

# **IMLA'S MID-YEAR SEMINAR**

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## ***The ABC's of Telecommunications Litigation***

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# Introduction

(a) In General - No state or local statute or regulation, or other state or local requirement, may prohibit or have the effect of prohibiting the ability of an entity to provide interstate or intrastate telecommunications service.

## **Introduction**

(b) State Regulatory Authority - Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with Section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, insure the continued quality of telecommunications services, and safeguard the rights of consumers.

# Introduction

(c) State and Local Government Authority- Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and non\_discriminatory basis, for use of public rights-of-way on a non\_discriminatory basis, if the compensation required is publicly disclosed by such government.

# Most Common Issues

## Franchise Fees

- Compensation vs. cost for management of right-of-way.
- State law limitations.
- Disparity between users of the right-of-way.
- Double charging; i.e., is the same network charged for cable service and also for telecommunications service.
- The operator does not provide a service in the City.

# Most Common Issues

## The City's Ordinance Is Beyond The Scope of Authority

- State law limitations.
- Section 253 limitations.
- State PUC vs. local government role.

# **Recommended Approach**

## Planning - The Best Defense Is A Good Offense

- Policy considerations - local government needs to be organized and develop a plan and a record that will support its ordinances and requirements before adopting regulations for telecommunications providers in the right-of-way.

# Recommended Approach

## Consider At Least

- City resources devoted to planning and maintenance and administration of the Ordinance.
- Should a Master Telecommunications Ordinance be adopted?
  - ❖ If so, when and how to treat existing as well as proposed new providers.
  - ❖ What needs to be included in the Ordinance.

# Recommended Approach

## Consider At Least (continued)

- Should there be a distinction between rights-of-way users providing service within a community and those that are simply extending lines through the community?

# Recommended Approach

## Consider At Least (continued)

- What document structure is required?
  - ❖ Regulatory Ordinance
  - ❖ Franchise Agreement
  - ❖ License Agreement
  - ❖ Franchise Fee Schedule
  - ❖ License Fee Schedule
  - ❖ Application and review procedures
  - ❖ Oversight and administration
  - ❖ Community need requirements

# Recommended Approach

## Consider At Least (continued)

- Should local government conduct an evaluation of existing structures for co-location?
- Are there alternatives that we would wish to explore, including co-ownership structures?
- Are there in-kind tradeoffs for use of public property; i.e., service to the residents in the community at discounted rates.

# Right-of-Way Construction and Administration Ordinance

## Purpose

- To impose public health, safety and welfare standards for community benefit.
- To protect a valuable local government asset.
- To control disruption and obstruction.
- To streamline the administrative process.

# Right-of-Way Construction and Administration Ordinance

## Purpose (continued)

- To protect property of residents and businesses.
- To ensure that the users are treated equally.
- To mandate records of use and location.
- To provide for local government inspection.

# Right-of-Way Construction and Administration Ordinance

## Purpose (continued)

- To tailor requirements to the location.
- To provide for registration of all users of the right-of-way.
- To establish a permitting process and permit fee.
- To prepare for mapping.

# Telecommunications Ordinance

## Purpose

- To manage and control right-of-way.
- To secure compensation that is reasonable, competitively neutral and non-discriminatory.
- To ensure compliance with federal and state law.

# Telecommunications Ordinance

## Important Considerations

- Places a burden of application and compliance on operators.
- Does not provide the same regulatory powers as the cable franchise.
- Does not provide the same regulatory powers as the state PUC.
- Does not regulate services.

# Telecommunications Ordinance

## Important Considerations (continued)

- Does not require wiring the whole community.
- Does not control consumer rates.
- Does not regulate customer service.
- Must include provisions for timely review of applications.
- Must include provisions for the protection of public welfare; I.e., insurance, compliance with construction and industrial standards, and periodic review.

# **Important Principles Applicable to Local Government Authority**

## I.e., Adopted Principles of NATOA

- Local governments have a duty and an obligation to bear the costs of acquiring and maintaining public rights\_of\_way.
- Commercial use of public property for private profit requires equitable, fair, and reasonable compensation for its use.

