

Public Rights-of-Way and Marketing Exclusivity

Avoiding franchise rules while preserving exclusivity in wired communities

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In this article, we examine two legal issues that may arise in connection with a private cable operator's use of public rights-of-way in order to provide broadband services to residents of an HOA Community. By "HOA Community," we refer to any community governed by a Homeowners Association, including condominium developments, planned unit developments, some residential subdivisions, and master planned communities.

The first issue concerns cable television franchises: If the selected provider locates its network facilities on what is or will be (when construction is complete and lots are sold) a public right-of-way (PROW), will the provider be required to negotiate a cable television franchise with the local municipal or county government?

The second issue focuses on exclusivity: Can the developer, and later the Home Owners' Association, convey exclusive access rights to a single selected broadband provider, such that only that provider has a legal right to provide services to master planned community (MPC) residents?

Broadband Properties has been at the forefront of publications documenting the imaginative ways in which real estate developers, broadband service providers and municipal planners are changing the concept of community itself, by blurring traditional distinctions between the traditional public and private models for community organization. Challenging traditional models of community organization will become increasingly important as the idea of customer-owned

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or operated communications networks presents itself as an attractive alternative to the top-down model of centrally controlled networks owned by huge cable and telephone companies.

One articulation of this challenge is the idea of a "wired community," one that includes, from the initial design stage through the completion of construction, a bottom-up and fully integrated state-of-the-art broadband communications infrastructure, conceived as an essential utility not unlike electric and sewer systems. Such wired communities enable a degree of user control over the network that is not available to communities that must passively wait for and accept whatever communications infrastructure and service packages the established carriers decide to offer.

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Fiber-to-the-Premises (FTTP) is the technology of choice for wired communities, because the huge data capacity of FTTP (together with its reliability and low maintenance costs) guarantee that once installed, the infrastructure will remain viable – able to deliver the most bandwidth-intensive applications – for the foreseeable future.

Provision of video, voice and data services to single-family home developments does require some adjustment of the traditional private cable operator business model, which has traditionally been tailored to the multi-dwelling unit (MDU) environment. Rather than dealing with a landlord, the PCO is partnering with a real estate developer, and later the HOA. And instead of wiring a building, the provider is wiring a community. The legal environment for wired communities is different as well,

because deploying infrastructure in an HOA community will often require that facilities be located on or under rights-of-way that are – or upon completion of construction will be – public streets.

Cable Television Franchises

Federal law, of course, requires that anyone providing video programming over a “cable system” must operate under the authority of a franchise granted by the local municipal or county government. The local franchise requirement is premised on the assumption that local government has primary jurisdiction over public rights-of-way, and any private interest that uses public rights-of-way must compensate the community for its use of public property.

This regulatory scheme may change radically in the near future. Anyone who reads the news these days knows that the legal framework for cable television is evolving at a rapid clip, particularly with respect to local regulatory authority over cable systems. There is a movement afoot to all but eliminate local regulatory authority over cable, by legislatively replacing the local franchise system with a statewide or national franchising system for any video provider that uses a public right-of-way.

The few remaining former Bell telephone companies, especially Verizon and AT&T (formerly SBC), have been investing heavily in FTTx networks across the country in order to compete with cable companies in video markets. These efforts have included intense lobbying in state legislatures and in Congress to reform the local video franchising framework. So far, statewide video certificate laws have been enacted in Texas, South Carolina, Virginia, Kansas, Indiana and New Jersey, and are under consideration in another dozen states. Rep. Joe Barton’s telecommunications bill in the U.S. House of Representatives would establish a national franchise system in lieu of the existing local franchise system.

Finally, the FCC recently initiated a rule-making proceeding dealing with ways to reduce the regulatory burdens associated with negotiating individual franchise agreements with multiple local governments.¹

Thus, it seems likely that the local cable franchise system is headed for extinc-

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tion in the near future. This may be bad for large franchise operators like Time-Warner and Comcast, because a significant entry barrier will be eliminated for the powerful telephone companies. But it will provide a window of opportunity for ambitious PCOs to expand their service offerings to include many communities they have ignored because these properties could not be efficiently wired without crossing public rights-of-way.

Under the new franchising frameworks being proposed, the provider would use a relatively streamlined procedure to obtain a statewide (or national) video certificate. The certificate would authorize the use of public rights-of-way anywhere in the state, subject to an annual five percent (of revenue) “franchise fee” payable to each local franchising authority in which systems are deployed.²

For the moment, however, in most states a video system that crosses a public right-of-way must presumptively operate under a franchise awarded by the local municipal or county government. This requirement originates in Section 621 of the Federal Cable Act,³ and applies to “cable systems” generally. However, the so-called “private cable exemption” excludes from the definition of “cable system” any system that doesn’t “use” a public right-of-way.⁴ PCOs have traditionally relied on this exemption to escape the need to negotiate cable franchise agreements, but the price has been foregoing otherwise attractive business

opportunities, where serving the property would entail crossing public rights-of-way.

