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October 12, 1999

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Ex Parte Letter Re: Cases WT 99-217; CC 96-98

Dear Secretary Salas:

Enclosed are two (2) copies of an ex parte presentation in the above-referenced proceeding.

Very truly yours,

Michael J. Czymbor
City Administrator

MJC:bg

Enclosures

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Current Michigan and Federal Developments

on

Cable and Telecommunications

prepared for

Michigan Municipal League

Centennial Celebration

October 7, 1999

Grand Rapids, Michigan

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Current Michigan and Federal Developments on Cable and Telecommunications

by
John W. Pestle[1]

I. **Introduction:** This paper briefly summarizes several major developments at the Michigan and Federal level regarding cable and telecommunications. The three principal topics covered are:

A. Current cable/telephone activities involving Michigan municipalities.

B. FCC Proceeding to preempt municipal authority on wireless antenna, building wiring, control of rights of way and taxes.

C. House Bill 4804--Rewrite of Michigan Telecommunications Act.

II. **Cable and Telephone Developments**: The following is a summary of the major types of cable and telephone matters involving Michigan municipalities in the last year.

A. Cable Franchise Renewals

1. Many municipalities have renewed or in the process of renewing their cable franchise

2. It is rarely possible to terminate a cable company. The principal issue in the renewal will be what terms and conditions the municipality can obtain in the renewal franchise for the better benefit of the municipality and it's residents.

3. Legally there are two ways to renew a cable franchise:

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[1] John W. Pestle is the Co-Chairman of the Energy and Telecommunications Practice Group at Varnum, Riddering, Schmidt & Howlett LLP. The firm represents municipalities nationwide on cable and telecommunications matters. He is a past chair of the Municipal Lawyers Section of the State Bar of Michigan, and past Chair of the Legal Section of the American Public Power Association. He has worked extensively representing municipalities on the Michigan Telecommunication Act amendments of 1995 and their implementation. He received the Member of the Year Award from the National Association of Telecommunications Officers and Advisors in 1996 for his representation of municipalities on the passage and implementation of the Federal Telecommunications Act of 1996. He is a graduate of Harvard College, Yale Graduate School and University of Michigan Law School.

The firm's web site, www.vrsh.com, contains extensive information on cable and telecommunications matters including summaries of recent developments of interest to municipalities and copies of papers and FCC filings that may be of interest.

a. **Formal Process**--under the Cable Act the **only way** to

(1) Terminate a cable franchise or,

(2) Force a cable company to agree to legitimate terms (necessary to correct problems, meet future community needs) which the cable company dislikes.

(3) The formal process involves consultants to determine community needs; public hearings and the like.

b. **Informal Process**--that involves simply negotiating with the cable company.

(1) Frequently used by smaller communities or if the cable company is generally willing to provide what a municipality wants on renewal.

(2) Is similar to the process used to originally award a cable franchise.

(3) But in contrast to the initial award of a franchise, a municipality lacks bargaining power because it cannot credibly threaten to deny renewal if the cable company doesn't meet legitimate community and resident needs (in the initial grant of the franchise the municipality did have bargaining power because it could refuse to award a franchise until the company meets legitimate needs).

c. For a general description of the formal process, informal process, applicable legal requirements and what a municipality can do to enhance it's position in the renewal process see the following papers. To obtain copies contact John Pestle at (616) 336-6725, his secretary, Kim Van Dyke at (616) 336-6743 or see the firm's web site at www.vrsh.com.

(1) Memorandum re: Cable Television Franchise Renewal Procedures.

(2) Cable Franchise Renewals Today.

B. Cable Consolidation/Transfers

1. In the past two years there has been a major consolidation of cable systems with

   a. Three to four companies now serving ninety percent (90%) of the US and

   b. Only one cable company per major metropolitan area.

2. There have been many sales of cable systems, swaps of cable systems and acquisitions by one company of another to accomplish the preceding.

3. Such "transfers of control" typically require municipal approval if the cable franchise (or ordinance) so requires.

4. In such transfers municipalities typically:

   a. Have existing problems and franchise violations corrected.

   b. Examine the qualifications of a potential buyer.

   c. Obtain protections and franchise changes to reflect new developments.

5. For a description of franchise transfers and what municipalities may do in the transfer process see our paper Important Issues Related to Cable Franchise Transfers. To obtain copies call John Pestle at (616) 336-6743 or Kim Van Dyke at (616) 336-6743 or visit the firm's web site www.vrsh.com.