# Important Principles Applicable to Local Government Authority

## I.e., Adopted Principles of NATOA

(continued)

- Both public and private entities have a role to play in the delivery of advanced telecommunications services to all Americans.
- Federal, state, and local governments each have a role in ensuring the goals of the Telecommunications Act are achieved, and each must respect the authority of the others.

# Case Example

## Mobile, Alabama

- BellSouth Telecommunications v. City of Mobile, 171 F.Supp. 2d 1261.
- Background - BellSouth sued Mobile challenging an ordinance under which BellSouth would be required to obtain a permit and pay a fee before undertaking construction work on public right-of-way.

# Case Example

## Mobile, Alabama (continued)

- The district court held that:
  - The Telecommunications Act did not preempt the ordinance.
  - State law did not preempt the ordinance.
  - The ordinance did not violate the Supremacy clause.

# Case Example

## Mobile, Alabama (continued)

- The ordinance did not violate equal protection or due process rights of the company.
- The ordinance did violate the Commerce clause.

# Case Example

## The Mobile Process

- A copy of the final report is included with our handout.
- Brief summary of the process and recommendations.
  - The City created a committee.
  - The City agreed to organize and meet regularly.

# Case Example

## The Mobile Process (continued)

- The committee included expert advice and consulting on the City's role and requirements in regulating the use of right-of-way.
- City evaluated what other municipalities are doing.

# Case Example

## The Mobile Process (continued)

- The City established a procedure for assessing the needs for regulating the right-of-way and evaluated current regulatory procedures and requirements.
- The City established a framework of concepts for its regulatory requirements.

# Case Example

## The Mobile Process (continued)

- The City invited comments from a broad-range of users of the right-of-way, including the City's own water works department.
- The City made it clear to the users that they would be part of the process.
- The City developed a preliminary ordinance and invited comments from users.

# Case Example

## The Mobile Process (continued)

- The City made modifications and changes to its ordinance and numerous compromises.
- Throughout the process, the committee kept a record of its process, its decisions, its studies, and the basis for its requirements.
- City held three public hearings before adopting the ordinance.

# Case Example

## The Mobile Process (continued)

- The City established a time within which the ordinance would become effective; i.e., one year after its adoption in order to permit a reasonable time for transition and to allow the City's internal procedures, including development of forms to be completed.

# Case Example

## The Mobile Process (continued)

- On the eleventh hour of the effective date, BellSouth commenced a lawsuit challenging the ordinance.
- Unlike many cases involving challenges to local regulation, the court in the Mobile case clearly was impressed by the City's procedure and all of its processes as well as the record that had been developed to support the City's decisions.

## Case Example

Another case study currently pending involves a challenge to the City's requirements, including an agreed upon franchise.

- The franchise fee, although it had been agreed to, it is claimed unreasonable and a burden to entry.
- The franchise fees have been paid under protest, and are delinquent.

# Case Example

- The City has determined to get in the drivers seat and control the objections by implementing at least the following:
  - Place the burden on the complainant to establish clearly in writing the basis for its complaints.
  - Provide a clear opportunity for review and discussion, and resolution of the complaint.

# Case Example

- Establish a notice of default with an opportunity to cure and a hearing on a default if there is continued non-compliance. The hearing needs to include:
  - ❖ City records to support its requirements.
  - ❖ A record of franchise fee payments or lack thereof.

# Case Example

- ❖ Communications between City staff and operator.
- ❖ A summary of federal and state law applicable to the City's rights.
- ❖ The City witnesses prepared to testify at the hearing.

## Case Example

A hearing involving a local challenge to City requirements for violation of a regulatory ordinance, including the applicability of a franchise fee requirement should be treated the same as a judicial proceeding to ensure that in the event there is an appeal, the City's record will clearly support the decision of its governing body and a court will be equipped with a demonstrated record that will provide the information essential for the court to uphold the local government decision.

# Conclusion

- Know the law and limitations.
- Prepare a plan.
- Designate person to administer and keep records.