There is a split of judicial authority on the question of whether a PCO that runs its cabling across a single public right-of-way thereby “uses” the PROW in a way that triggers the cable franchise requirement. After all, the purpose of the franchise is to compensate (monetarily and otherwise) the local community for use of public property by a private interest. The five percent (of gross revenues) “franchise fee” extracted from the franchised cable operator, together with universal service and public interest programming and various other obligations, constitute the compensation.

But if the burden placed on public property is de minimus – for example, placement of a fiber optic cable underneath and across a single public street – then the public policy rationale for requiring a cable franchise evaporates. At any rate, this was the Eighth Circuit Court of Appeals’ conclusion in *Guidry Cablevision v. City of Ballwin*, 117 F.3d 383 (8th Cir. 1997). There, the court held that the local franchise authority’s franchise requirement was pre-empted by the “private cable exemption” in Federal law, because the crossing of a single city street did not constitute “use” of a public right-of-way within the meaning of 47 U.S.C. § 522(7). In support of its ruling, the *Guidry* court emphasized not only the de minimus nature of the public burden,

but also that requiring a cable franchise in this circumstance would conflict with Congress' desire, expressed in the private cable exemption, to encourage "open entry in the satellite field for the purpose of creating a more diverse and competitive telecommunications environment."

Other courts have adopted a strictly literal reading of the statutory language, holding that a franchise is required whenever a provider's facilities cross at least one public right-of-way, and that the extent of the public burden is irrelevant to the legal requirement.

Regardless of how courts interpret federal law, it should be emphasized that local governments have a great deal of discretion in deciding whether or not a cable franchise is required. More often than not, local communities welcome new housing developments in their areas in order to increase their tax base, attract new businesses and gain other tangible benefits such as jobs. These communities have a strong interest in lowering the regulatory barriers to new entry by broadband providers and will not insist on asserting their cable franchise authority if doing so might deter new development.

It stands to reason, therefore, that developers and their PCO partners should maintain close contact with local government authorities, and when appropriate, seek written assurance that their wired community project will not require a full-blown cable television franchise either immediately or in the future. (Another strategy, for use in new, greenfield, developments, involves the location of communications facilities in private easements, before any rights-of-way are dedicated to public use. This point will be discussed in the final section of this article.)

Finally, a PCO may avoid the franchise requirement by distributing its video signal through leased common carrier facilities located in public rights-of-way, as long as the PCO has no management control over or ownership interest in the facility. This method is based on the FCC's 1998 decision in a case called *Entertainment Connections, Inc.*,⁵ later affirmed by the Seventh Circuit Court of Appeals, and is not discussed in this article.

Can Developers Convey Exclusive Access Rights to a Single Provider?

The ability to ensure exclusive access for the chosen broadband provider is an important aspect of planning a developer/PCO partnership. This is because wiring a community for FTTP broadband services is an expensive proposition. Lacking the economies of scale possessed by huge cable and telecommunications incumbents, most private cable operators are understandably reluctant to undertake the large investment required to wire a community without the expectation of a high penetration rate. The way to get a high rate is through exclusive access to potential subscribers.

In many cases, exclusivity can be achieved as a practical matter through a bulk service agreement with the HOA, whereby subscription to PCO services is made a mandatory condition of owning a home in the development. Although subscription is mandatory, services are provided at a bulk rate that would not otherwise be available to subscribers on an individual retail basis. Assuming that the services are state-of-the-art (for example, over FTTP), mandatory bulk services can be a positive selling point for the technologically literate developer, rather than a burden.

In other cases, however, the developer will not agree to a bulk arrangement. Because the private cable operator's billing relationship will be with the individual subscribers rather than with the HOA, it is important to know whether there are any legal problems associated with seeking exclusive access to rights-of-way within the development.

The concept of exclusivity has unpleasant connotations in public policy discussions. It suggests monopolization, lack of choice, and harm to consumer welfare. As a result, policy makers at all levels of government have used various methods of prohibiting or restricting the use of exclusive access contracts dealing with the delivery of telephone and video services. While exclusivity is for the moment unregulated at the federal level (except for traditional telephone service), efforts to restrict exclusive access contracts for video and high-speed data

are likely to reappear, and some states have already imposed such restrictions. These efforts should neither be generally endorsed nor generally condemned; the truth is, the benefits or harms of exclusive contracting can only be evaluated in light of its empirical effects in particular circumstances.

In the PCO industry, restrictions on exclusivity come in the form of mandatory access laws, which provide franchised cable operators with a statutory right to install their facilities on private property without the property owner's consent. In multi-dwelling unit (MDU) markets, some states and localities have enacted mandatory access laws giving cable franchises a paramount right to wire apartment and condominium buildings in order to provide service to residents. These laws prevent MDU owners and condominium developers or associations from forming exclusive access agreements with PCOs, and thus suppressing competition for video services.

In HOA communities and other single-family housing developments, the primary restriction on exclusivity originates in federal law.⁶ Section 621 of the federal Cable Act (47 U.S.C. § 541(a)(2)) provides:

Any franchise shall be construed to authorize the construction of a cable system over public rights-of-way, and through easements, which is [sic] within the area to be served by the cable system and which have been dedicated for compatible uses.