6. Examples of recent cable transfers in Michigan that are part of the preceding consolidation process include:

   a. AT&T purchase of TCI.

   b. AT&T proposed purchase of MediaOne, and related swaps.

   c. Comcast acquiring the TCI/AT&T/MediaOne systems in Southeast and Southern Michigan. This will make Comcast the sole or dominant cable company throughout Southern and Southeast Michigan.

d. Charter buying Cable Michigan, Mercom, Bresnan, TW Fanch and Jones Communications.

III. Franchising a Second Cable Company

A. Currently the best prospect for true competition and resulting pressure to improve service and hold rate increases in line is having a second cable company provide service in a municipality.

B. This is still rare throughout the United States. Michigan is fortunate in having Ameritech New Media which currently has approximately 115 franchises and over 200,000 customers, of which approximately half are in Michigan.

C. Ameritech New Media appears to be towards the end of obtaining cable franchises to serve the Southeast Michigan area where it is currently franchised to serve many communities (notably excluding Detroit). It is unclear when Ameritech New Media may serve other portions of the state. It is currently expanding into the Chicago area, Columbus, Ohio and Cleveland areas, among others.

IV. 1999 FCC Wireless Preemption Proceeding

A. **General**: On July 16, 1999 the FCC

1. Proposed a rule

   a. Preempting state and local laws, ordinances, building codes and deed restrictions affecting telecommunications antennas, and

   b. Allowing multiple telephone companies to (1) place their wires in buildings and (2) place their antennas on buildings but (3) without the permission of the building owner,

2. Issued a Notice of Inquiry to consider preempting local management of rights of ways, compensation, permitting and fees regarding telephone companies, and

3. Also issued a Notice of Inquiry to consider preempting state and local taxation of telephone companies.

4. Further information on the proposed rule and Notices of Inquiry is as follows.

B. **Wireless Preemption**: The FCC's proposed rule would allow any cable or phone company to extend their wires to any tenant of a building and to place their antennas on the building roof. The FCC's stated goal in the rulemaking is to increase competition in local telephone service by allowing any tenant of a building to be physically reached and served by any phone or cable company the tenant chooses. In part the rule would extend the FCC's 1996 rules prohibiting landlords from preventing tenants from installing small direct broadcast satellite dishes to other types of antennas.

1. A principle emphasis of the rulemaking is "fixed wireless" telephone service where a new phone company reaches a building via a microwave dish on the roof, not wires in the streets.

2. To encourage the desired competition to occur, the rule would allow all phone and cable companies to place wires in buildings and antennas on their roofs necessary for this to occur. Building owners (including units of government) would not be allowed to prohibit this from occurring.

3. Municipal concerns on the proposed rule include the following

   a. The rule may create major problems where municipalities are landlords, such as for housing projects. In some states eighty (80) to two hundred fifty (250) new telephone companies have been approved to provide service. Each tenant could have a different wire, antenna and phone company. Serious safety and other problems could occur at prisons and municipal hospitals.

   b. The rule would preempt building codes, zoning codes, safety and environmental laws that would impair placing multiple antennas of unlimited size on the roof of buildings. Private restrictions (deeds, condominiums, by-laws, homeowner association restrictions) on these antennas would be prohibited as well.

   c. Such preemption ignores the safety and other concerns which these items address. For example, by allowing multiple antennas of unlimited size on buildings (without screening) it invites structural problems, collapses and encourages urban blight.

   d. The FCC's rule in part is based upon its broad interpretation of a statutory provision allowing cable and phone companies to use "rights of way" "owned or controlled by a utility." If the FCC broadly

interprets this provision to include the roofs and interiors of buildings, it may well apply it next to streets and highways to achieve the FCC's apparent goal of preempting all local telephone franchising, permitting and fees.

e. It is unclear whether or how the rule will apply or be extended to municipalities that have allowed cellular antennas on their buildings or water towers. If a municipality allows one cellular antenna does the FCC contend that all types of antennas must be allowed, over the municipality's objection and without compensation?

f. The FCC did not publish the proposed rule, making it much harder to provide detailed comments on it.

g. The rule violates principles of Federalism where zoning and local safety concerns are exclusively reserved to municipalities.

h. The rule violates constitutional property rights by taking public and private property without compensation.

i. Congress has not given the FCC authority to take these actions.

j. There is a risk given FCC proceedings in this area that cellular providers may ask–and the FCC may agree–that any resulting rule must be extended to cellular antennas, such that if a municipality (or other landlord) allows a cellular antenna or tower on its property, that it has to allow many other cellular antennas or towers to be placed there (and perhaps on other property as well).

