Connecting America's Public Sector
to the Broadband Future

SPIEGEL & MCDIARMID LLP

COURT & FCC DEVELOPMENTS IMPACTING LOCAL GOVERNMENTS

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The Courts

I. THE COURTS.

A. Supreme Court.

1. *City of Arlington, Texas, et al. v. FCC et. al.*, No. 11-1545 (U.S. cert. granted Oct. 5, 2012).

- Review of Fifth Circuit's decision upholding FCC's Cell Tower "Shot Clock" Ruling, *City of Arlington et al. v. FCC*, 668 F.3d 229 (5th Cir. 2012).
- Cert. granted as to only one of two issues raised:
  Whether, contrary to the decisions of at least two other circuits, and in light of this Court's guidance, a court should apply *Chevron* to review an agency's determination of its own jurisdiction.
- Court is therefore less likely to reach merits of §332 (c)(7) issue, although it is possible. More likely, and if Arlington were to prevail, result would be a remand to the 5th Circuit and/or the FCC.
- Briefing Schedule.
  - *Amicus* briefs supporting Arlington are due on or around **November 26**.

The Courts

2. *Armour v. City of Indianapolis*, 132 S. Ct. 2073 (U.S. June 4, 2012).

   - Held that city's decision, in changing the manner in which it assessed property owners to pay for sewer project, to forgive future assessments on taxpayers who elected to pay in installments but not to refund payments already made by taxpayers who elected to pay the entire assessment upfront, did not violate Equal Protection Clause.

   - Decision is helpful to state and local taxing authorities, as it contains strong language reaffirming prior Court precedent holding that state and local tax classifications are owed substantial deference.

3. *DirecTV, Inc. v. Levin*, No. 10-1322.

   - Issue: Whether Ohio's DBS/cable tax, allowing cable franchise fee offset, violates dormant Commerce Clause.

   - Court asked SG for views, and SG urged against cert, arguing lower court's decision was consistent with dormant Commerce Clause precedent.

   - Cert. denied on June 25.

The Courts

B. Courts of Appeals.

1. *City of Arlington et al. v. FCC*, 668 F. 3d 229 (5th Cir. 2012), *cert. granted,* ___ S. Ct. ___, 2012 USLW 4748083 (U.S. Oct. 5, 2012).

- Appeal of FCC's wireless facilities *Shot Clock Ruling*.
- Hobbs Act Issue.
  - Held that pending FCC recon. petition tolls appeal deadline only for party filing the recon. petition.
  - Narrowly construes what intervenor arguments fall within the scope of the petition.
  - Lesson: At least if you're planning to appeal to the 5th Circuit, appeal any FCC decision you don't like within the 60-day deadline; do not wait for FCC recon., and appeal rather than intervene.

The Courts

- Standard of Review.
  - Held that *Chevron* deference applies to FCC's interpretation of the Communications Act's limits on FCC jurisdiction.
  - Recognized that 7th and Federal Circuits disagree.
  - This is the only issue on which SCOTUS granted cert.
- Merits.
  - Read §332(c)(7)(A)'s "Except as provided in this section" as swallowing its "nothing in this Act" command.
  - Found "reasonable period of time" ambiguous.
  - Discounted legislative history as "ambiguous."
  - If it survives SCOTUS review, 5th Circuit's reading would make it difficult, if not impossible, to draft Communications Act language that would insulate a topic from FCC authority to interpret.
  - If it survives, 5th Circuit decision would also lend support to FCC's claimed authority to construe "fair and reasonable compensation" under §253(c). *See FCC ROW NOI* discussion below.

The Courts

2. *Time Warner Cable et al. v. Hudson,* 667 F. 3d 630 (5th Cir. 2012), *cert. denied,* ___ U.S. ___, 132 S. Ct. 2777 (June 18, 2012).

- Ruled that Tex. Util. Code §66.004(a), which limits incumbents' ability to opt out of local franchises until they expire, violates 1st Amendment because it targets a small group of 1st Amendment speakers (incumbents) for discriminatorily unfavorable treatment.
- Applied "strict scrutiny" (a/k/a, the kiss of death).
- Due to SB-1087 amendment, decision directly impacts only Irving, Dallas, Corpus Christi & Lubbock, *but* implications could be broader:
  - Is *any* differential treatment of incumbents and new entrants permissible? (Note that FCC's *2d Video Franchising Order* said that, with respect to buildout & PEG, it was.)
  - More generally, does the decision put at risk other SB-5 provisions (like PEG)? Probably not, unless broadband providers are found to be 1st Amendment speakers, too. Which brings us to…

The Courts

3. *Verizon v. FCC*, No. 11-1355 (D.C. Cir. filed Sept. 30, 2011).

   - Appeal of FCC's *Open Internet Order*.
   - Verizon attacks on 2 grounds:
     - Beyond the FCC's Title I ancillary jurisdiction authority.
     - Violates 1st (& 5th) Amendment rights of broadband ISPs.

