

# FTTH Network Regulation in Master-Planned Communities

The author expands on last month's Summit coverage on network regulation for MPCs

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**A**dvances in new technologies used to deliver multichannel video and telecommunications services – and the demand for such services – have created significant new revenue opportunities for real estate developers through the construction of fiber-to-the-home (FTTH) networks in master-planned communities.

Although developers have ignored these opportunities in the past and left them to traditional video and telecommunications providers' networks without receiving appropriate compensation for such networks' use of their land, national data recently made available

more attractive by offering new amenities to homeowners and business occupants only available from a state-of-the-art FTTH network. An FTTH network increases the value of homes and office spaces in master-planned communities. FTTH networks provide new streams of revenue for the developer that are specifically derived from the sale or lease of capacity and from fees for private easements and rights-of-way. FTTH also assures the residents of master-planned communities a choice of video and telecommunications providers and more options for such services.

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are their legal obligations under federal and state law, if any, to traditional video and telecommunications providers where a developer has decided to build an FTTH network in a master-planned community.

In this article, we address some of the key legal and regulatory issues that immediately appear in connection with a developer's construction, installation, ownership, or management of an FTTH in a master-planned community.

## **Will a Developer be Regulated?**

Whether a developer is regulated or unregulated if he constructs an FTTH network depends upon whether the developer actually provides telecommunications services over the network. The construction alone of an FTTH network generally will not be subject to federal or state telecommunications regulation. The Federal Communications Commission ("FCC") only regulates the use of fiber that is lit – that is, activated with optical and electrical equipment attached to an FTTH network or if capacity in an FTTH network is leased or sold or otherwise made available to any user on a "common-carrier basis."

A "common-carrier basis" means making capacity in an FTTH network available *indiscriminately* to any person or entity. If a developer attaches optical and electrical apparatus to an FTTH network or leases or sells capacity in an FTTH network *indiscriminately* to any

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shows that developers now recognize these opportunities. Developers are installing FTTH networks for delivery of voice, video, and high-speed data services in their master-planned communities at ever-increasing rates, and they are just beginning to realize new revenues from FTTH networks.

The advantages to a developer of deploying an FTTH network are well-known. FTTH makes communities

more attractive by offering new amenities to homeowners and business occupants only available from a state-of-the-art FTTH network. An FTTH network increases the value of homes and office spaces in master-planned communities. FTTH networks provide new streams of revenue for the developer that are specifically derived from the sale or lease of capacity and from fees for private easements and rights-of-way. FTTH also assures the residents of master-planned communities a choice of video and telecommunications providers and more options for such services. Given these newly recognized revenue opportunities, and the advantages of an FTTH network, there are numerous legal and regulatory questions that immediately arise from a developer's decision to construct an FTTH network in his master-planned community. Developers want to know if they will be regulated if they construct, install, own, and manage an FTTH network in their master-planned communities. Moreover, developers want to know what

person or entity, a developer would be deemed a “telecommunications carrier” providing a “telecommunications service” under the Communications Act of 1934, as amended (the “Communications Act”), and therefore will be regulated by the FCC.<sup>1</sup>

Many state public utilities laws have similar provisions, and if a developer offers capacity on a common carrier basis in the FTTH network, the developer will be regulated by the state where the FTTH network is situated. Of course, if a developer merely constructs an FTTH network but does not attach optical and electrical facilities to an FTTH network, or does not offer capacity in an FTTH network to any user on an indiscriminate basis, he will not be regulated by the FCC or a state.

#### **Offering of Telecommunications Services**

**Federal regulation is the first issue.** If a developer were to specifically offer local exchange or long distance telecommunications services over an FTTH network, under federal law the developer would have a duty to provide interconnection to other telecommunications carriers under Sections 201 and 251 of the Communications Act;<sup>2</sup> apply just and reasonable practices to the rendering of telecommunications services, including avoiding unjust and unreasonable practices and discrimination under Sections 201 and 251<sup>3</sup> of the Communications Act; and not impose unreasonable and discriminatory conditions on the resale of telecommunications services through the FTTH under Section 251 of the Communications Act.<sup>4</sup>

In addition, the developer must provide number portability to the extent feasible, dialing parity to competing telecommunications providers, and access to its rights-of-way under Sections 251 and 224 of the Communications Act.<sup>5</sup> To avoid these requirements, a developer should not render any local exchange or long distance telecommuni-

cations service over an FTTH network.

**State Regulation is the next issue.** If a developer provides local exchange or long distance service over an FTTH network, a developer will have substantially the same obligations described above under the public utilities laws of the state where an FTTH network is located.