4. The rulemaking is currently pending (initial comments filed in August, 1999, reply comments in September, 1999). Some FCC Commissioners have expressed reservations about the proposed rule due to the taking of private property involved. It is unclear when the FCC will act.

a. We filed Reply Comments opposing the proposed rule on behalf of over 50 municipalities and municipal organizations nationwide, including PROTEC and many Michigan municipalities.

C. **Right of Way/Franchising Preemption**:

1. The case starts a Notice of Inquiry to compile a record on claims by phone companies that "many state and local governments continue to engage of rights-of-way management and compensation practices that the carriers believe are unreasonable, anti-competitive, and contrary to Federal law."

2. The FCC made new claims that it has jurisdiction over local rights of way because municipalities "regulate the entry" of cellular phone companies into the communications business (by requiring franchises or permits where cellular companies build lines in the rights of way to connect their cell towers).

3. The FCC cited recent cases overturning certain aspects of municipal control over rights of way, fees and compensation and ignored cases such as those won by the City of Dearborn upholding municipal rights in this area.

4. The FCC asked for comments regarding right of way management and compensation as it affects phone companies and comments on state legislation restricting municipal authority in this area.

5. Municipal concerns include the following:

   a. Congress removed FCC authority over rights of way in 1996. The FCC is attempting to assert jurisdiction in defiance of Congressional wishes.

   b. Phone company claims to the FCC about municipal conduct have often been overstated or untrue. The FCC should require specific information (name of municipality, date and place) on allegations of municipal misconduct and serve such allegations on the affected municipality so it may respond. It has not done so.

   c. Local control of rights of way is essential for the public health, safety and welfare. Compensation by phone companies for their use is required to compensate the public for the large sums spent on highways and to prevent subsidies to telephone companies.

   d. Under principles of Federalism and constitutional protections against taking private or government property the FCC may not intrude in this area.

6. Comments in both the Right of Way/Franchising Preemption matter and the Property Tax matter (see below) are due October 12, Reply Comments are due on December 12.

7. We are filing Reply Comments in this proceeding on both the Right of Way and Property Tax issues on behalf of over 50 municipalities and municipal groups across the country at a fixed price of $300 per municipality. If your municipality would like to participate in this filing and oppose Federal preemption of your right of way authority, fax or mail the attached form to us.

D. **Property Tax Preemption**:

1. The FCC similarly instituted a Notice of Inquiry on whether the assessment and collection of taxes and "other fees" are "unfair" to new telephone providers or "impede competition."

2. The FCC inquiry goes not only to tax structure but to whether the resulting "tax burden" on new phone companies is unreasonable or discriminatory. Cellular companies paid more than $24 billion to the FCC in auctions for the rights to provide cellular service–the FCC appears particularly concerned by ad valorem taxes which use these auction prices to set the market value of the property to be taxed.

3. Municipal concerns include the following:

   a. Municipal taxes in this area are appropriate and fair. This is simply another attempt to reduce local tax revenues, similar to the Federal prohibition on taxes on Internet sales.

   b. The FCC lacks statutory or constitutional authority to intrude on state and local taxation of telephone companies.

   c. If the FCC believes local fees are excessive it should consider refunding a portion of the $24 billion it raised in its auction of cellular telephone rights.

   d. Under principles of Federalism and constitutional protections against taking private or government property the FCC may not intrude in this area.

4. Comments in both the Right of Way/Franchising Preemption matter and the Property Tax matter are due October 12, Reply Comments are due on December 12.

V. Michigan Telecommunications Act

A. Background: The Michigan Telecommunications Act is the general Act relating to telephone companies in Michigan. The Act currently expires on December 31, 2000. Some action will be needed to extend or rewrite the law.

B. The Michigan Telecommunications Act was rewritten in 1995.

1. Initial versions of the legislation were extremely unfavorable to municipalities.

2. The 1995 legislation as finally adopted set forth a compromise arrived at between municipalities, legislative leaders and telephone companies in general as follows:

a. All telecommunications companies must obtain permits before using the rights of way. There is no exemption for traditional phone companies such as Ameritech or GTE.

b. Municipalities must act with ninety (90) days on applications for a permit.

c. Permits may be granted, denied or conditioned based upon considerations such as the public health, safety and welfare.

d. Bonds may be required for restoration of the public rights of way.

e. Municipalities may assess fees not to exceed "the fixed and variable costs of the right of way used by a telecommunications provider" plus the cost of issuing a permit.

