

rev'd 9/13/96

Bob Beaumier  
Assistant City Attorney  
City of Spokane  
W. 808 Spokane Falls Blvd.  
Spokane, WA 99201-3326  
(509) 625-6284; fax (509) 625-6277

## **The Telecommunications Act of 1996; impacts upon a municipality's ability to control and charge fees for use of its right of way**

The communications and cable industries do not first spring to mind as a desperate class, in need of federal protection against discrimination; nor does one think of individual state or local governments as instruments of their special oppression, ripe for whittling down by new federal weapons and a large federal bureaucracy, so that economic opportunity for these multi-billion dollar industries may be restored.

Perhaps this overstates the impact of the Telecommunications Act of 1996. Indeed, the intent appears to move towards creating a shield against disparate or inconsistent state and local government treatment of telecommunications market participants than a sword for the oppressed. Perhaps also the federal restrictions of state and local government in the new Act will be muddled and overshadowed by more dramatic changes in other areas of federal regulation of the communications industry.

The approach offered in these comments is first, to review some of the general provisions of the new law, and second, to review the context of Washington state law. This framework will, hopefully, prepare local governments for managing right of way resources and avoid conflict with the new federal regulatory design.

### **I. FEDERAL LAW REVIEW**

#### **1. General restriction of state and local powers; qualifications**

The Telecommunications Act of 1996 is the first major rewrite of the Telecommunications Act of 1934 (47 U.S.C. 151 et seq) since enactment. Although it professes to preserve local regulatory powers over the right of way, and specifically, the state and local government right to assess reasonable compensation for the use, it imposes a loose federal anti-discrimination overlay. Key provisions of the new law relating to local government are in section 253<sup>1</sup>. Under section 253 (a), no state or local government may

---

<sup>1</sup> This section numbering is taken from the Telecommunications Act of 1996, used unless otherwise indicated.

WSAMA PAPER page 2

"...prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service".

Section 253 (b), although drafted as a qualification of the general limitation, also elaborates upon it. (b) specifies that state or local governments are allowed

"...to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service<sup>2</sup>, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers."

Section 253 (c), drafted like (b) as a limitation of (a), reserves 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 non-discriminatory basis, for the use of public rights-of-way on a non-discriminatory basis if compensation is publicly disclosed".

For enforcement purposes, FCC authority to preempt state or local action only applies to issues arising under subparts (a) or (b) of section 253, but not to subpart (c). 253 (d). A threshold comment offered by one commentary states that although local authority to require a franchise and collect a franchise fee or tax may not be nullified in most cases, local governments must review franchise agreements, current and pending, to assure "level playing field" for comparably situated right of way users.

#### Cable Operators; OVS operators

The federal requirement that a local franchise be obtained for "cable operators" operating a "cable system" in a city is delicately preserved in the new law. The definition of "cable system" in section 602 (7)<sup>3</sup> [47 USC 522 (7)] however was amended to

---

<sup>2</sup> Section 254 is the Congressional mechanism to ensure and promote a new federal policy of "universal service". That policy is based upon seven principles ranging from assuring that quality service be made available to the public at affordable rates to providing advanced telecommunications services for schools, health care facilities and libraries. A joint Federal-State Board is created to make recommendations to the FCC towards the end of the year.

<sup>3</sup> This is the section numbering from the original Telecommunications Act of 1934

WSAMA PAPER page 3

specifically state that for an installation to be regarded as a cable system, there must be a use of public right of way. The federal franchise (but not any underlying state law requirement) that a franchise be required is removed however where a telecommunications carrier elects to operate an "Open Video System" (OVS). This is discussed further below. Cable companies themselves have some restrictions upon being able to initiate an OVS in their franchised area.