A related question, however, is whether a developer’s pure management of an FTTH network without actually providing telecommunications services triggers state regulation. In some states, a “telecommunications infrastructure provider” is classified as a regulated utility for certain purposes. These purposes may include but are not necessarily limited to filing reports and making rights-of-way available to traditional video and

not to date regulated a developer who only “manages” an FTTH network. It is, however, in the process of developing a policy on this subject. In most states, however, if a developer just “manages” an FTTH network and does not provide telecommunications services to the public, the developer will not be regulated as a public utility. California is an example.<sup>8</sup>

#### **Provision of Video and Internet Services Over FTTH**

**Video Service.** If a developer were to provide traditional multi-channel video services over broadband cable to residents in a master-planned community, the developer would be deemed a “cable operator” under the Cable Policy Act of 1984, as amended by the Con-

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telecommunications providers. Kansas is one example.<sup>6</sup>

In other states, if a developer “manages” telecommunications facilities or a plant, but does not provide service, he may be classified as a “telecommunications corporation” subject to public utility regulation. An FTTH network would be regarded as such facilities or plant.

Illinois is an example.<sup>7</sup> The Illinois Commerce Commission, however, has

consumer Protection and Competition Act of 1992 (“CPA”)<sup>9</sup>, and be regulated by both the FCC and the franchising authority where the FTTH network is located.<sup>10</sup>

Moreover, the developer would be operating a “cable system” under the CPA.<sup>11</sup> A cable system is defined as a facility, consisting of a set of closed transmission paths and associated signaling generation, reception, and control equipment that is designed to pro-

vide cable service which includes video programming and which is provided to multiple subscribers within a community, with certain exceptions not pertinent here.

Additionally, the developer would be providing “cable service” under the CPA. Cable service means a one-way transmission to subscribers of video programming or other programming service and subscriber interaction, if any, which is required for selection or use of such video programming or other programming service.<sup>12</sup>

Consequently, a developer in this instance would be required to obtain a franchise from the local government before providing cable service. Such franchises contain a number of conditions including a “build-out” requirement in the franchised area, and payment of fees

Where a developer offers “IPTV,” the developer may be providing an “information service” under the federal Communications Act, and therefore not subject at this time to federal or local franchising authority regulation.<sup>14</sup>

In *National Cable & Telecommunications Assn., Inc., et al. v. Brand X, et al.*,<sup>15</sup> (“*Brand X*”), decided on June 27, 2005, the U.S. Supreme Court held that the FCC had lawfully concluded in its 2002 *Declaratory Ruling*<sup>16</sup> that cable companies that sell broadband Internet service do not provide “telecommunications service” as that term is defined under the Communications Act.<sup>17</sup> Hence, such services are exempt from mandatory, common-carrier regulation under Title II of the Act.<sup>18</sup>

In *Brand X*, the Supreme Court also held that the FCC had properly con-

management of a telecommunications service.<sup>21</sup> Thus, consumers who use their cable modems do so not to transmit information transparently, such as by a telephone, but instead to obtain Internet access.

In view of *Brand X*, if a developer provides IPTV over an FTTH network, the developer should not be deemed a “cable operator” providing a “cable service” over a “cable system” under the CPA<sup>22</sup> because, as in *Brand X*, IPTV allows for the capability for manipulating and storing information and integrates the Internet and a high-speed line, thereby rendering it an “information service.”

Neither the FCC nor the federal courts has issued any rulings to date that IPTV is a cable service and thus subject to the CPA.

Incumbent local exchange telecommunications carriers like Verizon Communications, which is deploying its FiOS system, and AT&T which is offering IPTV, or integrating satellite TV programming with high-speed Internet access to provide digital video recording, video on demand, and Internet content including photographs and music via a new set-top box, have, however, either obtained statewide franchises from those states which have enacted legislation allowing statewide franchises,<sup>23</sup> or cable franchises from local franchising authorities before deploying their IPTV systems, because local governments currently demand a grant of authority for the use of their right-of-way.

Apparently, these incumbent local exchange carriers have elected to pay fees in the form of percentage of revenues to local governments where their IPTV networks are located, rather than litigate the issue of whether they must obtain a franchise for IPTV.

Congress is, of course, currently addressing the structure of the telecommunications industry and is planning an overhaul of the 1996 Communications Act, but has not yet enacted any

## **Does a developer’s pure management of an FTTH network without actually providing telecommunications services trigger state regulation? It depends on the state.**

based on a percentage of revenues.<sup>13</sup>

**Internet Protocol Television (“IPTV”).** A slightly different set of circumstances is presented when a developer provides IPTV over an FTTH network to residents of a master-planned community. IPTV is the distribution of video signals using Internet Protocol (“IP”). “IPTV” is a new method of delivering and viewing television programming using an IP network and high-speed broadband access technology.