C. 1995 legislation did not affect the Constitutional provisions which:

1. Reserve the reasonable control of the rights of way to cities, villages and townships and,

2. Require all utilities, including phone companies, to obtain a local franchise before providing service in a municipality.

D. Activities since the 1995 Amendments.

1. Many entities have sought municipal approval to place new telecommunications lines in the rights of way, including

   a. New phone companies.

   b. Cellular phone companies laying lines to connect towers.

   c. Fiber optic companies.

   d. Schools.

   e. Other.

2. Type of Approval Obtained.

   a. Many municipalities have issued permits.

   b. Others have issued franchises or consent agreements, often at the request of the provider, due to the greater security and certain legal status which they provide.

3. Fees

   a. Fees vary by community (as expected given that the Act refers to each municipalities individual cost). Annual per foot fees vary from five cents per foot to the range of one dollar per foot with many communities in the twenty to fifty cent range.

   b. Computation of the maximum fee under the Act can be difficult. PROTEC has developed a good methodology for computing such fees.

   c. Some communities requested or obtained percentage of gross revenues based fees.

   d. The City of Dearborn has successfully defended such a percentage of gross revenue based fee against a Federal court challenge under the Federal Telecommunications Act of 1996. A challenge based on the MTA is still pending in Wayne County Circuit Court.

VI. House Bill 4804

A. House Bill 4804 (introduced by Representative Mark Shulman, from West Bloomfield) contains a rewrite of the Michigan Telecommunications Act as desired by many telephone companies. It makes several changes to effectively attempt to remove most municipal control over the rights of way and prohibits most fees in violation of both the Constitution, the compromise reached with the legislature in 1995 and common sense.

1. Major points are as follows:

   a. Municipalities have thirty (30) days to issue a permit.

   b. Permits may only be conditioned on safety reasons (not health or welfare).

   c. Fees are limited to the cost of issuance of a permit and must be "competitively neutral and non discriminatory as to all providers."

   d. A bond may be required to require restoration of the right of way after the provider removes it's lines, but perhaps not while they are in place.

   e. All right of way disputes go to one member of the Public Service Commission, not to the courts.

   f. If a telecommunications provider says it is an emergency the Public Service Commission member must issue an order in seven (7) days and without any hearing

   g. A Public Service Commission order may not be stayed on appeal barring extremely unusual circumstances.

   h. No permit may be required for telecommunications providers who use Federal, state or county roads. No fees can be assessed against any providers using such highways.

   i. Where the Bill still allows some limited municipal authority municipalities are prohibited from taking action unless it is "competitively neutral and nondiscriminatory." Providers will obviously contend that unless the identical condition is imposed upon

the incumbent provider (Ameritech, GTE or the like) it cannot under the Bill be imposed on them.

j. The PSC would have the authority to "enforce" the "no state or local barrier to entry" provisions of the Federal Telecommunications Act of 1996.

k. The PSC could start a case before the FCC to obtain a ruling that a municipality has violated the requirements of the "no barrier to entry" provisions of the 1996 Act. This section ignores the fact that the Federal Act expressly removes FCC authority over states and local units of governments on right of way related matters.

l. The Bill contains a telecommunications services anti-trust section stating that a contract, combination or conspiracy to monopolize telecommunications services or to establish a monopoly is unlawful. It provides for injunctions, damages, attorneys fees and in certain cases treble damages. It states that "this section shall apply to an employee or official of a local unit of government who enters into an agreement, directly or indirectly, or a conspiracy with a telecommunications provider to violate this section."

B. **Analysis**: House Bill 4804 is similar in philosophy to HB 4777 (which would preempt most municipal authority).

1. The Bill attempts to reduce municipal control over the rights of way and the fees that may be charged to zero or nearly zero.

2. The Bill violates the Constitution and attempts to turn the clock back one hundred years.

a. In the late nineteenth century the legislature granted franchises to any telecommunications company who desired one.

b. The problems with control over the rights of way resulted in the 1909 Constitution expressly taking the franchising power away from the legislature and affirming that franchising and reasonable control over the rights of way are exclusively reserved to cities, villages and townships.