### New opportunities, duties for telecommunications carriers

The new law intends to restructure significantly the federal regulatory design to develop telecommunications competition. Local telephone companies are allowed to provide long distance service. They may also provide cable television, audio and video programming, interactive telecommunications and internet access. Long distance carriers can also jump into the local market. One provision impacting local control of the right of way is section 251. Subpart (a) imposes a duty of interconnectivity with other carriers; compare, section 256. Subpart (b) (4) imposes upon local exchange carriers

"...[t]he duty to afford access to poles, ducts, and rights-of-way of such carrier to competing providers of telecommunications services...."

One effect of this requirement might be to reduce the need for double trenching or repeated breaking of the right of way to allow successive competing telecommunications service providers to install fiber. Presumably, the statutory duty would apply to any rights, franchises or easements acquired over public property or rights of way, to the extent a local carrier would have authority to grant such a right. One consideration here, in drafting local franchises is to provide that users of any franchisee fixture in the public right of way or on public lands remain responsible to obtain municipal approval. Additionally, I have included a provision that third party users are responsible for compliance with all franchise obligations.

Disputes between carriers are heard by the "state commission" (W.U.T.C.) with no right of review by a state court, and with a right of FCC intervention if a "state commission" fails to act. Section 252.

### Pay phones

Some municipal attorneys are drawn into the question of location and design of pay phone booths on the right of way. Nothing limiting local authority to regulate these kind of fixtures on the sidewalk appears in the new law. Section 276 now forbids cross subsidization by the local Bell affiliate of pay phone service from other ratebases, and further forbids preferential

## WSAMA PAPER page 4

treatment by the local company of its pay phones over its competitors. Provision is also made for FCC regulations to be promulgated. My expectation is for new providers of pay phones service. This suggests the need for a regulatory local ordinance to address minimum construction standards and placement. Spokane experience has been to favor use of more durable (and expensive) materials in favor of more breakable plastics.

## 2. Cable franchise fees

Section 622<sup>4</sup> (b) allows a local franchise fee not to exceed "...5 percent of such cable operator's gross revenues..." in a 12 month period. Franchise fees are limited to gross revenues from the operation of the cable system. The 1996 Act adds the words "to provide cable services" to 622 (b). It also slightly expands the definition of "cable services" in section 602 (6). "Cable service" is now defined as: (A) one way transmission of subscriber video or other programming and, (B) subscriber interaction for "selection or use" of such programming [underlined words added].

April 26, 1996, the FCC released In the matter of: United Artists Cable of Baltimore (adopted April 24, 1996) FCC 96-188 which determined that in computing the base against which the 5% franchise fee was applied, the cities could not include the franchise fee. In other words, the amount of the franchise fee itself could not be counted as part of the "gross revenues" for purposes of computing the amount of the franchise fees. This holding may be contrary to practice in some tax cases, considering that "gross revenues" are what the taxpayer brings in the door from the customer, as opposed to an "add on" sales tax, where the sales tax is not included in principal or tax base for purposes of applying the tax rate to compute the tax; it is the FCC position however. Compare definition of "franchise fee" as "any tax, fee, or assessment of any kind imposed by a franchising authority or other governmental entity on a cable operator or cable subscriber, or both, solely because of their status as such." Section 622 (g) (1); 42 USC section 542 (g) (1).

## 3. Open video systems

Of expressed concern to the U.S. Conference of Mayors [Michael Guido, Mayor of Dearborn, Chair of the Subcommittee on Telecommunications<sup>5</sup>] are amendments to the Cable TV laws allowing local operation of an "Open Video System" (OVS). OVS is a hybrid cable-communications proposal where a communications company must

<sup>4</sup> 1934 Act numbering; 47 USC section 542

<sup>5</sup> US Conference of Mayors address: 1620 Eye Street, Northwest, Washington DC 20006; voice telephone (202) 293 7330; fax (202) 293-2352.

WSAMA PAPER page 5

dedicate 2/3 of its bandwidth as a "common carrier" to any comer.