This statute allows a franchised cable operator to install its infrastructure over (a) any "public rights-of-way," and through (b) any easements "which have been dedicated for compatible uses" in a housing subdivision or other development, notwithstanding the existence of an exclusive access agreement between a developer or HOA and a particular communications provider. Therefore, to the extent that use of those public rights-of-way or compatible-use easements allows the cable operator to reach individual residents in an HOA community, the exclusivity provisions of an access agreement would be unenforceable, because the HOA cannot override or annul the cable operator's statutory right of access.

The scope of section 621 is ambiguous, however: there is a split of judicial authority regarding the meaning of (b) – whether the “easements” to which cable operators have access includes *all easements, public and private, as long as they are “dedicated for compatible uses,”* or only easements that are, like the rights-of-way mentioned earlier in the statute, *dedicated to public (and compatible) uses.* If the statute applies only to dedicated public easements, it is much easier for the developer to control access to the development, by granting exclusive private easements to the chosen provider. Those private easements would not then be available for use by competitors, including the franchised cable operator.

On the one hand, there is a line of cases stemming from the Third Circuit Court of Appeals’ decision in *Cable Invs., Inc. v. Woolley*, 867 F.2d 151 (3rd Cir. 1989), holding that under section 621, a franchised cable operator has access only to rights-of-way and easements that have been dedicated to public use. “Dedication” to public use requires some official act by which local government accepts legal responsibility for maintaining the right-of-way for use by the general public.

Although state law or local ordinances may specify when and how this occurs, as a general matter, an easement in a new housing development is publicly dedicated when the government votes to accept a subdivision plat that identifies particular rights-of-way as public streets or thoroughfares. This interpretation represents the majority view in the United States, having been adopted (with minor variations) by the Eleventh, Ninth, Fourth and Eighth Circuits, as well as by numerous U.S. District Courts.

On the other hand, a number of decisions originating in Florida have held that section 621 prevents a HOA from using private agreements to block a franchised cable operator’s ability to install infrastructure along or across dedicated general utility easements, if the designated purposes of the easements are compatible with the provision of ca-

ble television. In this view, the purpose of Section 621 is to authorize the cable operator to “piggyback” on easements dedicated to electric, gas or other general utility transmissions, such that the law forbids any private agreement that would prevent a cable franchise from using dedicated utility easements.

The Solution: Private Easements

Notice that the cable franchise problem arises only to the extent that a PCO uses a public right-of-way, and the exclusivity problem arises only to the extent that a new housing development includes public rights-of-way or easements that are dedicated to public or general utility use.

It follows that both problems may be avoided or at least mitigated by careful planning to either minimize or control the access provided through the use of public rights-of-way in a private development. For example, a cable franchise is only required when the provider “uses” a public right-of-way by locating facilities on or under the public right-of-way. Arguably, however, if those facilities are installed in a *private* right-of-way that is conveyed *before* the right-of-way is dedicated to public use, the PCO is not “using” the public right-of-way at all.

Similarly, the local cable franchise statutory right-of-access applies only to the extent that easements are either public or dedicated to general utility uses. If the development project does not use public or general utility easements, or if any such easements are placed such that a user of the easements cannot access individual residences without crossing private property, a cable franchise’s access under Federal statute will be limited. That allows the developer greater control and, assuming there are no other legal impediments, the ability to form exclusive access agreements with a broadband service provider selected on the basis of merit rather than by default.⁷ **BBP**

About the Author

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References

¹² It should be emphasized that none of the franchise reform laws being discussed would remove local regulatory over how PROWs are used, or the ability of Local Franchise Authorities to extract a five percent fee based on revenue generated from such use.

³ Some of the new legislation is ambiguous with respect to whether the franchise fee is based on revenue generated from all systems within the franchise area, or only those that actually utilize PROWs. If the fee is based on all systems, the provider can create a separate affiliate to own and operate its traditional PCO systems that do not cross PROWs.

⁴ 47 U.S.C. § 541(b)(1) (“Except to the extent provided in paragraph (2) and subsection (f), a cable operator may not provide cable service without a franchise.”).

⁵ 47 U.S.C. § 522(7).

⁶ 13 F.C.C. Rcd 14277 (1998), *aff’d*, *City of Chicago v. FCC*, 199 F.3d 424 (7th Cir. 1999).

⁷ Possible state laws and regulations dealing with exclusivity or other preferred provider arrangements should not be ignored. Numerous state legislatures and/or public utility commissions are discussing ways to regulate preferential or discriminatory contracts between developers, HOAs and service providers, and most states have laws allowing HOAs to nullify long-term or self-dealing contracts made by real estate developers before control is turned over to the owners.

⁸ It is important to emphasize that some states and municipal ordinances may limit a developer’s right to restrict access to easements or to form exclusive service contracts on behalf of homeowners in a planned development. For example, Florida’s Plat Act provides that platted utility easements must allow access and use by franchised cable operators.