

NEW YORK PSC RULES ON VERIZON

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need not obtain a cable franchise before making improvements to that system, merely because the system could be used to provide cable service.

The PSC was also asked to determine whether Verizon was required to obtain a pre-construction franchise under federal law. The PSC rejected claims by Babylon and others that a franchise was required pre-construction under federal law. But, it also rejected Verizon's claim that, under the Cable Act, it is not required to obtain a franchise until and unless it provides cable service. The PSC concluded that the Cable Act requires a franchise (a) when a telephone company provides service; OR (b) when it builds facilities that are not common carrier facilities or are exclusively for provision of cable services.

Thus, while the PSC decision may allow Verizon to proceed with construction without obtaining a cable franchise, it is far from a complete

victory for Verizon, or a complete loss for PEG providers or local franchising authorities. In fact, the PSC repeatedly reaffirmed local franchising authority.

The PSC emphasized that:

- Verizon is required to adhere to all local right of way management requirements with respect to "public safety, aesthetics, pole attachments and other legitimate municipal concerns"
- Verizon must have permission to use the rights of way for telecommunications purposes. Once it has that authority, it can upgrade its telecommunications system, even if the upgrades will put it in a position (or put it in a better position) to provide cable services.
- While Verizon can make changes to its system that "enhance and improve its voice and data systems" without first obtaining a franchise, Verizon must obtain a cable franchise before it installs

plant exclusively for cable use, and before it offers cable service.

- While Verizon may be able to proceed with construction, "where Verizon has plans to eventually use its network to provide cable service, we strongly urge Verizon to work with local officials to understand their needs so that they can be engineered and met efficiently."

It may be particularly interesting to see if Verizon follows the PSC's advice on the last point. Commenters argued that Verizon may be unable to meet local needs and interests for PEG unless it designs and constructs its system to meet those needs from the outset. The PSC was told that Verizon might have to make expensive alterations to its system if it sought a franchise post-construction. The PSC caution may signal that the Commission will not allow Verizon to build, and then use "facts on the ground" to refuse to meet PEG and other local requirements.

MICHIGAN APPEALS COURT FINDS PROGRAMMER LIABLE FOR INDECENCY

The Michigan Court of Appeals has held an access programmer liable for nudity on an access channel under laws designed to govern in-person, indecent exposures in public places.

Michigan v. Huffman, 2005 WL 1106504 (Mi. App. May 10, 2005)

The Alliance for Communications Democracy is participating in the Huffman case, in support of Huffman.

Huffman cablecast a program in which penises were used as puppets. He was convicted under a Michigan law that prohibited indecent exposure in public places—the first case in which a law intended to govern the conduct of people in parks and streets was applied to television. As the ACD brief to the Appeals Court explained, the court "was confronted with the fundamental issue of whether the state of Michigan can criminally

convict and punish a cable programmer for showing a cable television program containing a comedic routine based on a joke-telling (voiced-over) penis puppet."

The Alliance argued, among other things, that Huffman cannot be convicted for cablecasting programming that may be indecent, but which is not obscene. Indecent programming on cable is protected speech, the brief argues. Parents can protect themselves and children from exposure to that speech by changing the channel, or by using lock boxes or other devices.

Ultimately, the Michigan appeals court rejected those arguments. It concluded that Huffman was entitled to no more protection on television than in a "traditional public square." In the judge's view, an action on television, including on cable, is subject to the same rules that apply to exposure in public.

The decision represents a striking departure from court cases which have refused to hold cable operators to even the indecency standards that apply to broadcasters. Those decisions have reasoned that regulating indecency on broadcast television is permitted because broadcasting is "pervasive in the lives of all Americans." By contrast, one can only receive cable by subscription, so if cable content is objectionable, it can be avoided. In *Huffman*, the Michigan Appeals Court stated that cable presented the same problems as did broadcast television, so that indecency on cable could also be regulated. In fact, the court applied an indecency rule that has never been applied to broadcasters.

The decision is subject to review by the Michigan Supreme Court and potentially by federal courts. If upheld, the potential implications are staggering not just for PEG, but for the cable and entertainment industries as a whole: actors would be subject to local criminal prosecution for on-screen nudity under laws designed to protect against flashers.

