

Telecom: Making the Change from Franchising to a Regulatory Approach

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OVERVIEW

- Whether City has a franchise or a pure regulatory model, 2 main objectives:
 - Right of way management
 - Compensation for private use of public asset

OVERVIEW(Continued)

- It is more important than ever to have clear, up-to-date regulations
 - Both objectives have been attacked by the telecom industry since the Telecom Act of 1996
 - Telecoms have refused to enter into new franchises—supposedly awaiting decisions in the litigation over the Act
 - Recent proposed legislation at federal and state levels is threatening City authority

SUMMARY

- Cities need a regulatory system that:
 - Complies with federal and state law
 - Protects the ROW
 - Ensures fair compensation for use of the ROW
 - Enables the City to adapt to changes in law and technology

BACKGROUND

- Over 100 years of franchising in Oregon
- Utilities must get a franchise from each city (and the county, in some cases) prior to placing facilities in ROW
- Challenges to authority
 - Legal Challenges
 - Local government survived, but not unscathed
 - Discussed in detail below

BACKGROUND

- Challenges to authority
 - Legislative action
 - State-wide telecom franchises threatened in Oregon, but unsuccessful so far
 - Other states have not fared as well
 - National cable franchising threatened, and partially successful by FCC Rule
 - Cable modem, DSL, Vonage-type VoIP—now an “Information Service”—largely unregulated and beyond local reach for ROW compensation, taxation, and customer care

BACKGROUND – REGULATORY AUTHORITY

- Home Rule – Oregon Constitution, Art. XI, Sec. 2:
 - “The legal voters of every city and town are hereby granted power to enact and amend their municipal charter ...”
- Local Laws – Under Oregon Constitution, local codes, ordinances, resolutions and other forms of regulation and taxation governing the use of the rights of way are valid unless preempted by state or federal law or rules

AUTHORITY(Continued)

- Oregon Revised Statutes - ORS 221:
 - Statement of city authority to act as “necessary and convenient” (221.410)
 - Reaffirms municipal authority to regulate public utilities (221.415)
 - Authorization to impose “privilege tax” (221.450, 221.515)
 - Regulation of “telecommunications carriers” (221.505-221.515)
 - Definition specifically excludes competitive local exchange carriers (CLECs)

AUTHORITY(Continued)

- Oregon Administrative Rules
 - Many provisions governing telecoms
 - Most do not overlap with local rules, except:
 - Undergrounding of utilities – costs charged to customers

AUTHORITY (Continued)

- Federal Law

- Telecommunications Act of 1996: Preserves local government authority to regulate the ROW, and to receive fair compensation for that use, subject to two basic restrictions discussed later (47 U.S.C. § 253)
- Cable Communications Policy Act of 1984: Clear authority to require franchises for use of ROW by cable operators (47 U.S.C. § 541) and to collect franchise fees (47 U.S.C. § 542)
- Internet Tax Freedom Act: Imposes a moratorium on state and local taxes on internet access services through November 1, 2007
 - Bill pending that would make it permanent

BACKGROUND – SUMMARY

- Cities have clear authority to regulate ROW and collect compensation for private use of ROW
 - In Oregon, local government has withstood many challenges to this authority (discussed below)
- Need to ensure City has a regulatory scheme that exercises this authority within the limits of state and federal law

REGULATORY APPROACH – Why Make the Change?

- Telecoms refusing to enter new franchises
 - Fall out from Telecom Act of 1996 and related litigation
 - Legal status of provider with expired franchise?
 - Some providers content to rely on terms of expired franchise (often to cities' detriment)
 - Many Municipal Codes do not address this issue
 - How do you enforce code provisions requiring franchises (especially when telecom pays the franchise fee)?

REGULATORY APPROACH – Why Make the Change?