4. *American Electric Power Service Corp. v. FCC*, No. 11-1146 (D.C. Cir. filed May 18, 2011).

   - Appeal of FCC's *Pole Attachment Order*, which (among other things) lowered the telecom attachment rate to close to the cable rate, applied the FCC's rules to wireless attachments, and extended the rules to ILEC attachments.
   - Note: FCC's pole attachment rules do not apply to munis or co-ops, but state law may apply them (as they see fit to modify) to munis & co-ops.

The FCC

II. FCC.

A. FCC's *ROW NOI* (WC 11-59) and *Level 3* (WC 09-153) proceedings.

1. Both still pending.

2. Section 253 & ROW.

   - Is "fair and reasonable" ROW compensation limited to costs or FMV? [Note: tw telecom attacks TX Chap. 283's access line-based ROW fees.]
   - Is discriminatory or non-competitively neutral ROW compensation *ipso facto* a §253(a) "prohibition"?
   - Should FCC "overrule" 8th Circuit *Level 3* and 9th Circuit *Sprint* decisions? [*i.e.*, that any non-*de jure* §253(a) "prohibition" must be proved with facts.]
   - Does FCC have authority to interpret and/or adjudicate §253(c)?

The FCC

3. Section 332(c)(7) & Wireless Siting.

   - New, shorter "shot clocks"? Construe some modifications not to be "modifications"? Apply "deemed granted" when shot clock not met?
   - Will these issues be mooted by §6409 of Spectrum Act, which provides that zoning authorities "shall approve" requests for "modification" of an "existing wireless tower or base station" that "does not substantially change the physical dimensions of such tower or base station"? Or will FCC expand proceeding to construe & apply §6409?
   - Treatment of DAS: Wireless or landline?

B. NextG's DAS petition (WT 13-37).

1. Seeks declaration that DAS & other "small cell solutions" are not CMRS, but are wireless backhaul accomplished primarily through landline facilities.
2. Arises out of wireless ROW fee dispute with Scottsdale, AZ.
3. NextG wants to take advantage of state law protections provided to PUC-certificated telelcom providers. (Note: NextG is PUC-certificated in states where it operates.)

The FCC

4. DAS status has TX Chap. 283 ROW compensation implications.

5. San Antonio filed comments urging the FCC not to declare blanketly that NextG's services are not "CMRS," because its services appear to have mixed wireless and landline elements.

C. ACM's Petition Challenging AT&T's "PEG Product" (MB 09-13).

1. Argues that AT&T's PEG product violates Cable Act & FCC rules.

   - Represents impermissible operator "editorial control" of PEG.
   - Impermissibly discriminates against PEG vis-à-vis commercial channels.
   - Fails to provide "channel capacity" within meaning of Cable Act.

2. Among other arguments, AT&T defends on the ground that its U-Verse system is not a "cable system" because AT&T does not provide "cable service."

3. FCC has been sitting on the petition for nearly 4 years.

The FCC

D. Definition of "MVPD" and "Channel" under the Cable Act (MB 12-83).

1. Arises out of OVD's dispute with Discovery Channel.
2. Presents issues of whether OVDs are "MVPDs" & whether online video is a "channel."
3. PEG interests are concerned that an overly broad interpretation of "channel" could undermine the ACM Petition's argument that AT&T is failing to provide PEG "channel capacity."
4. Public interest groups mostly seek broad reading of "MVPD" and "channel" so that OVDs receive the benefits of MVPD status (primarily, access to programming).
5. Cable industry argues that OVDs aren't MVPDs because they are not facilities-based.
6. Most parties agree that issues should be addressed in a broader rulemaking.

The FCC

E. FCC Order on NCTA's Section 652 Petition (WC 11-118).

1. Section 652(b) generally prohibits cable operators from acquiring LECs in their franchise areas, subject to waivers & exceptions in §652(d).

2. Section 652(d)(6)(B) requires LFA approval of FCC waivers of §652(b).

3. FCC:

    a) Denied NCTA's request for a declaratory ruling that §652(b) doesn't apply to cable operator acquisitions of CLECs;

    b) Granted NCTA's request that the FCC forbear from applying §652(b)'s restriction to cable operator acquisition CLECs (as opposed to ILECs); and

    c) Declined to reach NCTA's request that the FCC forbear from, or place limits on, LFA approval authority under §652(d)(6)(B).

4. First example of FCC applying its §10 forbearance authority to a provision of Title VI (Cable Act) as opposed to Title II (telecom).

The FCC

F. FCC NPRM on *Cable Television Technical and Operational Standards* (MB 12-217).

1. For the first time, FCC proposes cable system technical standards that apply to digital technology, including "non-QAM digital cable systems"—*i.e.*, those that "primarily utilize [IP] delivery over either fiber-optic cable or DSL-based transmission."

2. This would suggest (although the NPRM doesn't say so) that AT&T's U-verse is in fact a "cable system."

3. Expect AT&T to contest that proposition in its comments.

4. Comments are due December 10, 2012 ; replies January 7, 2013.

Questions?

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