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There Is Life After State Cable Legislation Passes

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In My Opinion: Surviving Language Migration From Telecom To Broadband Policy

By Chuck Sherwood

For those of us who have been around since the beginning or so it seems, I keep wondering when we, on the public interest side, will finally develop strategies that move us from always being on the defensive to going on the offensive. It all started in the mid '70s, the glory days, where the 1979 Mid West Video decision by the Supreme Court forced the cable industry into the hand-to-hand combat of the '80s Cable Wars. That was the last win for the public interest as we witnessed the Cableco[1] manipulations of Congress in the '84 and '92 Acts[2] which culminated with the passage of the "grand compromise," better known as the Telecommunications Policy Act of 1996. In the past twelve years, we have been rolled by telecom "corporate interests," with their highly paid lobbyists and lawyers as well as their Astroturf[3] groups and so called academic think tanks. We have been rolled over in Congress, in the FCC, in the courts and in one state legislature after another. The most recent example is in the 6th Circuit Appeals Court upholding of the FCC's March 5, 2007 Cable Franchise Order giving Telcos franchises in 90 days.

There are lots of reasons why the industry has been so successful, and it's more than their use of money to buy political influence. Telco's understand that it's all about the language and use of words, whether as part of a public relations pitch which some would call propaganda campaigns or in legal drafts. Waged in the media, which telecom conglomerates also control, or as part of legal briefs where words are carefully parsed, we find distorted definitions and meanings designed to manage judges decisions, which, these days, more often support corporate over public interests.

Let me give you a couple of examples of the industry's reasoning processes that justify recent legislative decisions—

- Preempting Local Franchising Authorities (LFAs) with either national or state franchising will foster competition which will lower subscriber rates and create jobs,
- LFAs are "barriers to entry." LFAs make "unreasonable build-out requirements and demands for PEG Access."
- How about at&t's claim that they do not need a franchise since their U-verse service is not a Title VI cable service but an "IP service," thus subject to Title I, Information or ISP classification.

As has now been documented by both NATOA and Alliance for Community Media surveys to assess the impact of state franchising, not only have these claims proven not to be true in any state that passed legislation preempting local franchising processes, but there is still no consensus on whether carrying video programs on twisted pair phone lines and juiced-up DSL is an "Internet Protocol" or "Cable Service."

Keep in mind that it's not just the usual corporate opponents of municipalities, counties, states and Public, Education and Government (PEG) Access organizations who frame issues in favorable, pro-industry language. Sometime our allies in the consumer, civic and media reform arenas also undermine LFAs' authority—not with malice, but from ignorance of telecom history and the land-use laws that govern the granting of franchises. The key to ensuring deployment of next generation, last mile, telecom infrastructure is the ability of local governments to manage Public Rights of Way (PROW)[4] for the benefit of citizens. We see property taxes rise for public communications services (for education, police, fire, emergency management, etc.) as the telecom industry orchestrates legal exemptions from paying its fair share for use of public land. Year after year we watch the original sources of franchise revenues designed to protect the public's communications interests evaporate due to the careless use of language by both protagonists as well as antagonists.

For example, any talk of migration from analog to digital or IP services is a word game that plays into the hands of the industry. As I recently heard in a discussion on National Public Radio, one of the media reform folks claimed that the Internet is a "publishing" tool and not a "communications network" for the delivery of voice, video and data services. Once again, this activates the language game since using the term "publishing" triggers the old cable companies' claim in the 80's, that they were "electronic publishers" with the same First Amendment right as newspapers. Obviously, newspapers aren't regulated—so if cable is a newspaper—voila, government can't collect a fee for use of PROW. The cable industry actually claimed that it's infrastructure was no more than a newspaper stand using the sidewalk for free.

Many people think that American municipalities are new to the management of PROW when, in fact, local governments have a fiduciary responsibility to manage public land for the benefit of citizens and have been doing so for years. My recollection is that this responsibility goes back to English Common Law and has been part of American Common Law practice since the founding of the Nation. It's also important to note that since the early '80s, municipalities managed on-going financial crises with the down turn in the national economy and the launching of anti-tax campaigns. Local governments consistently needed to figure out how to deliver services with constantly shrinking revenues because they are required to operate within budget. Unlike the private sector, local governments can't suddenly raise rates for essential services nor, like the federal government, can they operate with trillions of dollars in deficits.

Let's not forget what happened after the passage of the '96 Telecom Act, which at the request of the industry classified cable modem or Internet (ISP) services as a Title VI, Cable Service. As soon as the City of Portland attempted, in its transfer of ownership proceedings, to require the same open access provisions for unaffiliated ISP services that had been imposed by the Act on Telco's for use of their network by Competitive Local Exchange Carriers, Cablecos began the

[1] Cableco refers to the cable companies / industry.
[2] The Cable Communications Policy Act of 1984 and the Cable Consumer Protection and Competition Act of 1992.
[3] Astroturf or Astroturfing in American English is a neologism for formal public relations campaigns in politics and advertising which seem to create the impression of being spontaneous, grassroots behavior, hence the reference to the artificial grass Astro Turf.
[4] Public right of way (PROW) is the 9 feet of land on each side of every road in the U.S. reserved as utility corridors, which are purchased and maintained with tax dollars. Arguably, PROW is the most valuable real estate in the nation, granting private companies access to the marketplace in every town where a franchise is awarded. Franchise fees, PEG access and Institutional Network requirements codified the most fair and consistent form of compensation so communities benefit along with the franchisee from the success and growth of new technology and evolving innovation.

process of changing the cable modem classification from Title VI, Cable Service to Title I, Information Service. As a result, LFAs didn't just lose regulatory authority but also lost some $500,000,000 in new franchise fees that were just beginning to be collected from the provision of ISP services. Once again the FCC, the Appeals Court and then Supreme Court, in the Brand X decision, upheld corporate over community interests.

