# Recent Cases Affecting Franchise Renewals, Transfers, and Enforcement

**8th Annual TATOA Conference**

**Hot Topics in Telecommunications**

**August 14-15, 2003**

**Austin, Texas**

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## Level Playing Field

***Insight Communications Company, L.P. v. City of Louisville***, 2003 WL 21473455 (Ky. App.), No. 2002-CA-000701-MR, June 27, 2003.

This case reviewed the City's actions under a "level playing field" clause, and found the City acted appropriately in awarding a new franchise to the provider's competitor. The City's franchise with Insight contained a provision that the City could grant other franchises, provided that such franchises are neither "more favorable" nor "less favorable" if the rights granted and burdens imposed in the subsequent franchise are substantially similar to those contained in the Insight franchise.

The City granted a franchise to Knology, and Insight filed for a declaratory judgment that the City had breached the level playing field provision of its franchise with Insight. Specifically, Insight pointed to the following discrepancies between the two franchises: (1) Insight's franchise was for a term of 12 years, while Knology's was for 15 years; (2) Insight's franchise required completion of a reconstruction project within 15 months, while Knology was allowed 54 months to build its system; (3) Insight was required to perform a "simultaneous build" in all parts of the City, while Knology was permitted to concentrate its construction in one part of the City each year; and (4) Insight's franchise had a 60 day notification period to cure any defaults with revocation as a potential penalty, while Knology's franchise provided the City the sole penalty of $600 per day for failure to meet the construction schedule for 18 months.

In granting a summary judgment in favor of the City, the court determined that an "apples-to-apples" comparison was simply not possible because of Insight's status as an incumbent for over 30 years. Nonetheless, the court found that the two franchises were substantially similar to each other and the City had not breached Insight's franchise agreement.

***WH Link, LLC v. City of Otsego***, File No. 200247 (Minn. Ct. App. July 1, 2003).

The court affirmed the City's decision to require an Open Video System ("OVS") operator to obtain a cable franchise and to comply with Minnesota's "level playing field" statute. The statute provided that "no municipality shall grant an additional franchise for cable service for an area included in an existing franchise on terms and conditions more favorable or less burdensome than those in the existing franchise pertaining to: (1) the area served . . ." The court cited *City of Dallas v. FCC*, 165 F.3d 341 ($5^{th}$ Cir. 1999) as support for the authority of the city to impose franchise requirements on OVS operators to the extent permitted or required by state law. The City's requirement that the OVS operator construct a system to serve the entire City, similar to the requirement placed on the cable franchisee (Charter), was proper under the state statute that broadly defined "cable communications system" so as to include OVS. The court found no federal preemption of the state statute

## Gross Revenues

***Parish of Jefferson v. Cox Communications***, 2003 WL 21634440 (E.D. La.), No. CIV.A. 02-3344, July 3, 2003.

This case involves the definition of "gross revenue" in a cable franchise. Cox and the parish entered into a cable franchise agreement requiring a franchise fee in the amount of 5% of Cox's gross revenues, defined as "all receipts . . . derived, directly or indirectly, by the Company from or in connection with the operation of the System, including, without limitation: the distribution of any Service over the System; the provision of any Service Related Activity in connection with the operation of the System." During the term of the franchise, Cox refused to pay franchise fees on telecommunications services, and initially paid fees on data services but later stopped paying on these services. The parish sued Cox for breach of contract.

The court initially determined that the franchise agreement contemplated franchise fees on data and telecommunications services because of the broad definition of "gross revenues" and "System" in the franchise. However, the court finally determined that the Cable Act preempted the Agreement and prevented the parish from exacting these fees. This decision was based upon the 1996 amendment to the franchise fee provision of the Cable Act (47 U.S.C. § 542(b)), limiting franchise fees to 5% of gross revenues derived from the operation of the cable system to provide cable services. Because "telecommunications services" was separately defined in the Cable Act (47 U.S.C. § 153 (43) and (46)), and because of the FCC's March 2002 Declaratory Ruling that cable modem service is separate from cable service and telecommunications service, the court ruled that the Agreement was preempted.

## Transfer of Ownership

***City of Thousand Oaks v. Verizon Media Ventures, Inc.***, 2003 WL 21421721 (9$^{th}$ Cir.), No. 02-55798, 92-55816, June 13, 2003.