- Adaptability to new legal requirements
 - Possibly avoid litigation over franchise terms later found to be preempted
 - Recent FCC Order (your telecom provider may soon be a competitive cable provider, with no ROW regulation)
- Adaptability to new technology
 - Beware of “communications” franchises
- Allows City to adopt new construction/ restoration standards for ROW as industry standards change

REGULATORY APPROACH

- Different models:
 - Pure Franchising – Franchise required if facilities in ROW
 - Should have an ordinance with this requirement
 - Pure Regulatory/Licensing – Licenses/Permits to use ROW, no franchise agreement
 - Ordinance/Code sets out terms of use of ROW, including fees
 - Mixed model – Franchises permitted, otherwise Code sets out terms of use
- Pros and cons to each
- Common element: Regulations in Ordinance/Code

REGULATORY APPROACH

- Appropriate provisions depend on:
 - Authority to regulate
 - Recent legal challenges and developments have altered the landscape
 - Goals of regulatory scheme
 - Regulation of use of ROW
 - Compensation

REGULATORY APPROACH – Recent Legal Challenges

- Section 253 of the Telecom Act of 1996 has generated a lot of litigation:
 - 253(a): “No State or local statute or regulation . . . may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.”
 - 253(c): “Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way”

CHALLENGES (Continued)

- *Auburn v. Qwest*, 260 F.3d 1160 (9th Cir. 2001)
 - Frequently cited by industry in support of assertion that regulations are preempted by 1996 Act
 - Review of ordinances of several Washington cities
 - 9th Cir. held that the ordinances are preempted by 1996 Act
 - Ordinances regulate companies, not ROW
 - City has too much discretion

CHALLENGES (Continued)

- Provisions preempted under *Auburn*:
 - Extensive application process
 - Requiring information on financial, technical and legal qualifications
 - Reporting requirements
 - Regulation of ownership and transfer of shares
 - Franchise terms unrelated to ROW management
 - “Most-favored-nations” provisions
 - Free excess capacity
 - Unfettered discretion to require unspecified franchise terms and to grant or deny application

CHALLENGES (Continued)

- *Qwest v. Portland* – 9th Cir. Appeal (#2) Pending
- District Court (Round 1), 200 F. Supp. 2d 1250 (D. Or. 2002)
 - Qwest refused to pay cities franchise fees based on *Auburn*
 - Qwest sued Portland, eight Oregon cities intervened
 - Held the cities' various legal structures were not preempted

CHALLENGES (Continued)

- 9th Circuit (Round 1), 385 F.3d 1236 (2004):
 - Upheld gross revenue-based fees (*U.S. West v. Eugene*)
 - Remand to District Court to conduct an “individualized analysis” of each challenged ordinance
 - Must consider cumulative effect of regulatory scheme
 - Preempted if “may have the effect of prohibiting” services
 - Telecom-specific vs. Non-telecom-specific
 - “We doubt whether *City of Auburn* can be read so broadly as to apply to ordinances that are not specific to the telecommunications permitting process.”

CHALLENGES (Continued)

- District Court (Round 2), 2006 WL 2679543 (2006):
Again ruled in favor of cities
 - Considered and upheld every challenged regulation
 - In-kind contributions okay – not required and, if provided, deducted from franchise fees owed
 - Most-favored nation okay – discretion limited (charges subject to tariff and price lists) and deduct from franchise fee the difference between best rate and rate that otherwise would apply
 - Transfer restrictions okay – City may not unreasonably withhold or deny consent
- Qwest's appeal is pending

CHALLENGES (Continued)

- *Qwest v. Berkeley*, 433 F.3d 1253 (9th Cir. 2006)
 - City telecom ordinance preempted
 - Required extensive “opt out” to avoid permit requirements
 - “Control over the Company” vs. “Control over the right of way”
 - Regulations go to technical and legal qualifications, not ROW management, for example:
 - Identify state and federal qualifications
 - Annual documentation of compliance with environmental and communications law
 - Yearly records of current rates and tariffs

CHALLENGES (Continued)

- *Portland v. ELI*, 452 F. Supp 2d 1049 (D. Or. 2005)
 - Franchise requirement upheld
 - Franchise requirement that Charter and all general ordinances apply upheld
 - Cites *Portland* on non-telecom specific provisions
 - City's discretion "fettered" because subject to limits imposed by state and federal law
 - 5% of gross revenue fee upheld
 - No evidence it's a barrier to entry
 - Safe harbor: "Compensation" not limited to costs

CHALLENGES (Continued)

- *Portland v. ELI* (Cont.)
 - Most-favored-rate invalid
 - No restrictions on services ELI would have to provide City
 - In-kind compensation – Use of fiber and ducts by City invalid
 - NOTE: this case was settled while on appeal

