

## MEMORANDUM

TO: TeleCommUnity and Local Government Friends

DT: December 8, 2004

RE: 108th Congress and 2004 Policy Development Wrap Up

## INTRODUCTION

The effort to rewrite the nation's communications laws was anticipated to take place in 2005 and 2006 (109th Congress). Nevertheless a great deal of communications policy activity of importance to municipalities took place in 2004 in the 108th Congress, as well as at the FCC and in the courts. What follows is a thumbnail description of those various actions divided by venue: Congress, FCC and the Supreme Court. There is also a not so subtle message to local government advocates in this paper. Local governments' interests were and are under attack in Washington and in the state legislatures. Absent a unified and strong response by local governments (and where possible with state government groups), matters will only get worse in 2005 and 2006.

## LEAD CONGRESSIONAL COMMUNICATIONS ACTIVITY

The 108th Congress, which may be known as the "Congress that would not *sine die*," did just that after two failed attempts late in the evening on December 8, 2004. Before adjourning, they made some major changes in the nation's communications laws. Other than S. 150, the Internet Tax Freedom Act, all the changes in communications laws that are of interest to municipalities were passed by the Senate on the last day of the Congress. In fact, the very last bill passed by the 108th Congress was H.R. 5419, a telecom catchall bill.

***Internet Tax Freedom Act (S. 150/H.R. 49)*** – During the pre-Thanksgiving lame duck session, the House and Senate passed S. 150, the Internet Tax Nondiscrimination Act. To the applause of industry, President Bush signed the bill into law<sup>1</sup> on December 3, 2004.

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<sup>1</sup> Walter B. McCormick Jr., president and chief executive officer of the U.S. Telecom Association stated, "By signing S. 150 into law, President Bush brings the nation one step closer to his ambitious goal of deploying broadband in all communities by 2007." CTIA President and CEO Steve Largent said the president's action "is further evidence that our federal government

The bill, as introduced by Sen. George Allen (R-VA), sought to make permanent the moratorium on internet access taxes. Because of local governments' advocacy, the bill does much less. If signed by the president as expected, the bill:

1. Extends the ITFA from November 1, 2003 until November 1, 2007;
2. Expands protected class of "Internet Access" to include telecommunications services "to the extent such services are purchased, used, or sold by a provider of Internet access to provide Internet access;"
3. Continues "grandfathered" status of certain states until November 1, 2007 (Nov. 1, 2006, for those states taxing DSL) and clarifies that Texas fits the category of grandfathered states; and
4. Clarifies that bill does not intend to impact universal service contributions nor the taxation of VoIP services.

**Public Safety Communications** – In its very first briefing paper, TeleCommUnity focused on the issue of public safety communications. The October 2001 paper advised the Congress, "Public Safety is a core function for local governments [and adequate] wireless communications are essential to executing the Public Safety function promptly, effectively, and cost-efficiently." The 108th Congress focused on the spectrum issues of interference, interoperability and their impact on first responders. Much of this focus was brought about due to the tragic loss of first responders on September 11, 2001, and the advocacy efforts of local governments through SAFECOM, the Public Safety Wireless Advisory Committee (PSWAC) and the National Task Force on Interoperability.<sup>2</sup>

Despite this focus, final action on legislation to free up government spectrum and spectrum currently employed by broadcasters for transmitting their analogue signals and to establish an interoperability office with DHS did not occur of the final hours of the Congress with passage of the National Intelligence Reform Act (S. 2845) and the H.R. 5419.

**National Intelligence Reform Act (S. 2845)** – The Intelligence bill provides, "The Secretary of Homeland Security, in consultation with the Secretary of Commerce and the Chairman of the Federal Communications Commission, shall establish a program to enhance public safety interoperable communications at all levels of government." (Section 5131) The bill defines interoperable communications as the "ability of emergency response providers and relevant Federal, State, and local government agencies to communicate with each other as necessary, through a dedicated public safety network utilizing information technology systems and radio communications systems, and to

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recognizes the extreme harm that tax increases can have on the development and deployment of high-tech service offerings."

<sup>2</sup> The NTFI effort resulted in its book, *Why Can't We Talk*. The book may be downloaded at [http://www.agileprogram.org/ntfi/ntfi\\_guide.pdf](http://www.agileprogram.org/ntfi/ntfi_guide.pdf)

exchange voice, data, or video with one another on demand, in real time, as necessary.” (Section 5131)

The bill also authorizes \$150 million in grants to state and local governments to promote interoperability and expresses the sense of the Congress that “the Communications Act of 1934 should be amended to eliminate the 85-percent penetration test and to require broadcasters to cease analog transmissions at the close of December 31, 2006, so that the spectrum can be returned and repurposed for important public-safety and advanced commercial uses.” (Section 5011)