ALLIANCE REPORTS

What is the Alliance?

The Alliance for Communications Democracy is a non-profit organization primarily funded by access organizations. The ACD seeks to educate courts and other national institutions that are making legal decisions that affect public access as to the importance of public access and the first amendment values underlying public access.

The Alliance is now in its 17th year of operation, and has participated in almost every major case involving the first amendment and public access during that period.

We need your help in 2005

2005 could be a seminal year for PEG access and cable franchising. SBC claims that it does not require a franchise from local governments. Verizon, which also is entering the video marketplace, admits it needs a franchise, but is seeking to limit franchise fee obligations, and obligations to provide PEG access channels and support. There will be debate over PEG and local franchising in state legislatures and the Congress, but the FCC and state agencies will also play important roles. The FCC is now considering whether video services provided via IP are subject to federal franchise rules. The FCC's decision and appeals of that decision could dramatically affect PEG.

Access organizations are invited to join the Alliance by contacting Sam Behrend, Access Tucson, 124 East Broadway Tucson, AZ 85701, phone: (520) 624-9833; email sam@accesstucson.org.

YEAR IN REVIEW

CONVERGENCE HITS THE SUPREME COURT: HOW BRAND X COULD AFFECT PEG'S FUTURE

On the last day of its 2004-2005 term, the Supreme Court issued its decision in *NCTA v. Brand X Internet Services*, 545 U.S. ____ (June 27, 2005). Over a caustic dissent by Justice Scalia, the Court ruled, 6-3, that cable modem service is not a telecommunications service, but instead is an interstate information service.

The decision, written by Justice Thomas, could have dramatic consequences both directly and indirectly. It means that cable operators are not subject to the sort of common carrier requirements that apply to telephone companies and as a result, may be able (among other things) to block consumer access to

certain Internet sites, refuse to carry certain types of content, or prevent companies that wish to provide competing services, such as Voice over IP (VoIP) from using the

Does PEG Have A Place In A World of Convergence?

cable system to deliver those services.

Less directly, but perhaps even more importantly, the decision suggests that courts will be required to defer to FCC decisions classifying services as information services, cable services, or information services. The FCC, for example, may decide whether

video services delivered using an IP protocol are cable services, subject to cable franchising requirements. At least one FCC Commissioner has virtually invited telephone companies to file a petition asking the Commission to declare that local telephone companies do not require a Cable Act franchise when providing video services. As a result, the Supreme Court's decision could have significant short and long-term effects on franchising and on PEG.

The *Brand X* decision concluded that some form of franchise or municipal permission is required for an entity to use local public rights of way. However, the Commission also concluded that a cable franchise is not the only vehicle under New York law for authorizing an entity to build a system capable of providing a variety of services. Hence, where an entity already has permission to use local public rights of way to build a system "capable of providing multiple services," it

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NEW YORK PSC TO VERIZON: BUILD, FIRST, FRANCHISE LATER

The New York State Public Service Commission (PSC) has ruled that Verizon is not required to obtain a local cable franchise before upgrading its telephone system under New York State law — even if the upgrade will allow, and is intended to allow, the company to provide cable service to the home.

Verizon has been upgrading its telephone facilities in New York State in order to provide cable service and other services. Several communities had demanded that the company obtain a franchise before building; Verizon refused. The

communities, along with the cable industry, asked the PSC to rule that, because Verizon intended to provide cable service, state law required it to obtain a cable franchise before upgrading its telephone system. In *Joint Petition of the Town of Babylon, et. al.* (June 15, 2005), the PSC rejected the "intent" test. It ruled that Verizon had to obtain a franchise before providing service, or building facilities useful only for provision of cable service.

The decision largely turns on the way New York State law governing cable systems is written.

Essentially, the PSC concluded that some form of franchise or municipal permission is required for an entity to use local public rights of way. However, the Commission also concluded that a cable franchise is not the only vehicle under New York law for authorizing an entity to build a system capable of providing a variety of services. Hence, where an entity already has permission to use local public rights of way to build a system "capable of providing multiple services," it

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THE BRAND X DECISION

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service” or a “telecommunications service.” Cable services include one way video and other services generally made available to subscribers, plus the interactivity required to use those services. Internet services, the FCC concluded, did not fit within that definition. A telecommunications service is a transmission service. The FCC found that cable modem service involved transmission. But, because the transmission service was not offered on a stand-alone basis, the Commission concluded that Internet service was an information service — a service that involves the storage and forwarding, or manipulation of information.

