Cable TV

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CABLE TELEVISION AND TELECOMMUNICATIONS CLIENT UPDATE

TO: Cable Television and Telecommunications Clients and Other Interested Persons

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To Our Readers:

Due to changes in technology and programming services, we have decided to expand the scope of our regular cable television client update to include information on other current telecommunications issues and topics. By doing so, you will have the benefit of updates on the growing convergence of cable, telephone and computers.

SPRINT AND CONTROL DATA SIGN AGREEMENT TO INTEGRATE TELEPHONE AND COMPUTER SERVICES

Control Data Systems, Inc. and Sprint made a joint announcement at the E-mail World and Internet Expo in Boston on November 28, 1995 about a new Sprint InfoXchange service. The service will enable business, industry and government users to communicate with others without regard to the type of system each has and to control and manage telephone and computer services including fax, Internet, e-mail and computer links. **Fredrikson & Byron** brought its cable and computer expertise together to assist in the development of the agreement, working at the nexus of cable, computer and telephone convergence in a world-wide arrangement and marriage of these technologies. Users of the service will experience a whole new concept of working, without the confusion of individual attempts to find and use the many different types of services needed to fulfill the needs of today's work environment.

MUNICIPAL UTILITIES AND FIBER OPTIC DEVELOPMENT

At a recent conference held by the American Public Power Association ("APPA") in Seattle, Washington, municipal utility officials met to study the latest in the development of fiber optic systems by municipal utilities. A number of examples were provided, including the municipal utility in Glasgow, Kentucky, which has operated a fiber optic network for a number of years. This utility is increasing the capabilities of its system to offer services to its electric utility users and special services for the schools and the city. The city of Cedar Falls, Iowa is also developing a municipal fiber optic utility system, and has agreements with many local institutions, including schools and hospitals, to access the system for video, voice and data purposes. And, the city of Gainesville, Florida recently announced that it intends to develop a fiber optic network that will serve the needs of its hospitals and schools. The conference also addressed the following questions, which must be considered by any city thinking of entering this new field:

- Is a fiber optic network owned and operated by your municipality desirable? Why?
- What is the process for examining these issues?
- What are the legal restraints?
- What type of planning process is required?

Fredrikson & Byron has created a process for guiding municipal utilities through the maze of regulatory and business decisions that are essential for a municipality or its utility in determining whether to construct and operate a fiber optic network. Please contact us if you would like further information.

CABLE TELEVISION FOR INTERNET ACCESS

Allowing access to the Internet or other on-line services through existing cable television infrastructures is currently being tested in many areas of the country.

Computers are used in more than 50 percent of homes in many cities. It is expected that their use will continue to grow as costs decline and technology improves. A recent study indicates that the cable television infrastructure can provide 1,000 times more bandwidth than current modems through standard telephone lines. Users will not need separate telephone lines for interactive services if they use a cable television modem. It will be possible to view a program on television while accessing the Internet on a personal computer in another room.

The increased speed and bandwidth that cable television systems can provide will allow full motion video and enhanced graphic capabilities to become an integral part of the Internet and worldwide web.

UPDATE ON FEDERAL LEGISLATION

In mid-October, the United States House of Representatives and Senate chose 45 conferees for the committee that will reconcile the telecommunications bills from the House (H.R. 1555) and the Senate (S. 652).

The conference committee began pouring over both bills in early November. Originally, the committee hoped to complete its work by Thanksgiving. However, the federal budget crisis derailed those plans. Legislative insiders are now mentioning the Christmas holidays as a possible completion date, although one lobbyist has suggested that negotiations may last until March. If a bill emerges from the conference committee, the House and Senate must pass it before it is presented to the President for his signature or veto.

We believe the legislation will pass by the end of this year. If it becomes law, **Fredrikson & Byron** will have a helpful summary available that identifies significant sections of the law and important changes to consider in cable television and telecommunications. Let us know if you would like a copy when it is available.

SUPREME COURT TO HEAR ALLIANCE FOR COMMUNITY MEDIA CASE

Depending on the outcome of the following case, municipalities may have increased responsibility for programming aired on public, educational or governmental ("PEG") access channels, specifically programming that includes obscene or indecent material or promotes unlawful conduct. On November 13, 1995, the United States Supreme Court announced that it would hear Alliance for Community Media et al. v. Federal Communications Commission involving a section of the 1992 Cable Act that allowed cable operators to ban certain types of programming on PEG access as well as leased access channels.

Some cable operators have indicated that if the rules are found constitutional, they expect the municipality or its access entity to monitor PEG programming to assure compliance with local standards. The Supreme Court will hear oral arguments early next year.