Problems arise however in applying the term "common carrier" to the regulatory structure, as understood thus far. Although the carrier's bandwidth is stated as required to be open to anyone who wants it, 1) it is uncertain how effective provisions to assure that the carrier's access rates are attractive to independent users and 2) the effectiveness of safeguards to assure the true independence of the possible bandwidth users from the carrier is undetermined. OVS service may be offered by cable companies, with restrictions in the same area as a cable company's franchise, and by telephone companies or others.

OVS provisions are contained in sections 302 and 303 of the 1996 Act. Additionally, June 3, 1995, the FCC released a Report and Order (170 pages), not reviewed, further governing OVS service. Section 303 contains the federal preemption language. It is divided into two major subparts; (a) and (b).

Section 303 (a) amends section 621 (b)<sup>6</sup> of the Communications Act by adding subparagraph (b)(3) to 621 (b)(1) and (2). (b)(3) is further divided into subparts A, B, C and D.

Section 621 (b)(3) A provides that if a cable operator or its affiliate chooses to provide telecommunications services, those services may be provided without obtaining a local franchise which might otherwise be required by federal law.

If a company wishes to provide OVS services, it must obtain FCC certification. If a cable operator wishes to operate an OVS within its franchise area, it must in addition, must show that there is "effective competition" as defined by the Act. The "effective competition" standard is a standard used to determine whether a cable operator is subject to rate regulation. A showing of "effective competition" will cancel cable rate regulation.

The theory, at least, is that rate regulation in accord with FCC rules is designed to approximate the impact on cable rates of true market place competition. Thus, when a cable operator can show that there is competition, the need for artificial rate control is eliminated. The question is how successful FCC standards for what is "effective competition" are in recreating a projection of true competition.

---

<sup>6</sup> 47 USC 541 (b). Confusion is easy with the numbering. Keep in mind three sets of numbers: first is the 1996 Act numbering, here section 303 (a). But 303 (a) amends paragraph (b) of an already existing section of law, which is 621 (b). The 621 is the provision placed in 1934 Act numbering. The USC numbering, 47 USC 541 (b), parallels 1934 Communications Act numbering and subparagraphing.

WSAMA PAPER page 6

Section 621 (b)(3) B provides that a local government franchisor may not impose any requirement, pursuant to the franchising authority granted by federal law, that limits or restricts the cable operator from providing telecommunications service.

Section 621 (b)(3) C forbids franchisors from ordering cable operators or affiliates to discontinue telecommunications service or discontinue operation of a cable system to the extent the cable system may be used for telecommunications service because of failure to obtain or non renewal of a cable franchise.

Section 621 (b)(3) D forbids local franchisors from requiring a cable operator to provide telecommunications service or facilities (except as allowed under Sections 611 and 612<sup>7</sup>). Exempted from this prohibition however are institutional networks.

These provisions do not erase the federal requirement for a cable operator to obtain a local franchise to provide cable services. Nor do they preempt local government from requiring a cable company which commences telephone business to obtain a telephone franchise under state or local law, if others using the public right of way for a telephone business purpose would be asked to obtain a telephone franchise.

Likewise, with an OVS provider, there is simply no federal requirement for an OVS provider to obtain a local franchise, but again, local law may still impose such a requirement if it applies to all OVS providers.

What does this really mean in practical terms? Commentaries reviewed suggest that the impact of removing the federal franchise requirement may relate primarily to cable franchise issues such as constructing institutional networks, supporting educational institutions, or specifying a system capacity. Commentaries further suggest that local control of the rights of way which are imposed in a non-discriminatory, competitively neutral fashion, such as zoning, construction or inspection fees or other right of way management requirements are enforceable.

As described in FCC regulations, OVS operators must further support "PEG" channel requirements negotiated in cable franchises [see prior footnote]. Notwithstanding absence of a federal franchise, a street use "gross revenues" fee may also be collected

---

<sup>7</sup> 611 is 47 USC section 531, allows a local government to require a cable operator to provide "PEG" channel facilities and equipment. "PEG" stands for public, educational, or governmental access channels. 612 is 47 USC section 532 requires a cable operator to designate a specified number of channels in its system to unaffiliated parties for commercial use.