The consequences of the FCC’s decision were significant. If cable modem service were a cable service, it would be subject to regulation like any other cable service, and would also be subject to franchise fees under federal law. Based on its classification of cable modem service, the Commission suggested operators were not subject to federally-authorized franchise fees, and operators across the country stopped paying fees on cable modem service. The Commission opened a proceeding (still pending) to determine whether cable modem service could be subject to franchise fees under state law, and to consider to what extent other provisions of the Cable Act (such as the privacy provisions) applied to cable modem service.

If cable modem service were a telecommunications service, cable operators would have had to comply with common carrier rules when providing Internet service. Those rules essentially separate content from the conduit. Among other things, operators might have been required to allow consumers to buy Internet service from other providers. Cable operators would have had only limited ability to prevent innovative entrepreneurs from selling video and telephony services to consumers with a cable modem connection to the Internet.

There are no specific public interests requirements or protections that apply to information services. The FCC claimed that it could impose those requirements, although there is

some question as to whether the FCC is correct in this regard, and an even greater question as to whether the FCC would impose public interest obligations on cable operators. Moreover, the FCC claimed that it had the right to preempt state regulation of information services.

The *Brand X* decision was appealed to the Ninth Circuit, which reversed the FCC. The Ninth Circuit had ruled that cable modem service was a telecommunications service *before* the FCC had ruled that it was not. The Ninth Circuit held that it was bound by its own precedent: that cable modem service was not a cable service, and not an information service, but was instead a telecommunications service, subject to common carrier rules.

Does Brand X Signal An End For FCC Regs Separating Conduit and Content?

The Supreme Court granted certiorari to consider whether cable modem service was a telecommunications service or an information service.

The Court recognized that its decision would determine whether cable modem service would be subject to common carrier regulation. But it did not decide the case based on whether such requirements might be necessary to protect the public. Instead, its decision turned on the law governing judicial review of decisions by administrative agencies.

Under long-standing administrative law principles, an agency like the FCC has broad authority to interpret “ambiguities in statutes” subject to the agency’s jurisdiction. “if a statute is ambiguous, and the implementing agency’s construction is reasonable,” a federal court must accept the agency’s construction of the statute. *Brand X* slip op. at 9. A court must defer to an agency’s interpretation of the law even where it is inconsistent with prior agency decisions (although unexplained inconsistency may be considered in deciding whether an agency’s construction is reasonable).

In *Brand X*, Justice Thomas took this rule a step further, and concluded that state and federal courts must defer to an agency’s interpretation even if the agency interpretation is inconsistent with a prior court order unless the “prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.” *id.*, slip op. at 10. A court’s opinion “as to the best reading of an ambiguous statute” is “not authoritative.”

Justice Thomas then concluded that the Commission’s classification of cable modem service as an information service was reasonable, based primarily on the fact that cable operators bundle together the transmission function and the information processing functions. According to Thomas, consumers do not use the cable modem to “transmit and receive ordinary-language messages without computer processing or storage of the message.” Hence, cable modem service is properly treated as an integrated, single information service, rather than a service that involves a transmission function and other functions.

Justice Thomas concluded that telephone companies offering Internet remain subject to common carrier regulation because telephone companies offer a transmission service that is separate from an information processing service. He argued at one point in his opinion that telephone companies cannot avoid common carrier regulation simply by bundling together information and common carrier services. It is not clear why that is so, as Justice Scalia’s dissent explains. At other points in the opinion, Justice Thomas seems to suggest that the Commission might be able to treat DSL and other telephone services the way it treats cable modem service. Slip op. at 29-31.

In its final — and perhaps most frightening — paragraphs, the decision acknowledges that the “cable modem” decision is just one part of what appears to be an ongoing FCC effort to revisit and eliminate rules designed to prevent companies that own important conduits from controlling content.