This case dealt with the transfer of ownership of a cable system. The City's franchise agreement with Verizon prohibited the sale or transfer of a "Franchise and any rights or obligations of the Grantee under the Franchise . . . without prior written consent of the city." (Sec. 4.1) The agreement also prohibited the transfer of "ownership or control of the Grantee . . . without the prior written consent of the City." (Sec. 4.2) The district court enjoined Verizon from transferring ownership of Verizon's cable system to Adelphia, holding that the transfer of the cable system violated the governing franchise ordinance.

The Ninth Circuit court reversed the district court, holding that the franchise is a permit to operate a cable system, and does not include the assets of the system, therefore an asset transfer agreement between Verizon and Adelphia did not amount to a transfer of the franchise. The Circuit Court also held that because the City had failed to raise an argument under Sec. 4.2 in its opening brief, the City waived its argument that the transfer was a violation of that section.

***Charter Communications, Inc. v. County of Santa Cruz***, 304 F.3d 927 (9th Cir.) 2002.

Charter Communications LLC ("Charter"), a subsidiary of Charter Communications, Inc. ("CCI"), had a franchise with Santa Cruz County (which required consent of the County to any ownership changes, which consent could not be unreasonably withheld). When Vulcan Ventures, owned by Paul Allen, sought to acquire CCI, it was necessary for the County to consent to the change in ownership of Charter in order for CCI to operate Charter's franchise. Charter submitted Form 394 to the County, and the County sought additional information relating to the effect on subscriber rates of the purchase price of $4.5 billion. Charter provided some information, but not all that was requested, and the County decided to withhold consent to the change in ownership. Charter, CCI, and Allen sued the County, alleging that it had unreasonably withheld its consent.

The district court substituted its judgment for the County's, and held that the denial was unreasonable (*Charter Communications, Inc. v. County of Santa Cruz*, 133 F.Supp. 2d 1184 (N.D. Cal. 2001)). However, the 9th Circuit determined that the County's decision was entitled to deference as a legislative act, and should be upheld as long as there was substantial evidence for any one sufficient reason for denial. The circuit court reviewed the reasons cited by the County for denial of renewal and found them to be reasonable: concern about Allen's true net worth and the relationship of that wealth to the viability of the enterprise; concern about keeping subscriber rates stable; and others. Charter has asked the U.S. Supreme Court to review the case.

***MediaOne Group, Inc. v. County of Henrico, Virginia***, 257 F.3d 356 (4th Cir. 2001).

AT&T acquired MediaOne Group, which had a franchise in Henrico County. The County approved the transfer of control of the franchise, but required MediaOne to provide any requesting Internet Service Provider ("ISP") with access to its cable modem platform. AT&T and MediaOne sued, alleging that the open access provision was preempted by federal law and also violated state law.

The district court granted summary judgment for AT&T and MediaOne, and the circuit court affirmed, holding that the open access provision violated 47 U.S.C. § 541 (b)(3)(D) by forcing MediaOne to provide its telecommunications facilities (its cable modem platform) to any ISP as a condition of the County's approval of the transfer of control of the franchise. The court held that although MediaOne maintained a cable system, its facilities could be properly classified as telecommunications facilities when they provide a transmission path to the Internet.

***Qwest Broadband Services, Inc. v. City of Boulder***, 151 F.Supp. 1236 (D. Colorado, 2001).

Qwest had a revocable permit from the City under which it provided cable services in the City. TCI also provided cable services under a permit, and WideOpenWest provided services in the City under a franchise. Qwest wanted to convert the permit to a franchise, and was told by the City that the City's charter required an election approving any franchise before it was granted by the City. Qwest filed for a declaratory judgment, alleging that the City's election requirement was preempted by 47 U.S.C. § 541(a)(1) prohibiting exclusive franchises and prohibiting a franchising authority from unreasonably refusing to award an additional competitive franchise.

The court considered the preemption doctrine in the Supremacy Clause of the U.S. Constitution and the legislative intent of the Congress in enacting the amendments to the Cable Act, and concluded that the City's charter provision requiring an election before a franchise was granted was preempted by § 541. The court determined that the City could not comply with its obligations under the Cable Act if it abdicated its responsibilities to the voters. The court also found that the charter provision defeated the statute's goal of fostering competition in the provision of cable services.

