

MUNICIPAL LAW NEWSLETTER



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8th Circuit Rules States Cannot Prohibit Municipal Telcos

In a stunning victory for municipal telecommunications providers, the U.S. Court of Appeals for the Eighth Circuit in Missouri Municipal League, et al. v. FCC ruled that states cannot prevent municipalities from providing telecommunications services because such laws are pre-empted by the Telecommunications Act of 1996 (“TCA”).

The appeal challenging the Missouri law was spearheaded by several Missouri municipalities, various municipal organizations and public power utilities, as well as the American Public Power Association.

At issue in the case was whether Congress intended to include municipalities within the term “any entity” as used in Section 253 of the TCA, which preempts any state or local governmental regulation that “may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.” According to the Court, “There is no doubt that municipalities and municipally owned utilities are entities under a standard definition of the term.” The Court explained, “although municipalities in Missouri derive all of their powers from the state, and although a state can control its subdivisions in an almost limitless way, . . . municipalities and other political subdivisions have an existence sepa-

rate from that of the state.” According to the Court, “[t]he plain meaning of the term ‘entity’ includes all organizations, even those not entirely independent from other organizations.”

The Court found unpersuasive a 1999 decision by the D.C. Circuit Court of Appeals, where the appellate court declined to preempt a similar Texas law on concluding that municipalities are not entities within the meaning of the TCA. The Court found that the D.C. Circuit’s opinion ignored decisions by the United States Supreme Court, in which the high court ruled that Congress’s use of “any” is to be given a broad reading.

Joining in the appeal were the Missouri Municipal League; the Missouri Association of Municipal Utilities; the City Utilities of Springfield; the City of Sikeston, Mo.; Columbia Water & Light; and the American Public Power Association.

— Anita T. Gallucci

Supreme Court to Address Municipal Liability for “Discrimination by Referendum”

May a city be held liable for intentional discrimination due to the discriminatory motives of a handful of residents who supported a facially neutral referendum petition? The United States Supreme Court is expected to address this issue in its next term when it takes up Buckeye Community Hope Foundation v. City of Cuyahoga Falls, 263 F.3d 627 (6th Cir. 2001).

The case arises from a proposal by a nonprofit developer to build an affordable housing complex in the nearly all-white city of Cuyahoga Falls, outside Akron, Ohio. The proposal brought out vocal opponents who cited concerns about crime, drugs and the “class” of prospective tenants. Nevertheless, the city council adopted an ordinance approving the project, finding that it met all zoning requirements.

Project opponents then filed a petition seeking a city-wide referendum on the ordinance. State law held that the city could not issue building permits for the project while the referendum was pending. Accordingly, the developer’s application for the permits was denied. City residents voted down the project in 1996.

The developer filed suit in both state and federal court. Its state court action alleged that the city ordinance approving the project was not the proper subject of popular referendum. The developer ultimately prevailed in that action, but only after its motion for reconsideration to the Ohio Supreme Court persuaded the court to change positions. The court determined that site plan approval is an administrative determination and therefore not subject to referendum in Ohio.

The developer’s federal court action alleged that the city’s refusal to issue permits for a project that otherwise satisfied the city’s zoning ordinance amounted to intentional discrimination in violation of the developer’s due process and equal protection rights and its rights under the federal Fair Housing Act, 42 U.S.C. §§3601, et seq. The federal trial court dismissed the developer’s claims, but the United States Court of Appeals for the Sixth Circuit reversed.

The court of appeals found that three elements supported the developer’s claims of intentional discrimination. First, the city’s decision to deny building permits to the developer during the pendency of the referendum petition had a disparate impact on African Americans. Second, there

was evidence of “highly unusual circumstances,” in that no site plan had ever been submitted to a popular referendum in the city. Third, comments by some members of the public and by the mayor could be interpreted as evidence of racial bias. The court concluded that these elements were sufficient to allow the developer’s claims to proceed to trial.