WHAT RULES SHOULD GOVERN PEG USE? COURTS AND AGENCIES CONTINUE THE DEBATE

Courts and regulatory agencies continue to debate the proper scope of rules governing PEG use of cable systems.

In *New York State*, the Public Service Commission adopted rules that for the first time explicitly state that public access channels are for “non-commercial” speech. Commenters argued the change could prevent the use of the channels for fund raising by schools and other non-profit organizations. The PSC noted: “The purpose of PEG channels is to provide a forum for the exchange of ideas in a local community. Allowing commercial use of the channels, even for fund raisers, may open the door to the misuse of the channels for profit.”

While the PSC was revising its rules, a federal court in New York was considering a challenge to new rules Cablevision adopted for use of PEG channels. Under Cablevision’s old rules, producers obtained series programming slots by standing in line. Slots were allotted on a “first come, first served basis.” Under the new rules, producers mailed time slot requests to Cablevision. Requests postmarked by a certain date were entered into a computer, and slots were awarded randomly, rather than on a first come, first served basis.

One producer claimed that the federal Cable Act prohibited Cablevision from exercising editorial control over the content of PEG, and therefore required Cablevision to allocate time slots on a first come, first served basis. In *Morone v. CSC Holdings Corporation*, 363 F.Supp.2d 552 (E.D.N.Y. April 4, 2005) a federal noted in passing that neutral regulations governing use of a PEG channel did not constitute illegal censorship, and were not prohibited. The court said that Cablevision’s departure from a strict first-come, first-served approach actually appeared “much fairer” and served the goals of the

Cable Act. That part of the decision should provide some comfort to access centers that are experimenting with different approaches to allocating time slots. However, the district court also suggested that PEG producers may not even have a right under the Cable Act to complain to the federal courts about real operator censorship.

Ultimately, however, the court noted that the New York PSC was reviewing Cablevision’s rules under in light of state cable regulations. The court refused to finally decide the case on the merits, pending completion of the PSC’s review.

Wilcher v. City of Akron, 2005 WL 1140676 (N.D. Ohio May 13, 2005) involved a challenge to another set of cable-operator instituted PEG rule changes. The decision was issued by a federal magistrate on Wilcher’s motion for a preliminary injunction, so the decision does not resolve the case—it decides whether Wilcher was entitled to interim relief pending a decision on the merits.

Time Warner Cable adopted new rules limiting use of the PEG channels to residents of certain specified communities; requiring that substantially all of a program’s content be from locally produced sources; requiring producers to pay a \$25 administrative fee with the submission of each tape; and requiring producers to provide proof of copyright clearances on demand. Plaintiff Wilcher did not claim that Time Warner’s actions violated the Cable Act’s anti-censorship provisions. Instead, she claimed that the rule changes violated the first amendment.

The first amendment only applies to government actions. Wilcher claimed, first, that the case did involve state action, because the rules were approved by the City of Akron. The district court disagreed. Mere municipal approval of Time Warner rule changes was not enough to transform the rules

into state action subject to the first amendment: “[t]here must be encouragement with municipal participation.”

Second, Wilcher argued public access channels are public property and a public forum; she claimed Time Warner was not acting as a private party in managing the channels, but instead was acting more like the manager of a public park. The court disagreed: the PEG channels, it concluded were “owned and controlled by Time Warner.” The Court found it significant that in the case before it, unlike other cases, there had been “no transfer of direct oversight” to a municipal actor, such as a non-profit access corporation. Therefore “under the particular circumstances in this case” neither Time Warner or the particular PEG channel is “public property or deemed private property dedicated to public use.”

Having concluded that Time Warner’s rule changes were not subject to first amendment scrutiny, the court next considered whether Wilcher could sue the City independently. However, since the court had concluded that the City had not encouraged the adoption of the rules, it also concluded that there was no municipal action to review: “mere approval of or acquiescence in initiatives of a private party is not sufficient to justify holding” the City responsible for the new rules.

The magistrate’s reasoning is not entirely clear, and the decision may well rest largely on franchise language. Nonetheless, the decision opens a rather obvious path for operator control of the content of PEG channels.

What does the future hold for PEG and for local franchising? No one knows yet, but bills are being introduced at the federal and state level addressing the provision of video by telephone companies. Two recent federal examples are attached to this Report.