***Telecom Clean Up Bill (H.R. 5419)*** – H.R. 5419 was a creation of House Energy and Commerce Committee Chair Joe Barton (R-TX) as a means to move three different bills that he considered “must pass” measures. The legislation, an amalgamation of the bills:

1. Provides a year-long exemption for Anti-Deficiency Act for E-rate programs. This is a victory for local government, which had pushed hard for adoption of the exemption.
2. Amends the National Telecommunications and Information Administration Organization Act to facilitate the reallocation of spectrum from governmental to commercial users. This section of the bill was reprinted from the H.R. 1320, Spectrum Trust Fund legislation passed by the House back in the late summer of 2003.
3. Seeks to enhance citizen activated emergency response capabilities through the use of enhanced 911 services for cell services by providing \$250 million for the implementation and operation of Phase II E-911 services.

## **BILLS OF INTEREST TO LOCAL GOVERNMENT BUT NOT PASSED**

***Streamlined Sales Tax (S. 1736/H.R. 3184)*** – Companion bills introduced by Senator Michael Enzi (R-WY) and Rep. Ernest Istook (R-OK), sought to provide federal authorization to states that are parties to the “Streamlined Sales and Use Tax Agreement” to require remote sellers to collect and remit sales and use taxes to States and local taxing jurisdictions. Neither bill moved out of committee (Judiciary in the House and Finance in the Senate), in no small part because of the debate surrounding S. 150. These bills will be reintroduced in the 109th Congress, and local governments must be prepared to articulate their serious concerns with the bills, which not only provide for the collection of remote sales, but require local governments to rewrite state and local telecommunications fees and taxes.

***VoIP Legislation (S. 2281/H.R. 3129 + H.R. 4757)*** – The TeleCommUnity and local governments’ policy is clear in its support of IP-enabled services and the benefits such services make possible. TeleCommUnity was equally strong in its opposition to preemption of state and local oversight of VoIP services and the networks used to provide

those services found in three VoIP bills introduced in the 108th Congress: S. 2281 (“Sununu bill”), H.R. 3129 (“Pickering bill”) and H.R. 4757 (“Stearns-Boucher bill”).

While the bills varied somewhat, their common thread was that they sought to exempt VoIP services and the infrastructure used to provide VoIP services (Stearns’ bill) from state and local government regulations and taxation. They also freed VoIP services from mandatory contributions to inter-carrier compensation, universal service and E911. Because of the efforts of TeleCommUnity and government advocates to demonstrate how these bills would jeopardize the future of universal service, E911, national security, the viability of services to many rural and inner city areas, and municipal tax bases, the Sununu bill – the only VoIP bill to be voted upon by the Congress – was amended in committee to return to state and local government oversight of VoIP services. Senator Sununu has already promised to reintroduce his original text in the 109th Congress.

Unable to move VoIP legislation, Rep. Charles "Chip" Pickering (R-MS) and other VoIP champions conducted a letter-writing campaign to the FCC that called upon the Commission to establish VoIP services are interstate in nature, thereby preempting state and local government oversight. Because state and local government was able to educate so many of the House members with the same information that had been shared with the Senate Commerce Committee, the letter was modified include a statement that “any Commission action should recognize the legitimate role of state consumer protection and public safety laws of general applicability.”

***Highway Bill Preemption Rollback (HR 3550 / S 1072 )*** – Current law contains a preemption of state and local rights-of-way authority in favor of a vendor selected to deploy traffic monitoring systems by the U.S. Department of Transportation. Because the preemption language needs to be reauthorized, TeleCommUnity and others advocated rolling back preemption to contain only that authority required by the vendor to deploy their systems. The agreed-to language is below, but because the highway bill did not pass in the 108th Congress, local government will need to prosecute this effort in the 109th Congress.

“(k) Use of Rights-of-Way.-- Intelligent transportation system projects specified in section 5117(b)(3) and 5117(b)(6) and involving privately owned intelligent transportation system components that are carried out using funds made available from the Highway Trust Fund shall not be subject to any law or regulation of a State or political subdivision of a State prohibiting or regulating commercial activities in the rights-of-way of a highway for which Federal-aid highway funds have been utilized for planning, design, construction, or maintenance, if the Secretary of Transportation determines that such use is in the public interest. Nothing in this subsection shall affect the authority of a State or political subdivision of a State to regulate highway safety or the authority of a State or a political subdivision of a State under the provisions of 47 U.S.C. 253 and 332(c)(7), as amended.”

## FEDERAL COMMUNICATIONS COMMISSION

The Federal Communications Commission found itself this past year at the center of numerous national controversies. Following the “wardrobe malfunction” at the Super Bowl, the FCC became embroiled in the indecency debate that ultimately led to major fines against CBS and others. The FCC also was at the center of the debate on media consolidation. Still, when history is written, 2004 will be viewed as the year that the FCC began its examination of IP-enabled services and began its efforts to address interference with public safety spectrum.