The City appealed to the United States Supreme Court, which accepted the following questions for review:

1. In considering a claim against a municipal corporation for intentional discrimination arising out of a facially neutral referendum petition, may a court inquire into the motivations of a handful of citizens who expressed support for the referendum and impute those motivations to the entire municipal corporation?
2. In light of constitutional freedom of political expression, can a disparate impact claim under the Fair Housing Act be maintained against a municipal corporation for the alleged impact of the filing of a facially neutral referendum petition?
3. Does the due process clause of the Constitution require a municipal corporation to issue building permits when the underlying conditions for issuance of the permits have not been met and the municipal corporation’s withholding of permits is required by judgments of state courts of competent jurisdiction?

The Court’s resolution of these issues could have broad implications. The developer claims that if the city prevails, the court’s ruling will allow municipalities to use referenda to block locally undesirable land uses that would otherwise be approved, without incurring municipal liability. The city counters that a ruling for the developer exposes municipalities across the country to liability for the political speech of their citizens.

Watch these pages for a report on the Supreme Court’s resolution of these important issues.

— Matthew D. Weber

PFC News:

Legislation Permitting Arbitration Alternative Vetoed

Under current law, police officers and fire fighters must appeal police and fire commission (PFC) disciplinary decisions in circuit court. The Governor recently vetoed a provision that was part of the Budget Repair Bill that would have allowed police officers and fire fighters to appeal PFC decisions through arbitration pursuant to a collective bargaining agreement rather than by circuit court review.

The legislation would have fundamentally changed the PFC appeal process. Under the current appeal process,

circuit courts generally review PFC decisions on the record created in the PFC hearing. In other words, the court does not take new evidence unless necessary. Under the arbitration process, however, the parties would essentially try the case twice: once before the PFC and a second time in arbitration. Several groups, including the League of Wisconsin Municipalities, opposed the legislation, arguing that it would undermine the important role of PFCs in the disciplinary process.

— Jennifer S. Mirus

Circuit Court Vacates Shawano's CLEC Certification

A Dane County Circuit Court issued its opinion August 7, 2002 in the only remaining pending municipal CLEC case, handing a victory to Frontier Communications of Wisconsin, Inc., ("Frontier") and the Wisconsin State Telecommunications Association ("WSTA"). The Court determined that in certifying the City of Shawano as a competitive local exchange carrier ("CLEC"), the Public Service Commission of Wisconsin ("PSC") violated Frontier's due process rights and failed to follow the procedures mandated under Wisconsin law.

Previous challenges to PSC orders granting certifications to various municipalities to provide telecommunications services in Wisconsin were dismissed on the ground that WSTA and the telephone companies seeking judicial review lacked the requisite interests to seek such review. However, in the Shawano matter, the Court concluded that Frontier and WSTA did have standing to challenge the PSC's certification of Shawano.

The Court ruled that the PSC should not have certified Shawano without first holding a hearing as required by statute. The Court relied on a statute that requires the PSC to hold a hearing to determine whether the "public convenience and necessary" require certification of a CLEC applicant who seeks to provide local exchange service within the service territory of a small telephone company, such as Frontier. The Court rejected the PSC's and Shawano's argument that no hearing was necessary because the PSC was careful to craft its certification order to prohibit Shawano from providing local exchange service within Frontier's territory. Specifically, the order allowed Shawano, among other things, to provide local exchange service in the so-called

open service territories of the state, but not in Frontier's territory. The Court, however, disagreed, concluding that a hearing was necessary because Shawano intended to build facilities within Frontier's territory that could be used to provide local exchange service. It apparently did not matter that Shawano could not so use its facilities.

Accordingly, the Court set aside the PSC's order certifying Shawano as a CLEC and remanded the matter to the PSC for a hearing. Curiously, the Court did not decide a second issue raised by WSTA and Frontier of whether municipalities have authority to provide telecommunications services. The Municipal Electric Utilities of Wisconsin, represented by the Boardman Law Firm, and the League of Wisconsin Municipalities intervened in the matter to weigh in on this issue. Rather than decide this issue, the Court ruled that the PSC should address the issue at hearing. In issuing the Shawano CLEC order, however, the PSC already determined that municipalities have authority to provide telecommunications services. It is expected that the PSC will appeal the Circuit Court's decision.