LEASED ACCESS CHANNELS – DO THEY WORK?

An article in the November 22, 1995 issue of the *Wall Street Journal* about leased access channel programming demonstrates the opportunities these channels present to local businesses.

The Cable Act allows any person to have a commercially produced program aired over the cable system. The *Wall Street Journal* article highlighted a self-improvement program produced by a self-help expert on the leased access channel through which the expert developed a significant business.

Since federal law mandates that all cable systems provide channel capacity for leased access programs, more should be done to inform the local business community of this inexpensive way to communicate their expertise or products in an informative way to the community.

SHOULD MY COMMUNITY JOIN WITH ITS NEIGHBOR TO REFRANCHISE ITS CABLE TELEVISION SYSTEM?

With increasing frequency, cities are looking to neighboring cities to join them in the refranchising process of cable television services. It makes good sense given that cable companies are consolidating operations, reducing facilities and attempting to serve larger areas out of a single headend. Cable systems are no longer limited to one city, but rather serve many cities. Ongoing changes in federal legislation, new technology, and services are making cable television administration and enforcement a major function for city government. Cable television systems also are increasingly viewed as a communication infrastructure, part of the on-and-off ramp to the information superhighway.

With all of these factors in mind, it is important for cities to consider the following questions about the benefits and opportunities of joining neighboring cities in the administration and regulation of cable television operators and the communications infrastructure.

- Are our interests similar?
- Do the needs and interests of the local businesses, institutions and schools require interconnection of cable services beyond city boundaries?
- Are there cost savings and administration and enforcement benefits that will be derived from joining our cities?
- Are our cities politically similar?

Before embarking upon the joint franchising process, cities must also recognize the importance of establishing a joint administrative organization. And, officials of each city must consider how a joint organization will be funded, what duties it will have, who will be responsible for carrying out the duties, and the tasks that will be involved.

TCI SETTLES WITH FCC ON CPST RATE COMPLAINTS

On October 30, 1995, the FCC released a proposed settlement agreement with TCI resolving all Cable Programming Services Tier (CPST) rate complaints pending before the FCC on September 15, 1995. The agreement would require TCI to refund $1.90 to every CPST subscriber of record on the date the refunds are issued. Refunds would most likely be made in early 1996.

In return for the refunds, all CPST rates as of September 15 would be deemed reasonable by the FCC. TCI would be allowed to move up to four regulated channels to a Migrated Product Tier (MPT). The initial price for MPTs would be set at the same level, on a per channel basis, as if it were a regulated tier. TCI would be allowed to add an unlimited number of channels to the MPT, with corresponding price increases capped initially at $.20, excluding programming license fees. Channels added to an MPT would not count toward the rate caps imposed by the FCC's "Going Forward Rules." However, TCI would be allowed to adjust rates for inflation and external costs in the usual manner. After May 15, 1995, TCI would be allowed to transform MPTs into New Product Tiers (NPTs), which are essentially unregulated tiers.

Interested parties have until December 13, 1995 to file comments with the FCC regarding the TCI rate settlement agreement.

3 KEYS TO A SUCCESSFUL FRANCHISE RENEWAL PROCESS FOR LOCAL GOVERNMENTS

1. Education.

Local government officials who will be participating in the cable television franchise renewal process should become familiar with the cable communications industry. By learning what cable communications services are available, the technical terms used in the cable industry, and the laws applicable to the cable television industry, local governments can save significantly on the time and expense involved in the renewal process.

2. Objectively Evaluate Your Relationship With the Incumbent Cable Operator.

An objective assessment of a local government's relationship with the cable operator will enable it to more accurately estimate the time and expense that will be involved in the renewal process. If a cable operator is known for its responsiveness to the changing demands of subscribers and is willing to share information with the franchising authority, the needs assessment process may not be as exhaustive as it would be if the opposite were true.

3. Do As Much As You Can On Your Own.

Identify the tasks that can feasibly be done "in-house" and do them yourself. A Southwestern Minnesota city recently saved itself substantial expense during its needs assessment process by conducting written subscriber surveys in-house. The city was able to line up local volunteer students to mail, sort and tabulate written subscriber surveys. Moreover, it is generally the observation of **Fredrikson & Byron** that franchising authorities that involve personnel in renewal tasks approach the negotiating table with more confidence.

FCC OFFERS OPERATORS OPTION TO REPORT ANNUALLY ON RATE ADJUSTMENTS

In September, the FCC gave cable operators the option to begin reporting rate adjustments annually instead of quarterly. To exercise this option, a cable operator must notify the franchising authority of its proposed filing date before filing for a rate adjustment. Franchising authorities may reject a proposed date for good cause, but must reschedule the filing date no later than sixty (60) days after the date proposed by the cable operator. Cable operators may implement annual rate increases ninety (90) days after filing Form 1240 with the franchising authority.