Since LFAs have a fiduciary responsibility to citizens, how can they continue to permit providers of voice, video and data services to use PROW without requiring fees for that use, regardless of the classification of the service provided—Title I, Information or ISP Services, Title II, Telecommunications Services, or Title VI, Cable Services. It makes no difference how services are classified, they're still carried on infrastructure located on public land and so must pay for that use. As an engineering friend told me, telecom infrastructure is neutral; it carries whatever you put on it. Telecom owners seeking to snivel out of legal agreements invent service classifications as a basis for land lease compensation.

Unfortunately, the easy explanation for this regulatory mess has to do with the history of development and delivery of utility and broadcast services—from telegraph to electric to telephone to radio to television to cable, satellite and cell phones and then finally to so-called broadband services of voice, video and data—which many refer to as the Internet. All of these utility and broadcast services use either the PROW or the Public Spectrum. Each of these services were given special consideration to help create viable business entities and to foster competition. Each of these services, provided by different companies, used delivery networks with differing technologies, capabilities and limitations. Regulations also considered which services were essential and thus subject to different regulation regimes and whether they fell under the purview of local, county, state or national government. Then there was the consideration of which service was intra-state or interstate and who had regulatory authority. In my opinion, these layers of definitions, classifications, issues and concerns create what I will call "Barriers to Common Sense."

My challenge is directed to the national associations that represent the interests of the LFA's, their attorneys, advisers, as well as members of NATOA, and especially our sharp attorneys. Come up with a legal construct based upon the understanding that in a 21st Century Digital Broadband Universe voice, video and data services are just *data bits delivered to a display device*, regardless of whether they are delivered on wireline or wireless networks. Since all providers of broadband services must use either Public Rights of Way or Public Spectrum as pathways of delivery then all providers must pay fees to LFA's. In the case of wireline services all providers would pay for the use of the PROW and thus make the LFAs whole as the managers of public lands. LFA's then assume the fiduciary responsibility for managing and dispersing, for the community's common good, revenues generated from public right of way use. In the case of wireless providers using Public Spectrum to deliver broadband services, fees would be paid to the LFA based upon subscribers' zip codes, which conform to the geographic

boundaries of LFAs. If you're in the broadband delivery business, wired or wireless—you pay local franchising authorities. It's the only fair way to make sure the public is compensated for use of public assets.

Now, as we head toward the 2008 Presidential election, facing the latest economic downturn caused by the credit, subprime mortgage and oil prices crises, it's estimated that state and local governments around the country are going to lay off some 45,000+ employees. Can you imagine what a difference there would be on state, county and local government budgets if the public was being fairly compensated with the billions of dollars owed them by the telecom industry for Internet service franchise fees? We've been playing this negative-sum telecom word game for thirty years. How much longer can we expect the public to subsidize the telecom industry bit by bit? ■

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REEL TIPS

Fresh Ideas for Programmers

- Consider the advantage of using powder that is a mineral. It can be used on all skin types, tones, and women and men of all ages. Mineral make-up is typically free of preservatives, talc, oil, fragrance and other chemicals. Many of the products have SPF, cover imperfections and allow the skin to "breathe." These products give skin a youthful "glow," looks natural and is not a heavy "made up" look you get with traditional makeup. Lip glosses now come in subtle shades and can be used to add a hint of color. Lastly, purchase disposable make-up applicators. These items can be purchased at your local beauty supply store, pharmacy or grocery store.
- Need "professional" make-up for a large scale production? Consider beauty school students. They are inexpensive and can provide excellent results.
- Colder weather is fast approaching. Review your inclement weather procedures with staff and make sure all contact information is up to date. Review, and revise if necessary, your CG pages with emergency information. Test your back-up generators and make sure your production vehicles have been serviced for the colder temperatures.
- Can't afford the cost of specialty production equipment? Purchase used equipment and make sure to get warranty and/or service agreements. Also, consider renting equipment from your local production supply, special effects lighting, costume or magic shop. Magic shops have great lighting and special effects equipment.
- Create a blog for production tips and techniques among the PEG members in your area. Here you can share commentary, descriptions of events, or other material such as graphics or video. A typical blog can contain text, photographs, images, sketches, video, music, audio and links to other blogs, web pages, and other media related to the topic.
- Think Green! Find ways to reduce, re-use, and recycle your production equipment and supplies. Produce programming that informs your viewers about energy conservation specific to your area. And while you are out on a shoot — use the government's hybrid vehicle.
- If you have tips you would like to share, please send then to donna.keating@montogmery countymd.gov.