***Comcast v. City of San Jose***, No. C03-02532RS, N.D. California (suit pending; hearing set for August 13, 2003).

Comcast has sued the City of San Jose, California requesting a preliminary injunction to prevent termination of its cable franchise. As part of the franchise transfer from AT&T to Comcast, the City requested access to modern telecommunications facilities, including an I-Net connecting city buildings and schools, and up to six new public access channels. The City requested that 10% of the bandwidth of the cable system be set aside for public use, including two-way video, voice, and high-speed data communications.

Comcast has asked for a declaratory judgment that the City's requests are illegal. Comcast has also objected to the City's appeals process for formal franchise renewal proceedings, in which a third-party officer will hear arguments from both sides and then make recommendations to the city council. Comcast has couched its suit in First Amendment terms, arguing that the City is trying to force Comcast to provide "an excessive and unlawful package of public benefits in exchange for the right to continue to speak in the City." Comcast has also objected to the maintenance of the channel location of the PEG channels, claiming that it will have an adverse impact on Comcast's editorial decisions about what programming to carry on its system and in what order those channels will be presented.

## Private Right of Action

***Leach v. Mediacom*,** 240 F.Supp. 994 (S.D. Iowa), Jan. 13, 2003.

This case dealt with the issue of whether a private right of action exists under § 531(e) of the Cable Act. The City of Des Moines required in its franchise with Mediacom that one channel be provided for non-commercial public access. David Leach produced "The Uncle Ed Show" that was aired twice weekly for several years on the public access channel. Leach requested Mediacom to air videos produced by him that showed graphic photographs of aborted fetuses and identifiable persons on the premises of a Planned Parenthood Clinic. When Mediacom refused to air the videos, Leach blurred out the objectionable content, and Mediacom subsequently aired the videos. Leach sued, alleging that Mediacom's refusal to air the non-blurred videos constituted an unlawful form of editorial control prohibited by § 531(e) of the Cable Act.

The court held there was no private right of action under § 531(e) because the statute did not expressly provide for such, the statute did not mandate the establishment of public access channels, and there was no implied intent to confer rights on any particular class of persons. The court also found that Congress expressly provided an enforcement mechanism for violations of the Cable Act, and vested that mechanism in franchising authorities, citing § 531(c).

## Franchise Fee Pass-through

***Texas Coalition of Cities For Utility Issues v. FCC***, 324 F.3d 802 (5th Cir.) March 27, 2003.

TCCFUI and NATOA petitioned for review of an FCC order that cable operators were permitted to pass through to cable subscribers the full amount of the franchise fees imposed on operators by franchising authorities and to identify the amounts passed through on subscribers' bills (the "Pasadena Order"). TCCFUI and NATOA argued that because the franchise fee is based on a percentage of the operator's gross revenues, only the portions of the fee attributable to revenues from subscribers may be passed through to subscribers.

The court agreed that "gross revenues" includes revenues from subscriptions and from other sources, such as advertising and commissions from home shopping networks. TCCFUI argued that 47 U.S.C. §§ 542 and 543 prohibited the pass-through of franchise fees not attributable to subscriber revenues. The court disagreed, holding that § 543(b)(2)(C)(v) does not address the pass-through of franchise fees, but only requires the FCC to take into account the factors listed therein in setting rates for the basic service tier, therefore failing to provide an unambiguous intent on the part of Congress to prevent operators from passing the entire franchise fee through to subscribers. Similarly, the court held that 47 U.S.C. § 542(c)(1), authorizing the operator to inform subscribers of the amount included in the bill that is attributable to the franchise fee, did not indicate any congressional intent that non-subscriber revenues could not be passed through. Other issues raised by TCCFUI, that the Pasadena Order contravened established FCC policies and was unreasonable, that the Order violated FCC rules on the timing of the pass-through, and that the pass-through places an unreasonable burden on subscribers, were also overruled by the court.

## Access Support

***City of Naperville v. Comcast of Illinois/West Virginia, LLC***, 2003 WL 21503317 (N.D. Ill.), No. 03 C 1512, June 30, 2003.

This is an on-going dispute regarding payment by the cable operator of rent for the City's community television office. Comcast succeeded to a pre-existing cable franchise with the City. The franchise required the franchisee to continue to provide studio and office space to Naperville Community TV ("NCTV") and maintain the production van and studio equipment at no additional charge. Comcast informed the City that it would no longer make rent payments for NCTV, and that it would no longer provide operating support unless it could offset those charges against the franchise fees under 47 U.S.C. § 542. The City demanded compliance with the franchise agreement. The City originally filed suit in state court, and Comcast removed the case to federal court. The City attempted to have the case remanded back to state court, but the remand was denied on the grounds that removal was proper under 28 U.S.C. § 1332 (providing federal jurisdiction over actions where the matter in controversy exceeds the sum of $75,000 and is between citizens of different states). More to come . . .