This option allows cable operators prospectively to adjust non-equipment and installation rates based on reasonably certain and quantifiable changes in inflation and external costs expected over the coming year. A "true-up" provision in the rules allows cable operators to increase or decrease cable rates during the year to make up for inaccuracies in their estimated rate adjustments.

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DATE: June 14, 1996

LOCAL GOVERNMENTS MUST TAKE A PROACTIVE APPROACH TO NEW FEDERAL TELECOMMUNICATIONS LEGISLATION

While it's inevitable that the Telecommunications Act signed into law the first of February will result in sweeping industry changes, it's also imperative that local government continue to play a leading role in oversight of communications services.

Municipal officials should consider implementing ordinances or resolutions that govern telecommunications providers in a uniform and consistent way. There are already a plethora of permanent facilities, including water mains, natural gas pipes, telephone wires and cable TV system cables below the surface of our public streets and sidewalks.

As more telecommunications providers attempt to obtain rights-of-way, there will be even more layers added to that substructure, intensifying public safety concerns and driving up management costs. Every time a new carrier enters a right-of-way, local government (and the taxpayers) face both increased direct costs for road replacement and indirect costs in the form of increased travel time, loss of access and trade to local businesses, and increased noise pollution and visual intrusion to name just a few.

The Telecommunications Act of 1996 preserves the rights of state and local governments to control the public rights-of-way and to require fair and reasonable compensation from telecommunications providers, on a competitive, neutral and non-discriminatory basis.

The new Act also affirms local zoning authority over the siting of cellular towers and other telecommunications facilities. Effectively managing the public rights-of-way and other properties in the city, within the limits allowed by state and federal law, will be one of the biggest challenges of the next decade for municipal officials and managers.

PCS IS COMING TO TOWN

We have all heard of Personal Communications Service (PCS) and the tremendous expenditure made by various operators to the FCC for the right to receive licensed spectrum. To date, the auctioned-off radio frequency spectrum has cost the industry in excess of $10 billion. These business operators are serious and will move ahead quite rapidly to deploy their systems throughout the country.

Municipalities are being faced with requests from PCS operators to use public property, public buildings, or other properties within the municipality to locate antenna towers or to locate cell sites and microwave dishes.

Local governments recognize that local control may be affected by the provisions of the Telecommunications Act of 1996, which limits their authority to zone the location and placement of these facilities.

Some of the solutions local governments are currently utilizing include the following:

1. A moratorium on development of PCS systems in their community. In a recent case in Medina, Washington, a federal district court upheld the right of a local unit of government to impose a six-month moratorium to plan for the impact of PCS development.

2. Co-location of facilities. Municipalities are developing policies and standards for the review of PCS applications, including requirements for co-location of PCS facilities.

3. Use of facilities owned by a local unit of government and/or location on public property. Local units of government are exploring ownership of their own facilities and leasing space for utilization by PCS operators.

4. Aesthetic considerations. Municipalities are adopting standards applicable to the color of the poles and antennas, screening, distance, and other factors to prevent intrusion to the greatest degree possible.

5. Rental and other payments. Requirements for compensation for use of right-of-way and payments for space on public buildings and property varies considerably in different communities, and requires careful review.

In conclusion, there are numerous considerations that are very important for local governments to evaluate before making a decision about its regulatory structure and other requirements. In the end, what is most important is to determine the priorities for your municipality.

IS YOUR COMMUNITY READY FOR THE NEXT "TWISTER?"

The violent weather that has battered much of the country this year highlights the importance of the FCC's new Emergency Alert System rules. In January 1995, the FCC threw out the old Emergency Broadcast System (EBS), and replaced it with the new Emergency Alert System (EAS). The EAS rules require participation by cable television systems by July 1, 1997. The rules direct state and local governments to coordinate in developing emergency alert system plans that comply with the new FCC rules. Fredrikson & Byron is currently working with officials in Minnesota to develop a state plan.

FCC rules provide a set of mandatory and permissive emergency codes that will be used to communicate emergency information between federal, state and local emergency officials. State and local governments should communicate to ensure that state emergency alert system plans do not conflict with cable television franchise provisions relating to, or customary local usage of emergency override capabilities of cable television systems.

