones v. Flowers*, 126 S.Ct. 1708 (2006), the court granted the plaintiff's motion for summary judgment. Since the mortgagee clearly had a substantial property interest which would have been significantly affected by a demolition, it was entitled to more than just posting a notice on the site. The evidence indicated that the city did not provide notice to the plaintiff and that it had a policy of not providing notice to mortgagees at that time.