Among other things, IPTV allows a subscriber to obtain television programming whenever the subscriber decides to view it. Simply put, IPTV is not just a new distribution or playback method for television or other video programming, but can serve to eliminate a fixed video programming schedule and operate similarly to how information on the Internet can be accessed by a consumer at any time.

cluded in its *Declaratory Ruling* that Internet access over a cable system using a cable modem is an “information service” under the Communications Act because it provides a capability for manipulating and storing information.<sup>19</sup>

Moreover, the Supreme Court affirmed the FCC’s conclusion that cable companies providing Internet access are not providing “telecommunication service” because of the integrated nature of Internet access and the high-speed wire used to provide Internet access.<sup>20</sup>

The term “information service” means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing or making available any information via telecommunications, and includes electronic publishing, but does not include any of such capability for the management, control, or operation of a telecommunications system or the

such legislation to do so.

IPTV is included among the subjects that Congress is considering in the Communications Act overhaul. Moreover, in Docket No. 05-311 (FCC05-189 released November 18, 2005), the FCC has issued a Notice of Proposed Rulemaking (“NPRM”) in which it is soliciting comments regarding whether local franchising authorities should continue to require cable franchises or whether requiring franchises for developing innovative video services slows or hinders competition from entering the marketplace.

The FCC has not yet concluded this proceeding, but is expected to do so in late 2006. In its NPRM, the FCC has requested public comment on a number of issues, including whether the “build-out” requirement for a cable system as set forth in Section 541(a)(4)(A) of the CPA impedes competition. See NPRM at Paragraph 23.

**Internet Access.** If a developer provides only Internet access over an FTTH network, the developer would definitely be deemed an “information service” provider under *Brand X* and the FCC’s 2002 *Declaratory Ruling*, and would not be subject to federal or state regulation.

### Obligation Under the Communications Act

Section 541(a)(2) of the Communications Act grants franchise cable companies the right to access “public rights-of-way” and “easements... which have been dedicated for compatible uses.”<sup>24</sup>

In light of this Section of the Communications Act, developers want to know if its provisions are applicable to them when they grant private easements for an FTTH network in their master-planned communities.

A number of federal circuit courts of appeal have ruled that the phrase “easements...dedicated for compatible uses” in Section 541(a)(2) means that a private property owner relinquishes his right of exclusion if he publicly dedicates an

easement so that the general public may use the property.

In *Cable Holdings of Georgia, Inc. v. McNeal Real Estate Fund VI Ltd.*, 953 F.2d 600 (11<sup>th</sup> Cir. 1992), the U.S. Court of Appeals for the Eleventh Circuit ruled that a developer may deal exclusively with one cable or telecommunications provider and exclude other cable or telecommunications providers from rendering cable or telecommunications services to his property if the developer has not dedicated any easements in the development for general use by any utility, but instead has granted the cable and telecommunications providers with whom he wishes to conduct business a private easement to provide cable services and telecommunications services.<sup>25</sup>

In its decision, the Court stated

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that the word “easement” in §541(a) is not defined, but noted that this word is qualified by the word “dedicated” in the statute. The court observed that an easement is legally “dedicated” only when the private property owner entirely relinquishes his right of exclusion regarding the easement so that the general public may use the property.<sup>26</sup>

The Eleventh Circuit court also concluded that the history of the CPA does not preclude a private landowner from entering into private agreements for easements and that a private landowner may deny franchise cable companies access to such easements. The Court determined that the words “dedicated” and “easements” as used in §541(a) do not equate to private easements.<sup>27</sup>

The Third, Fourth, Eighth and Ninth Circuit Courts of Appeals have generally followed the Eleventh Circuit’s analysis in *Cable Holdings*. Thus, if a developer deploys an FTTH network in a master-planned community, the developer must provide access to cable companies only if the developer dedicates public rights-of-way or easements for general public utility use.

### Obligations Under Section 224 of the Communications Act

Likewise, developers want to know if they are required to observe Section 224 of the Communications Act if they construct an FTTH network in their master-planned communities. Section 224 of the Communications Act provides that a *utility* shall provide a cable television system or any telecommunications

carrier with non-discriminatory access to any pole, *duct, conduit, or right-of-way owned or controlled by it.*<sup>28</sup>

The term *utility* as used in §224(f)(1) means “any person who is a local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications.”<sup>29</sup>

The term *pole attachment* as used in §224(a)(4) means any attachment by a cable television system or provider of telecommunications service to a pole, *duct, conduit, or right-of-way owned or controlled by a utility.*<sup>30</sup>

Unless regulated by a state, the FCC regulates the rates, terms or conditions of pole attachments. Accordingly, Sec-

tion 224 of the Communications Act controls a *utility's* obligation to a cable television provider or telecommunications carrier with respect to conduits and access to rights-of-way.