CITIES MAY LOSE FRANCHISE FEES DUE TO FCC DECISION ON CALCULATION PROCESS

On April 26, 1996, the FCC affirmed its decision in *United Artists Cable of Baltimore* which allowed a cable operator in Baltimore to subtract funds collected for franchise fees from its calculations of gross revenues. Because franchise fees are normally calculated as a percentage of gross revenues, a lower value for gross revenues results in less franchise fees. Franchising authorities whose cable operators currently include franchise fees

in their calculation of gross revenues may receive less franchise fees as a result of the new method of calculation. TCI has already changed its method for calculating franchise fees for all of its cable systems.

Franchising authorities object to the FCC's analysis because it implies that franchise fees are taxes rather than rent or compensation for the use of the public rights-of-way, and because the decision is inconsistent with accepted accounting standards. Several local government groups intend to appeal the decision.

FCC ISSUES CABLE ACT REFORM RULES PURSUANT TO TELECOMMUNICATIONS ACT OF 1996

On April 30, 1996 the FCC released interim and final rules implementing the Cable Act reform provisions of the Telecommunications Act of 1996. The definition of the term "Effective Competition" for the purpose of rate regulation was modified. The process for handling rate complaints regarding expanded tier programming was revised. Other issues dealt with included: geographic uniform rate requirements, enforcement of technical standards, the phase-out of expanded tier rate regulation and more.

PEG ACCESS AND FRANCHISE FEES SURVIVE IN NEW FCC OPEN VIDEO SYSTEM RULES

On June 3, 1996, the FCC issued its final rules regarding Open Video Systems (OVS). To qualify as an OVS, telephone companies must permit carriage of video programming that is offered by companies not affiliated with the telephone company/OVS. OVS operators must permit such carriage on reasonable, non-discriminatory terms. In order to begin operating as an OVS, telephone companies must be certified by the FCC. Cable operators are allowed to qualify as OVS, but only if the cable operator faces "effective competition" in its service area. In exchange for providing an open video platform, OVS operators are exempt from many federal franchising requirements applicable to cable operators.

The FCC rules provide that OVS operators must provide, at minimum, the same number of Public, Educational and Governmental (PEG) access channels as does the incumbent cable operator. Further, OVS is subject to a maximum five percent of gross revenue fee to compensate local governments for the use of public rights-of-way. The FCC will also allow local governments to impose conditions on the use of rights-of-way on reasonable, non-discriminatory terms. Local governments may not impose conditions on the use of rights-of-way

that are unrelated to the management of rights-of-way. Specific examples of what the FCC considers to be improper cable "franchise-like" requirements applied to OVS are: construction of institutional networks, donations of money to non-profit institutions and imposition of system capacity requirements.

Fredrikson & Byron's reaction to the final rules is mixed. To the extent that the rules allow local governments to continue management of public property, the rules are favorable to local governments. However, Fredrikson & Byron is troubled by the FCC's attempt to tread on the police power of local governments by "preempting" their participation in shaping the role of OVS as part of a community's overall telecommunications infrastructure. Fredrikson & Byron is currently consulting with local governmental associations to consider challenges to the unfavorable aspects of the OVS rules.

BEWARE OF "STUDIES" BY STATE AGENCIES ON TELECOMMUNICATIONS ISSUES

As a result of the passage of the Telecommunications Act of 1996, many states are reviewing how to create a "level playing field" for all telecommunications services providers on issues such as compensation for use of the public rights-of-way and the provision of public, educational and governmental (PEG) access programming. While many of these studies are useful methods of reviewing complex information, some of the studies can reach illogical conclusions due to influences by the telecommunications providers which they reference. An example is a recent study requested by the Minnesota legislature on PEG access which has received national attention.

During the 1995 legislative session, the Minnesota legislature asked the Minnesota Department of Public Service (DPS) to investigate and report on how to **ensure citizen access to local government and other public access programming on new communications technologies such as video dial-tone and satellite transmission.** The DPS Report released in March of 1996 provided no recommendations on methods to ensure access to PEG access programming on emerging technologies. Instead, the DPS Report recommended that municipalities **not** be able to use franchise fees to support access programming. This recommendation was made despite a Minnesota law requiring PEG access programming on cable and a statement in the body of the DPS Report regarding the legislature's support for the use of franchise fees to support PEG access programming. The DPS Report further recommended that PEG access programming should only exist if viewers are willing to pay for it. It concluded that if viewers or the municipality will not pay for PEG programming, it should be discontinued.

The DPS Report did not address the inherent contradictions in the data it collected and its conclusions.

This Report underscores the need for municipal involvement in the decision-making process at state legislatures and public departments. Industry groups may attempt to influence the final conclusions in studies and reports on these telecommunications issues. It is critical that municipalities address these issues.

Fredrikson and Byron would be happy to provide additional information on any of the above topics. Please contact us at any of the telephone numbers on page one of this update for further information. We look forward to hearing from you.