FCC Local and State Government Advisory Committee

Advisory Recommendation Number 11

Ex Parte Comments Regarding Cases DA97-2355, DA97-2438 and DA97-353

1. After a very brief review, beginning at the LSGAC's meeting on January 23, 1998, the LSGAC believes that the issues raised in these Petitions for Declaratory Ruling are of major importance to local and state governments. The facts of these proceedings had not previously been brought to the attention of LSGAC until January, 1998, resulting in LSGAC's late comment on this proceeding. We recognize that with the transition of many new staff members working with LSGAC, it has been difficult for all of us to stay on top of every issue.
2. There are a number of very important issues that have been raised in these proceedings. Due to the fact that the LSGAC has not had sufficient time to study the pleadings in depth, and having just recently learned that the Commission is likely to render a decision by the end of this month, the LSGAC has decided to limit this Advisory Recommendation to one issue of primary importance.
3. A decision in Petitioners' favor requires an interpretation that to be considered a cable operator under the Cable Act, an entity must provide video services ***and*** own the infrastructure which carries those services through public rights-of-way, to the point of delivery. An entity owning the facilities in the rights-of-way which carry the video signals would not be a cable operator; likewise, an entity which provided the video services, through leased facilities would not be a cable operator.
4. Such a ruling would create a giant loophole that would effectively end franchising of providers of cable service in many jurisdictions.
5. Many cable operators are known by the name of their parent corporation, yet serve many local communities through subsidiary corporations which are separate, legal entities. A ruling that the leasing of infrastructure removes the provider of cable services from the definition of a cable operator would encourage cable operators throughout the country to set up legal entities to own the infrastructure, and other legal entities to lease the infrastructure and provide service to the consumer.
6. Without the ability to require a franchise of these entities within the parameters of the Cable Act, local governments and their citizens will lose the authority to require access for public, educational and government programming, require compliance with customer service standards, require compliance with FCC technical standards, require service to all portions of a community (as opposed to allowing the provider to serve only high profit areas), and recover franchise fees for the use of public property.
7. Furthermore, a ruling in Petitioners' favor will do little to encourage competition. In communities where a cable operator does not restructure itself in order to utilize the loophole, there may be a cable operator who is subject to the provisions of the Cable Act, and a second provider of the same services, through the same infrastructure, that is subject to almost none of the same requirements. Such ruling cannot be reconciled with the goal of competitive neutrality set forth in the Telecommunications Act of 1996.

RECOMMENDATIONS:

For the foregoing reasons, the LSGAC recommends as follows:

1. That the Commission not grant the relief requested by Petitioners in these actions; rather the Commission should order that providers of video services utilizing infrastructure placed in public rights-of-way be considered cable operators under the Cable Act, regardless of whether those providers own, lease, or otherwise obtain access to the infrastructure.
2. That if the Commission is not inclined to deny the Petitions, that the matter be held in abeyance in order to allow the LSGAC more time to study the issue, and provide a more detailed and comprehensive recommendation at a later date.

Respectfully submitted by the LSGAC on this ___ day of February, 1998.

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Kenneth S. Fellman
Chairman