CHALLENGES (Continued)

- *Time Warner Telecom v. Portland*, 452 F. Supp. 1084 (D. Or. 2006)
 - 5% fee upheld
 - Per foot fee upheld
 - Two provisions violate § 253
 - Most-favored-rate: based on *ELI* decision
 - In-kind contributions: Open-ended requirement for conduit preempted
 - Case is on appeal to 9th Circuit

CHALLENGES (Continued)

- *U.S. West v. Eugene*, 336 Or. 181 (2003)
 - Oregon Supreme Court upholds Eugene's telecom fees
 - License Fee: 7% of gross revenues for placing facilities in ROW
 - Registration Fee: 2% of gross revenues for engaging in telecom activity through a facility located in the City
 - §253 of 1996 Act: Does not preempt—Based on analysis of *AT&T v. Eugene*, 177 Or.App. 379 (2001) (Did not demonstrate fee has effect of prohibiting)
 - ORS 221:
 - Registration fee is on revenue from nonexchange access services, so no violation of 221.515(3) (No additional tax or fee on revenue subject to the privilege tax = exchange access services)
 - 7% cap on privilege tax is for use of ROW; does not apply to 2% fee for provision of service regardless of ROW use
 - Restates home rule authority to adopt tax/fee

CHALLENGES (Continued)

- FCC Order on Competitive Cable Franchising
 - Sets up new process for competitive applicants
 - 90/180 day “shot clock” to agree on terms or franchise is “deemed granted”
 - Attempts to clarify requirements for PEG/I-Nets, build-out, and franchise fees
 - FCC now considering applying same rules to incumbents at time of renewal
 - Bottom line for local regulation:
 - Rights and obligations remain unclear
 - Consider regulations for competitive cable franchises

REGULATORY APPROACH – Provisions to Consider

- ROW Management and Compensation
- Issues
 - Provisions potentially preempted
 - Most-favored nation/most-favored rate
 - In-kind contributions
 - Regulations of company, not ROW
 - “Fetter” your discretion
 - Telecom specific vs. utility neutral
 - Level playing field issues
 - Scrutiny under Telecom Act

REGULATORY APPROACH – ROW Management Provisions

- Objectives and Provisions
 - Knowing where facilities are located
 - Maps and permits
 - Minimizing impact during and after construction
 - Standards for construction, traffic control
 - Preserving a public asset
 - Restoration and repair
 - Managing an increasingly scarce asset
 - Coordination of construction and joint trenches
 - Minimize interference with City projects
 - Relocation and undergrounding

REGULATORY APPROACH – ROW Management Provisions

- Issues
 - Franchise, License or Permit
 - Franchise
 - Which trumps, agreement or Code?
 - What are the regulations for operators without a franchise?
 - Level playing field
 - Scope of licensing/permit scheme
 - Annual registration or licensing?
 - Application to City utilities
 - Administrative concerns
 - Level playing field

REGULATORY APPROACH – Compensation Provisions

- Objectives
 - Compensate the public for cost of management, use, occupancy, and degradation of public asset (i.e., obtain fair value for use of public asset)
 - Achieve competitive neutrality among various users of ROW as required by the Telecom Act

REGULATORY APPROACH – Compensation Provisions

- Issues
 - Franchise fee/privilege tax for facilities in the ROW
 - Gross revenue-based fees upheld (so far)
 - ILECs vs. CLECs under 221.515
 - Per-foot fee
 - Fee/tax for provision of service (regardless of ROW use)
 - Just like any other business tax
 - Many telecoms benefit from ROW without paying
 - What about wireless?
 - Industry challenges – Corvallis, Springfield

REGULATORY APPROACH – Provisions to Consider

- Samples

- Eugene: http://www.eugene-or.gov/portal/server.pt/gateway/PTARGS_0_2_13640_0_0_18/Ord20083.htm

- Tigard: http://www.tigard-or.gov/business/municipal_code/docs/15-06.pdf

- Wilsonville: http://www.ci.wilsonville.or.us/departments/admin_serv/admin/documents/Ord615.doc

http://www.ci.wilsonville.or.us/departments/admin_serv/admin/documents/Ord616.doc

QUESTIONS?

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