How does this section of the Communications Act apply to a developer who constructs an FTTH network? Unless a developer who has constructed an FTTH network is classified as a "utility" under state law because the developer is a "telecommunications infrastructure" provider or "manages" telecommunications facilities and because the developer "owns or controls"

telecommunications carriers over the ducts, conduits, easements and rights-of-way in an FTTH. **BBP**

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conduits and rights-of-way used for wire communications, a developer *would have no obligation* under Section 224 to make such conduits or rights-of-way available to a cable television system or any telecommunications carrier.

Moreover, a utility's "ownership or control" of rights-of-way or other such facilities depends on whether the utility could *voluntarily* provide access to a third party and would be entitled to compensation for doing so.<sup>31</sup>

Significantly then, state law, rather than federal law, determines whether and the extent to which utility ownership or control of a right-of-way exists in any factual situation within Section 224. Thus, any degree of ownership or control would likely trigger a developer's obligations to make non-discriminatory access available to cable companies and

**References**

- <sup>1</sup> 47 U.S.C. §153(44); 47 U.S.C. §153(46).
- <sup>2</sup> 47 U.S.C. . §201 and 47 U.S.C. §251. Sections 201 and 251 also set forth additional duties and obligations for telecommunications carriers.
- <sup>3</sup> *Id.*
- <sup>4</sup> 47 U.S.C. §251.
- <sup>5</sup> 47 U.S.C. §251; 47 U.S.C. §224.
- <sup>6</sup> K.S.A. 66.1, 187 (2006) The Kansas Video Competition Act, however, excepts private easements from inclusion in public rights-of-way. K.S.A. 2006 Supp. 17-1902..
- <sup>7</sup> 220 ILCS 5/3 – 105.
- <sup>8</sup> California Public Utilities Code, 216(a).
- <sup>9</sup> 47 U.S.C. §521 *et seq.*; 47 U.S.C.

§522(5).

<sup>10</sup> 47 U.S.C. §541(a)(3) and (4); 47 U.S.C. §541(b)(1). Section 541(b)(1) provides that "Except to the extent provided in paragraph (2) and Subsection (f) [of Section 541], a cable operator may not provide cable service without a franchise."

<sup>11</sup> 47 U.S.C. §522(7).

<sup>12</sup> 47 U.S.C. §522(6).

<sup>13</sup> 47 U.S.C. §541(a)(3) and (4).

<sup>14</sup> 47 U.S.C. §153(20).

<sup>15</sup> 545 U.S. \_\_\_\_, 125 S.Ct. 2688 (June 27, 2005).

<sup>16</sup> *In Re: Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd. 4798 (March 15, 2002). Since *Brand X* was decided, the FCC ruled that Digital Subscription Line ("DSL") services are also "information services."

*Report and Order and Notice of Proposed Rulemaking*, FCC 05-1502 (released September 23, 2005).

<sup>17</sup> 545 U.S. at \_\_\_\_, 125 S. Ct.

<sup>18</sup> 47 U.S.C. §201 *et seq.*

<sup>19</sup> 545 U.S. at \_\_\_\_, 125 S. Ct. at 2688-2712.

<sup>20</sup> 545 U.S. at \_\_\_\_, 125 S. Ct. at 2709-2711.

<sup>21</sup> 47 U.S.C. §153(20).

<sup>22</sup> Texas, New Jersey, North Carolina, Kansas and California have enacted statewide franchise laws.

<sup>23</sup> 47 U.S.C. §541(a)(2).

<sup>24</sup> 953 F.2d at 606.

<sup>25</sup> *Id.*

<sup>26</sup> 953 F.2d at 607.

<sup>27</sup> 47 U.S.C. §224.

<sup>28</sup> 47 U.S.C. §224(f)(1).

<sup>29</sup> 47 U.S.C. §224(a)(4).

<sup>30</sup> *Implementation of Local Competition in the Telecommunications Act of 1996, Fifth Report and Order and Memorandum Opinion and Order*, 15 FCC Rcd. 22, 983, 23023 (Oct. 25, 2000).

<sup>31</sup> 15 FCC Rcd. at 23023.