***Rhames v. City of Biddeford***, 204 F.Supp.2d (D. Maine), May 24, 2002.

The City implemented a broadcasting moratorium on its public access channel because of numerous legal actions brought against the City challenging its policies, but stated that it would be reactivated soon. Plaintiff brought suit challenging the reasons for the moratorium, and alleging that the shut-down took place merely to stifle his broadcasts and thereby violated his First Amendment rights.

The court reviewed case law and determined that the city did not have to provide the forum in the first place, but once it does, it cannot favor certain speakers at the expense of others. Similarly, once a public forum has been opened, the First Amendment does not prevent the City from later closing it. However, if the City shut down the public access channel only temporarily, with plans to reopen it later, the court must determine whether the moratorium amounted to improper speaker or viewpoint censorship. The court decided that the moratorium was neutral as to content and speaker, and was a reasonable response by the City in dealing with procedural and legal problems with the channel.

***LaFortune v. City of Biddeford***, 237 F.Supp.2d 103 (D. Maine), December 18, 2002.

Plaintiff produced and broadcast a weekly show on the local public access channel, and filed a lawsuit against the city because of alleged unconstitutional restraints on future broadcasts. Because the City shut down the public access channel entirely (*see*, *Rhames v. City of Biddeford*, above), the case was dismissed as moot.

***Philadelphia Community Access Coalition v. Street***, 2002 WL 1611542 (E.D. Pa.), No. CIV.A. 02-1415, July 23, 2002.

In 1983, the City of Philadelphia adopted an ordinance authorizing the creation of the Philadelphia Public Access Corporation as a non-profit corporation for the development and promotion of public access television channels in cable systems in the City. In 1998, the City entered into franchise renewal agreements with several cable companies, providing for five cable channels' worth of bandwidth to be set aside for use as public access channels. The franchises also required the cable companies to provide access production facilities and equipment (at no cost to the City) and to contribute to the funding of the Public Access Corporation. However, the City never created the Corporation or appointed board members. Plaintiffs filed suit alleging the available bandwidths are a public forum which they should be able to use in exercising their right of free speech. Plaintiffs alleged that by failing to create the Corporation, Defendants denied them access to a public forum in violation of their First and Fourteenth Amendment rights.

The court dismissed the suit, finding that there have never been public access channels in Philadelphia, therefore the Plaintiffs failed to establish an injury in fact because nothing has been taken away from them. Mere residence in a city does not translate into a current harm of a lost or denied opportunity for access to public access television. The court also held that Plaintiffs did not establish a violation of their First Amendment rights because the ordinance authorizing the creation of the public access corporation did not create a public forum, and the Defendants took no action to create a public forum.

**Franchise Modifications**

***RCN Corporation v. Newtown Township***, 2003 WL 21054359 (E.D. Pa.), No. CIV.A. 02-CV-9361, May 7, 2003.

The Township granted RCN a 15 year, non-exclusive, franchise right to construct and maintain a cable television system in the Township. Three years later, RCN requested a modification of the franchise, including the creation of a regional franchising entity composed of multiple townships and a larger geographic scope for the franchise. The Township rejected the requested modification, notified RCN of its default under the franchise, drew down RCN's $250,000 letter of credit, and made a claim against the $100,000 performance bond. The Township's Board of Supervisors (the "Board") held a hearing and decided that RCN had committed an anticipatory breach of the agreement, and assessed liquidated damages of over $2 million. This decision was appealed to state court. The Board held a second hearing to address RCN's request for franchise modification, and rejected the request.

RCN filed this suit for declaratory and injunctive relief under 47 U.S.C. § 545(b)(1), claiming that the original requirements of the franchise were commercially impracticable. The Township moved to dismiss the suit, arguing that § 545 only provides for modifications of franchise provisions related to facilities or equipment, or services, and that RCN's request was actually one for termination of the agreement. The Court disagreed, holding that RCN made a plausible argument that its request for modification related to the equipment it must install in the geographic area of the franchise, and denied the Township's motion to dismiss.

