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Title: Federal Cable Legislation: Summary and Update

by

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Federal Cable Legislation: Summary and Update

by John W. Pestle

Introduction: This is a brief summary in broad strokes of the cable aspects of telecommunications legislation pending before Congress, as of mid-August. Because this is a brief summary and because the bills may yet change (e.g.--on the floor of the Senate or in Conference Committee), many of the problems in the detailed language of the bills are not mentioned.

Procedurally, the House bill has passed, and the Senate Commerce Committee is in the process of reporting out a bill following July hearings. Senate Majority Leader Bill Frist has set a requirement that proponents of the Senate bill have 60 votes in favor of it before he will bring it to the floor for a vote. As of the start of the Senate's August recess, proponents did not yet have the 60 votes.

Because the bills (especially the Senate bill) address other controversial issues, most notably "net neutrality," it is unclear whether they can be passed before the end of the year.

Legislation in General: Two main bills are before Congress to federalize cable franchising. Both bills are now numbered "H.R. 5252" although their texts are entirely different (the Senate version starts off by striking all of the House text, and then replacing it with different language). Each bill is lengthy, the Senate version in particular (at 287 pages), and for that reason are not attached. Both are available on our web site at www.varnumlaw.com/cable (go to Federal legislation in the right column).

As to cable, the bills in general provide that when a second cable company serves a community, local cable franchising is, in effect, replaced with national franchising. This responds to the claims of phone companies that requiring them to obtain thousands of individual cable franchises will take too long, delay competition, and delay the upgrade of broadband service.

In a provision sought by cable companies, the bills state that once a competing company provides service under a national franchise, the incumbent cable company can also obtain a national franchise that "supersedes" its existing local franchise (and supersedes franchises granted at the state level as well, such as under recent legislation in Texas, New Jersey, Kansas, or the Carolinas). There are obvious questions and legal problems with such attempts to abrogate existing franchises.

To varying degrees, the bills override state laws prohibiting municipalities from providing cable and telecommunications services (presumably to increase competition and to allow municipalities to serve areas bypassed by phone companies entering the cable business). The House bill is much better than the Senate bill in this regard.

The bills share the philosophy that if cable is deregulated, competition and broadband service will necessarily increase, rather than (for example) conditioning regulatory relief on the bills' beneficiaries meeting certain Congressionally specified goals (such as providing competition in cable to a certain number of residents).

House Bill: On June 8, 2006, the U.S. House passed its version of H.R. 5252, known as the ‘‘Communications Opportunity, Promotion, and Enhancement Act of 2006’’ or COPE Bill. This bill adds a lengthy new section titled “National Cable Franchising” to Title VI, the cable television title, of the Communications Act of 1934, 47 U.S.C. § 541 *et seq*., which is otherwise essentially unchanged. Current renewal procedures (and other provisions) are left intact, at least until a new cable company gets a national franchise in a municipality.

The new section creates a national franchise, which takes effect 30 days after filing a certification form with the Federal Communications Commission (FCC). Basically, anyone can obtain a national cable franchise and specify the municipalities in which they wish to provide cable service. The bill expands the definition of “cable service” to attempt to include AT&T’s “Internet protocol” television service (IPTV), which AT&T claims is not a cable or telecommunications service, and thus is exempt from most regulation.

A key point of controversy surrounding the House bill is that a national franchisee is *not* required to provide service anywhere. Accordingly, there is no “duty to serve” or “buildout requirement” such as to serve all areas with at least 20 homes per mile of line. Discrimination based on the income of a group of potential subscribers is prohibited, but enforcement of this (and other provisions of the bill) is largely by the FCC.

The national franchisee must provide as many channels for government, educational, and public use as the incumbent (with the number of channels increasing every decade), plus one percent of gross revenues to support such channels. Incumbent providers must continue to provide existing I-NETS (communications networks for municipal use), although new ones are prohibited.

Municipalities continue to receive franchise fees of up to five percent of gross revenues (they determine the percentage), and audits are provided for.

There is language preserving local control of the rights-of-way, *if* it is “reasonable, competitively neutral, and non-discriminatory” (terms that have been litigated in the past), with enforcement in the local courts.

The FCC is required to issue new consumer protection rules, which can be enforced by municipalities or the FCC.

Senate Bill: The Senate Commerce Committee has completed the hearing where it marked up (amended) its version of H.R. 5252 (which was previously numbered S. 2686) but as of mid-August had not yet formally reported out the marked up bill. However, a staff draft of the markup was released on August 4, which is what is used for this paper. The Senate bill has the short titles of "Advanced Telecommunications and Opportunities Reform Act" (or ATOR) and "Communications Act of 2006."

The Senate bill is much longer than the House bill, because it addresses many different topics and thus makes many more changes to the Federal Communications Act of 1934. Thus, it has fourteen (14) separate titles, each addressing a different topic.

From a state and local government standpoint, the Senate bill has major problems due to its

preemption of items such as cell phone taxes, taxes on the Internet, local franchising, etc. As a result, all national municipal groups, the National Conference of State Legislatures and the National Governor's Association oppose the bill.

A major portion of the bill is its Title III on cable and video franchising. The changes made by this portion of the bill are harder to follow than its House counterpart, because to a significant degree the Senate bill makes scattered but significant wording changes throughout Title VI (the Cable Act portion) of the Communications Act of 1934. By contrast the House bill adds a self-contained section addressing national franchising and for that reason is easier to comprehend.

As to cable and video, the Senate bill effectively nationalizes cable franchising by requiring the FCC to issue a standard franchise application whose use by municipalities is mandatory. Municipalities must grant such applications within 90 days of receipt. Failure to act in this time period leads to the application being deemed granted but without financial support (see below) for public, educational, and local government channels (commonly known as PEG channels).

Like the House bill, the Senate bill allows basically anyone to get a national franchise and to specify the municipalities in which they are authorized to provide service, and attempts to classify IPTV as a cable service.

Again like the House bill, there is also no buildout requirement. Senate floor amendments that will propose changing this are likely, should it come to a vote in the full Senate.

Redlining groups on the basis of income, race, or religion is prohibited, unless excused by technical feasibility, commercial feasibility, operational limitations, or physical barriers; enforcement is only by the state attorney general; and remedies may not use quotas, goals, or timetables. These exceptions and enforcement provisions make the effect of the redlining provisions problematic.

A national franchisee must provide as many government, educational, and public channels as the incumbent – with the number increasing every 15 years – plus financial support for them equal to the *greater* of one percent of gross revenues or that already provided by the incumbent (including lump-sum or one-time payments). Municipalities may require the continuation of existing I-NETS, but may not require new ones.

The Senate bill's franchise fee provisions are roughly similar to those in the House bill.

On rights-of-way, franchisees must agree to comply with municipal regulations regarding their use and occupation, including police powers, that are consistent with the bill. Other portions of the bill state that State and local laws applicable to national franchisees must be "reasonable, competitively neutral, nondiscriminatory, and consistent with State police powers" and limit permitting fees to "compensating that government for the costs incurred in managing the public rights-of-way." Similar wording in other statutes has lead to disputes. All disputes under these sections go to local courts, not to the FCC.

No local law can effectively prohibit the provision of cable service (wording similar to current telecommunications statutes, which have spawned some litigation).

And also like the House bill, the Senate bill requires the FCC to issue new consumer protection rules. These must include penalties payable to subscribers for violations, and municipalities can enforce such rules.