Municipal Franchises Threatened

By Diane Pedicord, OML General Counsel

Two recent events seriously imperil municipal franchise authority. These developments are merely the opening salvo of a process that will continue to be played out in Congress, the Oklahoma Legislature and, perhaps, the courts.

FCC Federalizes Nation's Local Franchising Process

On December 20, 2006, the Federal Communications Commission (FCC) by a 3 to 2 vote adopted an Order changing the rules for franchises for video services that meet the definition of a cable system under federal law. The federal cable communication laws prohibit municipal and county franchising authorities from unreasonably refusing to award competitive franchises for the provision of cable services. The FCC adopted a sweeping definition of what constitutes unreasonable behavior by local governments. The Order was described by a dissenting FCC commissioner as "an arrogant case of federal power riding roughshod over local governments" which is "breathtaking in its disrespect of our local and state government partners."

Unreasonableness of Local Government

The FCC Order concludes that local governments' current practices for franchising constitutes an unreasonable barrier to entry into the local right-of-way for cable and broadband facilities. According to the Order, these include drawn-out local negotiations with no time limits; unreasonable build-out requirements; unreasonable requests for "in-kind" payments that attempt to subvert the five percent cap on franchise fees; and unreasonable demands with respect to public, educational and government access (or "PEG"). Among the conditions that the Order defines as unreasonable are: negotiations lasting more than 90 days; municipal requirements that the franchised service be made available throughout the corporate limits within a defined period of time; emergency access or other benefits for local governments; requirements for PEG channels.

Several Serious Legal Questions Raised by the Order:

(from the dissent)

1. A 90-day deadline is imposed for a municipality to negotiate a franchise for new entrants with existing rights of way;

2. The municipality must grant the new entrant a franchise if no agreement is reached by the 90 day deadline. There is no obligation to negotiate in good faith;

3. The scope of a new entrant build-out obligation is limited so it may not include the entire municipality;

4. A new entrant is authorized to withhold payment of fees that it deems to be in excess of the 5 percent cap;

5. Public, education and governmental (PEG) and institutional networks (INET) support for the local community is undermined;

6. A new entrant is authorized to refrain from obtaining a franchise when it is upgrading mixed use facilities that will be used for the delivery of video content;

7. Although the Order applies at the local level (municipal/county) it does not apply to franchising decisions made at the state level or in compliance with state statutory directives, such as statewide franchising decisions.

Additional Rule-making Affecting Existing

Franchises:

The Commission also adopted a Further Notice of Proposed Rulemaking in which it seeks comment on how its

findings in the *Order* should affect existing franchisees, tentatively concludes that the findings should apply to existing franchisees at the time of their next franchise renewal process, and seeks comment on the Commission's statutory authority to take this action. The Commission will conclude this rulemaking and release an order no later than six months after the release of the *Order*.

The Future:

This order is a huge blow to local control over right-of-ways and franchising of utilities for cable and broadband services. The order takes place in the context of a two year Congressional study of this issue and strains the legal dividing line between agency rules that are regulatory and therefore valid and those rules that go to far and usurpt the legislative authority of Congress. Given the broad scope of this order it is expected that it may soon be reviewed by both Congress and the Federal Courts.

Use of Municipal Right-of-Way

for Video Services

According to an Attorney General opinion issued on May 3, 2006, municipal rights-of-ways may be used without the city or town's permission to provide new video services. The Attorney General opines that telephone companies do not have to obtain a municipal franchise to use municipal rights-of-ways to provide video services. 2006 OK AG 15. The blanket authorization described in the Opinion presumably applies to any other transmission over "telephone lines".

The municipal issue arises under a section of the Oklahoma Constitution granting telephone and telegraph companies the right to use public ways within the state to install transmission lines for such purposes. The Oklahoma Supreme Court has made clear that a franchise to use the streets and alleys is a constitutional right of the people to grant at the ballot box. See *Oklahoma Electric Co-op., Inc. v. Oklahoma Gas and Electric Company,* 1999 OK 35*; City of Okmulgee v. Okmulgee Gas Company,* 1929 OK 472 and *State ex rel. Williamson v. Garrison,* 1959 OK 260. However, telephone companies have not been subject to municipal franchises because of the Constitution's special statewide grant to them. The Attorney General Opinion now extends this rule beyond telephone operations.