**Franchise Renewal**

***NEPSK, Inc. v. Town of Houlton***, 283 F.3d 1 (1st Cir.) March 13, 2002.

The Town decided not to renew the franchise of the incumbent provider, NEPSK, d/b/a Houlton Cable, and sought competitive proposals for a new cable franchise, eventually awarding the franchise to Pine Tree Cablevision. During this process, Houlton Cable made a number of mistakes and missed several deadlines, all to its detriment. It missed the window of time in which to request formal renewal procedures, making it eligible for renewal only under the informal procedures of 47 U.S.C. § 546(h). The Town was dissatisfied with Houlton Cable's offerings, noting that it failed to provide high speed internet service to its subscribers. The Town determined that it could only support one cable provider, and it granted the new franchise to Pine Tree. Houlton Cable sued the Town, alleging: (1) that the Town violated the Cable Act by failing to comply with the formal renewal procedures, (2) that the Town had impermissibly conditioned a renewal of the franchise on Houlton Cable's willingness to provide high speed internet service, a violation of § 541(b)(3)(D) (prohibition against requiring cable operators to provide telecommunications services) and § 544(e) (prohibition against requiring or restricting a cable system's use of any type of transmission technology), and (3) that the Town unreasonably refused to award Houlton Cable a second franchise, in violation of § 541(a)(1) (providing appellate rights to an applicant whose application for a second franchise has been denied).

Houlton Cable missed an important deadline for responsive pleadings under the district court's local rules, and the Town's motion for judgment on the pleadings as to the first two complaints was granted. As to the third complaint, the court ruled that Houlton Cable's application was not

for a second franchise, since it was submitted in response to the Town's request for competitive proposals, and the Town had publicized the fact that it only intended to grant one franchise. Because second franchises are substantially different from first franchises, both the applicant and the franchising authority would approach such applications differently. Houlton Cable's application was not for a second franchise, therefore it had no appellate rights under § 541(a)(1).

***FrontierVision Operating Partners, L.P. v. Town of Naples***, 2001 WL 220192 (D. Me.), No. 01-16-P-DMC, March 7, 2001.

FrontierVision's franchise was due to expire on March 19, 2000. On March 25, 1997, it sent a letter to the Town invoking the formal renewal procedures under 47 U.S.C. § 546(a)(1). A cable committee conducted ascertainment proceedings and presented its findings to the governing body of the Town. The Town then issued a request for proposal to FrontierVision setting out the Town's minimum requirements for renewal of the franchise, and suspended the formal proceedings to negotiate a franchise. Negotiations wore on and finally broke down, and Adelphia bought out the company. The Town finally notified the company that it was going to adopt a cable regulatory ordinance and deny renewal based on the company's original proposal to the Town. The company filed suit, claiming that the Town failed to comply with the four month deadline (from the date on which a renewal proposal is submitted by the operator until renewal or a determination not to renew).

The court determined that the company had waived its right to have its proposal acted on within four months because it engaged in four informal negotiating sessions before mentioning the four month deadline to the Town, eighteen months after the proposal was submitted. The company first suggested suspending the formal proceedings and did not object to the Town's suspension of the formal deadlines. The court also found that if a waiver had not occurred, the Town's failure to comply with the four month deadline constituted harmless error. The company also requested that the court enjoin the adoption by the Town of a cable regulatory ordinance. The court refused to do this, holding that it could not intervene before an ordinance was enacted.

***U.S. v. Williams***, 264 F.3d 561 (5th Cir. 2001), or **A Lesson in How NOT to Conduct Franchise Renewal Negotiations**.

Mr. Williams was a former city councilman of Jackson, Mississippi. When Mr. Williams was on the city council, the council voted 4-3 to reject Time Warner's application for a franchise renewal. Two citizens then contacted Time Warner's maintenance engineer and stated that they could help Time Warner get its franchise renewed, for the tidy sum of $150,000. Mr. Williams was present at the second meeting between the Time Warner representative and the two citizens, and he assured Time Warner that if it would agree to the terms previously explained (by the citizens), he was 100% certain that the franchise would be renewed. Not surprisingly, the FBI got involved, and an agent posing as the franchise manager for Time Warner met with the citizens and was again told that the franchise renewal was guaranteed upon payment of the money. Mr. Williams was convicted of conspiracy to commit extortion and solicitation of bribery payments. He appealed his conviction on numerous procedural and evidentiary grounds, but was not successful; the 5th Circuit upheld his conviction. Chances are good that Mr. Williams will never again have the opportunity to vote on a cable franchise renewal.