WSAMA PAPER page 7

from an OVS operator, not to exceed the cable franchise fee (5%). The fee will include the OVS's revenues from its subscribers and from the unaffiliated video programmers paid to the OVS operator, but will not include revenues taken in from by the OVS's unaffiliated video programmers directly from those programmers' subscribers<sup>8</sup>.

Local zoning and tax authority is apparently not affected, except that denials of requests for construction or location of personal wireless services facilities (cellular type communications towers, antennae) may be appealed to a court of competent jurisdiction, except if based on environmental effects of radio frequencies. That group of cases is subject to FCC jurisdiction. Local tax authority is also apparently not directly affected, except there can be no tax or fee on satellite to home services (also sometimes known as DBS, direct broadcast satellite service).

Again, what does this mean? My suggestion is to develop a local broad band regulatory ordinance ("broad band" referring to signal carriage technologies over wire or fiber, with some physical fixture in the right of way, including cable and telephone, as opposed to airwave carriage). Copies of model ordinances are/will be available through Municipal Research. Some features to consider:

A. develop a coordinated regulatory ordinance for wire/fiber utilities.

B. in areas such as taxes, right of way use or franchise fees, develop a coordinated fiscal policy. This does not mean the 5% gross revenues for cable and 6% tax for telephone create a conflict. It means defining which fees or taxes apply to which right of way usage (or, in tax terms "business activity"). For video providers, develop a coordinated policy for "PEG" facilities and services right of way user obligations.

C. try to avoid, particularly in the telecommunications area, but also the cable area as it now overlaps into OVS, individual franchise anomalies in favor of a general regulatory ordinance. The regulatory ordinance may still be incorporated into and accepted into a franchise contract (strictly reserving local power to amend the regulatory ordinance). The point is to avoid a discrimination challenge based upon different negotiated franchises from like situated public service providers. There still appears some basis for different local requirements applicable to video programmers compared to telecommunications service providers, particularly cable operators.

---

<sup>8</sup> By way of caution, these comments are not the result of direct research, but a review of commentaries. A review of FCC regulations is needed for answers to specific questions.

WSAMA PAPER page 8

## II. STATE LAW

### 1. Non federal sources of local power to enact a franchise

Considering the avowed federal premise of leaving local regulatory, fee, and tax authority intact, it is appropriate to review the context of Washington state law.

In general, franchises are creatures of contract and a regulatory ordinance granting a special business opportunity use of the public right of way different from the general public use, and imposing terms and conditions for such use, generally including terms for compensation to the granting local government. Also sometimes included are terms allowing municipal use of a portion of franchised facilities at reduced costs or at no cost. Although a city's power to require a utility to obtain a franchise as a condition of installing fixtures and using the public right of way is generally well accepted, either as an exercise of police power, or in the contractual management of a valuable public resource, it is also subject to state control.

General Telephone v. Bothell, 105 Wn.2d 579, 716 P.2d 879 (1986) states at 584-5:

Franchises have the legal status of contracts. The power to grant franchises is a sovereign power that rests in the state, but which may be delegated to cities. Washington municipalities may grant franchises to telephone companies under RCW 35.22.280(7), RCW 35.24.290(10), and RCW 35A.47.040.

Despite their status as contracts, franchises must yield to a municipality's police power if it be reasonably exercised to attain reasonable ends. [citing Tukwila v. Seattle, 68 Wn. 2d 611, 615, 414 P.2d 597 (1966)] Cities exercise such power, again due to a grant of authority from the State under Const. art. 11, SS 11, which provides that any city may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws.

[footnotes omitted]

In Bothell, the "general laws" were held to include a favorable state tariff filed by the telephone company which changed the common law requirement that the utility pay costs of relocating wires to allowing the utility to pass on relocation costs to a "requesting party", which included the City of Bothell. Notice this was a sleeper "automatic" tariff in the sense that it became effective automatically because it was not contested by either the public or the W.U.T.C.. Without being familiar with the details of Bothell, the result suggests a need for better municipal coordination with W.U.T.C. staff and the Commission on general policy matters.