— Anita T. Gallucci

FCC Rules in Rice Lake's Favor on CTC Complaint

In an order issued July 15, 2002, the Federal Communications Commission ("FCC") ruled in favor of the City of Rice Lake, Wisconsin, on a complaint filed by CTC Telcom, Inc., ("CTC"). The FCC sided with Rice Lake and reaffirmed the Commission's rules, which require an open video system operator to match the incumbent's annual financial contributions to the community for public, educational and governmental ("PEG") access channels and to pay the monetary equivalent of the incumbent's in-kind contributions (e.g., studios, equipment, origination points). This so-called "default mechanism" applies where the open video system operator, the incumbent, and the municipality cannot agree on the open video system operator's PEG access obligations.

In January 2002, CTC filed the complaint at the FCC against the City of Rice Lake after negotiations between CTC and the City reached impasse regarding CTC's obligations as an open video system operator for financial support for Rice Lake's PEG access channels. CTC complained that Rice Lake failed to negotiate CTC's PEG support obligations, that CTC should not have to match Charter Communications' ("Charter"), the incumbent cable television operator, annual capital PEG payments, and that CTC, for a variety of reasons, should not have to pay the monetary equivalent of certain origination points for PEG programming installed by Charter under its cable television franchise with the City.

Regarding CTC's charge that Rice Lake failed to negotiate in good faith, the FCC found that "[a]lthough CTC disputes the sincerity of Rice Lake's PEG negotiations, it is apparent that the parties negotiated CTC's PEG obligations to impasse." The FCC went on to recognize that where such negotiations fail the default mechanism of the Commission's rules dictates the operator's PEG access obligations.

Accordingly, the FCC ruled that CTC is required to match the annual PEG contributions of Charter to the City. In so ruling, the FCC rejected CTC's plea that CTC be allowed to "match" Charter's contributions on a per-subscriber basis rather than on a dollar-for-dollar basis. CTC has petitioned the FCC for review of its decision.

The case has attracted national attention with both the National Association of Telecommunications Officers and Advisors and the Alliance for Community Media submitting comments in support of Rice Lake. Rice Lake is represented by the Boardman Law Firm.

— Anita T. Gallucci

PSC Opens Proceeding on Municipal Pole Attachment Agreements

The Public Service Commission of Wisconsin ("PSC") has opened a proceeding initiated by a complaint filed by a group of Wisconsin municipal electric utilities ("Municipal Utilities") against CenturyTel, Inc., and Verizon-North, Inc. ("Telcos"). The Municipal Utilities brought their complaint after failing to reach an agreement with the Telcos on the terms of new pole attachment agreements among the parties. The municipalities participating in the complaint proceeding are the cities and villages of Arcadia, Brodhead, Cumberland, Eagle River, Hustisford, Lodi, Marshfield, New Holstein, Plymouth, Prairie du Sac, Reedsburg, Rice Lake, Richland Center, Sun Prairie, and Whitehall.

The Municipal Utilities have asked the PSC to exercise its authority under § 196.04(2), Wis. Stats., to prescribe reasonable conditions and compensation for the use of their municipal utility poles by adopting the terms and conditions contained in two pole attachment agreements submitted with the complaint.

The Municipal Utilities and Telcos had been attempting to negotiate new pole attachment agreements to replace their existing agreements for over two years. The negotiations reached impasse primarily over one issue. Late in the negotiation process the Telcos insisted that the agreements contain a provision that would give the Telcos the right to buy municipally owned poles. The Municipal Utilities, after studying the issue, rejected the proposal.

The Telcos have responded to the complaint by asking the PSC to dismiss the complaint for lack of jurisdiction. The Telcos claim that the Federal Communications Commission, rather than the PSC, has jurisdiction over the dispute under the federal Pole Attachment Act. The Telcos have taken this position despite the fact that municipal electric utilities are exempted out of the federal pole attachment law.