In the IP area, relying upon its conclusion that cable-modem access to the internet is an interstate information service; the FCC issued four major orders addressing IP services and released a Notice of Proposed Rule Making (NPRM) outlining its vision of what a regulatory environment for IP services should entail. In 2005, the FCC will have an answer from the Supreme Court as to whether its cable modem–interstate information service designation is correct. We can also expect the commission to propose a new regulatory regime for IP enable services based upon its rulings in 2004.

***Pulver.com FreeWorld Dial-Up*** – [WC Docket No. 03-45, **Memorandum Opinion and Order, 19 FCC Rcd 3307 (2004)**]. On February 12, 2004, the FCC in the “Pulver.com’s Free World Dial-Up” docket held: A peer-to-peer voice service that was provided over a broadband network that did not touch the public switched network, given away for free and made possible only because the consumers on both ends of the line used their computers to make the call without employment of traditional phone number was an interstate information service, not an intrastate or interstate telecommunications service.

***IP-Enabled Services NPRM*** – [WC Dkt No. 04-36, **FCC 04-36, FCC 04-28 (rel. March 10, 2004)**] Almost three years to the day after issuing its cable modem order, the FCC on March 10, 2004, released its NPRM on IP Enabled Services. While there are IP orders that preceded the release of this NPRM and will follow the release of the numerous Orders that will be issued in this docket, this is the docket that will set the rules for IP communications for years to come. Orders are expected to begin being released in the spring of 2005.

***AT&T Petition*** – [WC Docket No. 02-361, **Order, 19 FCC Rcd 7457 (2004)**]. On April 21, 2004, the FCC denied an AT&T petition for a declaratory ruling that phone-to-phone calls that employed internet protocol were exempt from interstate access charges. The commission found a service that uses: ordinary customer premises equipment (CPE) with no enhanced functionality; has calls originating and terminating on the public switched telephone network (PSTN); and undergoes no net protocol conversion, nor provides enhanced functionality to end users due to the provider’s use of IP technology is a telecommunications service subject to all the traditional burdens.

***CALEA NPRM*** – [ET Docket No. 04-295; RM-10865, **Notice of Proposed Rulemaking and Declaratory Ruling, 19 FCC Rcd 15676 (2004)**]. In response to petitions filed by the law enforcement community, the FCC issued a notice of proposed

rulemaking that IP service providers are subject to the Communications Assistance to Law Enforcement Act (CALEA). Since adoption of the cable-modem finding that cable modem is not a telecommunications but information service, law enforcement had feared that IP service providers would not be subject CALEA's requirements of designing networks that facilitate trap and trace and wire taps. Information service providers are exempt from CALEA, whereas telecommunications providers are not. In the NPRM, the FCC tentatively concludes that facilities-based providers of Internet access are subject to CALEA, even if the service they provide is not a telecommunications service for purposes of the Telecommunications Act. Such services are telecommunications services under CALEA's "replacement for a substantial proportion of the local exchange service" test.

***Vonage*** – [WC Dkt No. 03-211, FCC 04-267 (rel. November 12, 2004)]. On November 9, 2004, the FCC found that Vonage's services were inherently interstate and, therefore, that Vonage was not required to obtain a certificate to do business in Minnesota from the Minnesota PUC. The commission further advised that other companies providing Vonage-like services (i.e. non-facility based services) need not be certificated at the state level. The commission did not address the issue of whether the services are telecommunications serviced or information service as they had in Pulver.com and the AT&T matters. The commission also stated, "[T]he order does not express an opinion about the applicability to Vonage of general laws in Minnesota governing taxation, fraud, commercial dealings, marketing, advertising and other business practices."

***BellSouth Forbearance Petition*** – [WC Dkt No. 04-405]. Seeking to have the FCC's anticipated regulatory light touch on IP-enabled services extended to traditional networks, on October 27, 2004, BellSouth filed a petition requesting forbearance for its broadband network (defined as capable of 200 Kbps in both directions) from any Title II common carriage requirements and the "Computer Inquiry" rules which require it to offer transport to others at tariff rates. As a justification for its position, BellSouth claims ILECs are no longer or never were dominant players in broadband delivery game. Should BellSouth prove successful, local tax revenues would suffer a major loss as previously taxable telecommunications services could be considered information services. Further consumer safeguards such as universal service, CALEA, and call blocking would be lost. There might be also be another wave of street cuts as providers need to build out their own networks as they can no longer rely upon carriage by the local phone company.