WSAMA PAPER page 9

Bothell does not rest its result upon state preemption of a franchise as contract however. The Court takes some pains to explain at 586:

General's tariff had the force of state law by the time ordinance 999 was enacted. Bothell thus tried to compel General to accept a franchise that ignored rather than included existing law.

The Court is also careful to point out that the franchisee in Bothell never "fully accepted" the City's proffered franchise terms.<sup>9</sup> Bothell is clear however that as an exercise of police power, the local franchise must yield to state law where the preemption is shown:

... a city's right to enact police power regulations in a given area ceases when the WUTC passes a general law concerning the same area and concurrent jurisdiction is not possible. General's undergrounding tariff was valid and pursuant to express WUTC authority. Concurrent jurisdiction is not possible since General's tariff conflicts with Bothell's subsequently enacted ordinances.

Such conflicts generally are resolved in favor of the public service commission. One authoritative text acknowledges the rights of a municipality to modify the terms of a franchise, by exercising its police power, but adds that a municipality cannot, under the guise of police regulations, usurp the functions of a state public service commission. Recent cases from other jurisdictions echo this observation.

id., 586-7, footnotes omitted.

Although Bothell must be read to limit an earlier case Edmonds v. General Telephone 21 Wn. App. 218, 584 P.2d 458 (1978), Edmonds is interesting for its analysis of the telephone company's reliance upon RCW 80.36.040 (not considered in Bothell). The statute says:

Any . . . telephone . . . company . . . doing business in this state, shall have the right to construct and maintain all necessary lines of . . . telephone for public traffic along and upon any public road, street or highway, along or across the right-of-way of any railroad corporation, and may erect poles, . . . wires and any other necessary fixture of their lines, in such manner and at such points as not to incommode

---

<sup>9</sup> "fully accepted" seems an equivocation on the question of formation. Could the City have required removal of fixtures or, alternatively, argued continued enjoyment of franchise privileges is acceptance? The case does not offer further analysis of this collateral issue.

WSAMA PAPER page 10

*the public use of the railroad or highway . . .*

As quoted, Edmonds, 222. Edmonds concluded the statute left to the City broad discretion, in the exercise of its local police power, to control the manner of erection and maintenance of telephone lines to the city. Also tossed out in Edmonds was the "state franchise" argument sometimes touted by local telephone companies to excuse entering into a local franchise. In reaching the opposite result of Bothell, the Edmonds analysis shows in that case that there was no conflict with the general laws, and that the impact of the Edmonds regulation was limited to only one public street, as opposed to a general impact ordinance.

Apart from general law preemption problems, case law generally approves municipal authority to control and charge for the use of the right of way. Hadfield v. Lundin, 98 Wash. 657, 168 P. 516 (1917) is quoted in later authorities for the statement:

The streets and highways belong to the public. They are built and maintained at public expense for the use of the general public in the ordinary and customary manner. The state, and the city as an arm of the state, has absolute control of the streets in the interest of the public. No private individual or corporation has a right to the use of the streets in the prosecution of the business of a common carrier for private gain without the consent of the state, nor except upon the terms and conditions prescribed by the state or municipality, as the case may be. The use of the streets as a place of business or as a main instrumentality of business is accorded as a mere privilege and not as a matter of natural right.

id. at 660, quoted in Baxter-Wyckoff v. Seattle, 67 Wn.2d 555, 408 P.2d 1012 (1965) at 561, and again in PUD v. Broadview Television, 91 Wn.2d 3, 586 P.2d 851 (1978), at 10-11. Similarly, Tarver v. Comm'n of Bremerton, 72 Wn.2d 726, 435 P.2d 531 (1967), at 733-4:

The right of a citizen to travel upon the highway and transport his property thereon, in the ordinary course of life and business, differs radically and obviously from that of one who makes the highway his place of business and uses it for private gain, in the running of a stage coach or omnibus. The former is the usual and ordinary right of a citizen, a common right, a right common to all, while the latter is special, unusual and extraordinary. As to the former, the extent of legislative power is that of regulation; but, as to the latter, its power is broader; the right may be wholly denied, or it may be permitted to some and denied to others, because of its extraordinary nature. This distinction, elementary and fundamental in character, is recognized by all the authorities.