The PSC will hold a technical conference in the matter on September 10, 2002. The purpose of the conference will be to allow the parties to update their positions and to examine if there is any opportunity for resolution prior to PSC formally addressing the parties' submissions.

— Anita T. Gallucci

State Budget Incentives for Consolidation of Municipal Services

The recently signed biennial state budget includes modest incentives to encourage counties and municipalities to consolidate services. It reduces shared revenue by \$45 million, and uses those funds to create a new County and Municipal Aid Account. Beginning in calendar year 2003, counties and municipalities may apply to the Department of Revenue for incentive payments from that account for consolidations that occur in the following year. If there are sufficient funds, applicants will receive one-time payments equal to 75% of their expected cost savings in the first year after consolidation. However, if DOR receives applications for more than \$45 million in incentive payments, each applicant will receive a lesser amount, equal to its proportionate share of funds from the County and Municipal Aid Account.

The incentive system is perhaps best viewed as a good first step. The consolidation of municipal services is a politically and technically challenging undertaking that is more likely to be accomplished with financial support from the state. Nevertheless, the incentive system as adopted in the budget has several shortcomings.

First, it is based on projected cost savings rather than actual cost savings. Savings from consolidation, particularly in the first year, are difficult to estimate. Nevertheless, with a limited pot of funds available, the system creates an incentive for counties and municipalities to inflate their estimates of projected cost-savings in order to secure as much of the incentive payment as possible.

Second, the incentive system does not recognize that consolidation of services sometimes leads to increased costs for one of the participating entities while decreasing costs for others. For example, a county that agrees to take over public safety dispatch services for a city could experience higher costs, even though the city saves funds and the overall cost to taxpayers is decreased. The city would be eligible to receive incentive payments from the County and Municipal Aid Account, but the county would not.

Third, it does not support consolidations designed to improve the level of services rather than to save funds. For example, a town and a village might consolidate fire departments because it enhances response times and provides a better trained and better equipped department. However, the overall cost of the consolidated department may be higher than the village and the town each paid for their individual departments.

In light of these and other shortcomings of the incentive payment system, expect revisions to the system in the near future. Indeed, the Governor's Task Force on State and

Local Government, chaired by Tim Sheehy of the Metropolitan Milwaukee Association of Commerce, is actively considering revisions to the system. It is expected to circulate ideas for public comment by early Fall. Meanwhile, counties and municipalities near agreement with other governments on the consolidation of municipal services may wish to postpone their plans for a year or so in order to take advantage of the new incentive system.

—Matthew D. Weber

Federal Agency Again Tackles Electricity Market Issues

For the third time in less than ten years, the Federal Energy Regulatory Commission (FERC) has proposed a major change in the operation of the electricity market. In a notice of proposed rulemaking (NOPR) issued July 31, 2002, the FERC proposes to standardize transmission service and other aspects of the electric market on a national basis. (FERC Docket No. RM01-12-000)

The proposed regulation itself is relatively short, taking up only about ten pages of the NOPR issued by the Commission. However, it is accompanied by some 600 pages of explanation and proposed standard tariffs.

Among the major components of the proposed rule according to a FERC press release are:

- A single transmission service, network access service, with a single tariff, replacing current multiple tariffs;
- Application of the tariff to all transmission customers—wholesale, unbundled retail and bundled retail;
- A standard market design for wholesale electric markets;
- A new transmission pricing policy, including locational marginal pricing (LMP) for transmission congestion; and
- Market power mitigation procedures.

The proposal continues to rely primarily on bilateral contracts and does not impose a power exchange (PEX) as was used in the California market.

The proposed rule drew immediate criticism from some state regulators, who believe that the FERC's action is impinging on their jurisdiction over local electric markets.

Public comments on the proposed rule are due within 75 days of issuance.

—Michael P. May

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If you have a particular topic you would like to see covered, or if you have a question on any article in this newsletter, feel free to contact any of the Boardman attorneys listed below who are contributing to this newsletter.

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