The new video services are being built-out by AT&T to compete with existing cable television franchises. Although AT&T is offering to pay an inspection fee and provide PEG and emergency access to municipalities, its costs to do so is generally less than similar requirements on the municipally-franchised cable system. This situation may bring federal law into play. The federal Cable Communications Act forbids a municipality from giving a competitor an unfair competitive advantage. Thus, the cable franchisee will not have to seek redress against AT&T but, instead, may choose to sue the franchising municipality. The only way for the municipality to avoid suit is to give up benefits and payments due under the franchise.

The Future:

In other states where AT&T has won similar opinions from attorney generals, it has sought legislation to obtain a statewide franchise. This effectively removes from each local government its authority to reach an individual franchise agreement with the service provider. In several states such legislation established the franchise terms, thereby removing from municipalities their authority to control their rights-of-way.

What About the Future

of Municipal Management?

The federal Telecommunications Act fosters a restructuring of telephone, cable television and other industries, which use information transmission technologies. Although the Act acknowledges local government's right to manage and control local rights-of-way, the Act requires local governments to allow access to those rights-of-way in a reasonable and nondiscriminatory manner. This means that more entities will seek a presence in local rights-of-ways. Local governments will have to devote more resources to manage rights-of-ways, develop a market-based valuation of right-of-way use (rental), and justify any fees or rentals charged.

To the extent that competition among telecommunications providers reduces their gross revenues in a particular locality, payments from individual providers to local governments based on percentage of gross revenues will decline. Payments from new entrants into the right-of-way will be limited to right-of-way management regulatory costs or the above-mentioned justified charges. At the same time, the life of streets will be diminished as additional right-of-way users make surface cuts.

Right-of-way issues impact municipal operations in a myriad of ways. Although cities and towns have broad

authority to acquire and control their rights-of-ways, federal encroachments threaten local planning and discretion. With franchise and right-of-way management under attack at both the federal and state levels, Oklahoma municipalities need to be vigilant in talking to their state and federal representatives about these issues. Unless we "tell our story", preserving management control and current revenue streams may be a thing of the past.

POSTSCRIPT:

Further Action by FCC not related to Franchises

In another action on December 20, 2006, the FCC issued a Ninth Notice of Proposed Rulemaking that proposes a national, centralized approach to maximize public safety access to interoperable, broadband spectrum in the 700 MHz band. In addition, the initiative seeks to promote the deployment of advanced broadband applications, related radio technologies, and modern, IP-based system architecture.

According to the FCC, the proposals contained in this item are designed to meet the following public safety objectives: (1) opportunities for broadband, national, interoperable use of 700 MHz spectrum; (2) new sources of funding for the build-out and operation of the national public safety network; (3) economies of scale and scope in production and competition in supply to maximize cost effectiveness; (4) efficient spectrum use; (5) network robustness and survivability; and (6) flexible, modern IP-based wireless system architecture.

Specifically, this item proposes that the Commission (1) allocate 12 megahertz of the 700 MHz public safety spectrum from wideband to broadband use; (2) assign this spectrum nationwide to a single national public safety broadband licensee; (3) permit the national public safety broadband licensee also to operate on a secondary basis on the narrowband public safety spectrum in the 700 MHz band; (4) permit the licensee to use its assigned spectrum to provide public safety entities with voluntary access to a public safety broadband service on a fee-for-service basis; (5) permit the licensee to provide unconditionally preemptible access to its assigned spectrum to commercial service providers on a secondary basis, through leases or in the form of public/private partnerships; (6) facilitate the shared use of CMRS infrastructure for the efficient provision of public safety broadband service; and (7) establish performance requirements for interoperability, build-out, preemption of commercial access, and system robustness.

This Ninth Notice of Proposed Rulemaking seeks comment generally on the above proposals or alternatives, as well as on spectrum leasing and Section 337 issues.