WSAMA PAPER page 11

Tarver, quoting State ex rel. Schafer v. Spokane, 109 Wash. 360, at 363; 186 Pac. 864, which in turn quotes Ex parte Dickey, 76 W.Va. 576, 85 S.E. 781 (1915).

Seattle v. Samis Land Co., 55 Wn. App. 554, 779 P.2d 277 (1989) relied upon RCW 35.22.280 (7) to affirm the City's right to charge for use of areas under and above the sidewalks and streets, but within the public right of way easement, which did not comprise any obstruction to street use or travel. Samis reversed the trial court's conclusion that a city could not, by ordinance, charge for such incidental and *de minimis* street encroachments, but affirmed the trial court's dismissal for lack of adequate proof.

**2. Current state limits on local ability to assess a franchise fee on a "telephone business"**

RCW 35.21.860 forbids local franchise fees on certain designated utilities, including "telephone business" as defined in RCW 82.04.065. This definition is for state tax purposes, and does not fit with exactitude the federal regulatory pattern, developed for a wholly different purpose.

Although not defined by statute, "franchise fees" are understood to mean fees to compensate the city for solely the use of the street. It is important to understand however that this prohibition is part of a statutory scheme which also empowers cities to enact a local 6% telephone tax, so that the statutory mechanism is not so much to abolish a local government's right to receive compensation from a telephone company using the right of way as to require the compensatory package to be in the form of a locally enacted tax rather than a franchise fee.

Additional points to note are:

1. RCW 35.21.860 only prohibits franchise fees, and specifically excepts from its prohibitions fees to recover a city's "actual administrative expenses"... "that are directly related to receiving and approving a permit, license, and franchise, to inspecting plans and construction, or to the preparation of a detailed statement pursuant to chapter 43.21C RCW."
2. a city can increase the tax above 6% with voter approval. RCW 35.21.870.

Beyond statutes, a check of the state constitution raises a few points. Would a cost free or below cost franchise be an improper expenditure of tax monies for a private purpose or would it comprise a public purpose under Article 7, § 1 (amendment 14) Would it be an improper gift of public property under Article 8, § 7? Perhaps not under a General Telephone analysis. But the constitution is a limit on legislative power.

WSAMA PAPER page 12

Article 7 § 1 provides that taxes may only be spent for a public purpose. The State Supreme Court seems to have taken a liberal approach in this area however, stating that:

[T]he test of a public purpose should be whether the expenditure confers a direct benefit of reasonably general character to a significant part of the public, as distinguished from a remote or theoretical benefit.

U.S. v. Town of Bonneville 94 Wn. 2d 827, at 834, 621 P. 2d 127 (1980), quoting from 15 McQuillin, Municipal Corporations SS 39.19, at 31-32 (3d ed. 1970).

The gift prohibition, Article 8, § 7 is similarly a limitation on legislative power. This challenge is not sustained however, where it appears there is absence of donative intent and the presence of consideration. Tacoma v. Taxpayers 108 Wn. 2d 679, 743 P.2d 793 (1987). General Telephone v. Bothell, 105 Wn.2d 579, 588, 716 P.2d 879 (1986).

### Conclusion

I do not see it essentially difficult to develop a coordinated regulatory approach to the issues presented by the 1996 federal legislation. Indeed, even without the new laws, such an approach seems appropriate from a policy perspective. The real devil will remain in the details, and possible problems in coordinating with ongoing federal regulatory changes.