***800 MHz Realignment*** – [Dkt No. 95-18, 00-258, FCC No. 04-168, (rel. August 9, 2004)]. This summer the FCC unveiled its plan to address the issues of interference in the 800 MHz range between commercial and public safety users. In the near term, the commission will rely upon enhanced technical standards to ameliorate interference until the long-term cure can be effectuated. In the broadest of terms, the long-term plan grants Nextel spectrum at 1900 MHz in exchange for (1) its 700 MHz and some of its 800 MHz licenses and (2) providing an irrevocable letter of credit of \$2.5 billion to cover other users' relocation costs. Nextel had yet to accept the outcome in the order and is seeking

additional credit for the spectrum it returns and more lenient interference protection standards during the transition. These requests are being met with strong criticisms; in fact some commenters in the proceeding have mocked Nextel's suggestion that it was not seeking modifications but only clarifications of the FCC's order.

***Emergency Alert System* – [EB Dkt. No. 04-290, FCC 04-189 (rel. August 12, 2004)].**

On October 29, in comments filed in the FCC's review of the Emergency Alert System (FCC 04-189), local government highlighted the value and importance of local emergency alert systems. The comments stressed that the FCC should not preempt local emergency alert systems for municipal use that are included in cable franchises.

Reply comments in this proceeding were due on November 29. A resolution in this docket is not expected much earlier than the spring of 2005.

***Digital TV*** – Even before federal lawmakers expressed a sense of the Congress on the need for the return of broadcast spectrum in the Intelligence bill; FCC chairman Michael Powell announced his plans to end the digital television (DTV) transition by 2009. Press reports have senior FCC officials claiming Powell had hoped to bring the issue to a vote in November or December, but that his efforts were sidetracked due to the need to write new local-phone-competition rules. That effort should be completed in December 2004, clearing the way for actions in the first quarter of 2005. Again, according to press reports, Powell's plan ends analog-TV broadcasting on Dec. 31, 2008, forcing broadcasters to return 108 megahertz of prime spectrum for reallocation to public-safety groups and wireless-broadband providers through an auction.

## SUPREME COURT

The Supreme Court in *Nixon v. Missouri Municipal League* handed down an opinion that could embolden industry advocates to seek state level legislation to bar or severely limit municipal provision of telecommunications services.<sup>3</sup> On December 3, 2004, the Court agreed to review the 9th Circuit's holding that cable modem is a telecommunications service (***Brand X***). The year 2005 looks to be equally important for local governments before the Court. In addition to a potential review of ***Brand X***, the Court has already agreed to address whether a municipality may be sued under the Civil Rights Act for attorney's fees (***Rancho Palos Verdes***).

***Brand X Internet Services v. FCC***<sup>4</sup> – The U.S. Supreme Court has agreed to review a decision by the 9th U.S. Circuit Court of Appeals in San Francisco, which had concluded that the FCC was bound by the court's earlier decision in *AT&T Corp. v. City of Portland*, 216 F.3d 871 (9th Cir. 2000). In that case, the 9th Circuit had concluded that cable-modem service was not a "cable service" but comprised of both

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<sup>3</sup> Recent activity to limit municipal provision of telecommunications services in the Pennsylvania and Louisiana legislatures is evidence of this new offensive by the industry against municipal provision given the lack of protection for locals under Section 253 of the Telecommunications Act.

<sup>4</sup> 345 F.3d 1120 (9th Cir. 2003), cert. pending (U.S. Nos. 04-277 & 04-281).

“telecommunications” and “information” services. Consistent with the *Portland* opinion, the 9th Circuit in *Brand X* overturned the FCC’s order that cable-modem services are comprised of only “information services.” Also consistent with the *Portland* decision, the 9th Circuit affirmed that part of the FCC's order that rejected the local government assertion that cable modem service is a “cable service.”

***Rancho Palos Verdes v. Abrams – Qwest*** and a number of other providers have alleged that state and local government are vulnerable to a claim for Section 1983 damages for any violation of the Telecommunications Act (TCA). By agreeing to hear *Rancho Palos Verdes v. Abrams*, USSC 03-1601, the Supreme Court will put to rest whether a plaintiff may recover costs and attorneys fees under Section 1983 of the Civil Rights Act for violations of the Telecommunications Act of 1996. The question before the court is whether “any person adversely affected by any final action or failure to act by a State or local government that is inconsistent with [Section 332(b)(7)(B)-cell tower siting section of TCA] may ... commence an action in any court of competent jurisdiction ...”

***Nixon v. Missouri Municipal League***<sup>5</sup>– On March 24, 2004, the Supreme Court reversed the U.S. Court of Appeals, holding that municipalities are not protected entities under 47 U.S.C. § 253(a). The case does not stand for the proposition that states must bar local governments from providing telecommunications services. This opinion only stands for the proposition that states may bar local governments from providing telecommunications services.

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<sup>5</sup> 124 S. Ct. 1555, (2004). This litigation arose after Missouri passed a law that says that Missouri's political subdivisions, such as towns and counties, cannot offer telecommunications services. For those wondering, Jeremiah Nixon was sued in his capacity as the Attorney General of the state of Missouri.