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## Wisconsin's Cable Franchise Bill Passes the Senate

As expected, the Wisconsin Senate passed the so-called "Video Competition Bill" (AB 207) on November 8 by a margin of 23 to 9. The bill was passed with just three amendments, only one of which is of any significance to municipal interests. That amendment would require video service providers to continue paying Public, Education, and Governmental ("PEG") television support fees to the communities that currently receive such fees for three years. The Senate otherwise ignored efforts by the Wisconsin Association of PEG Access Channels ("WAPC"), the League of Wisconsin Municipalities, the Regional Transmission Commission, and the Alliance of Cities for amendments based on recent Illinois legislation that would have gone a long way toward protecting consumers, preserving local authority over rights-of-way, and supporting PEG television.

Because there are differences in the Senate and Assembly versions of the bill, AB 207 must go back to the Wisconsin Assembly for minor adjustments so that the Senate and Assembly version are identical. No additional changes are anticipated from the Republican-controlled Assembly. The bill is expected to be taken up by the Assembly no later than mid-December. The bill will then go to Governor Doyle for his signature. The Governor has been generally supportive of the bill.

Some of the major provisions of the bill include the following:

**Franchising Authority.** The bill strips municipalities of their authority to obtain franchise agreements from cable TV operators and other video service providers who use local rights-of-way to provide their services. The current system will be replaced by a state franchising process headed by the Department of Financial Institutions ("DFI"), which will be the sole authority to issue statewide franchises. Such state-issued franchises will be perpetual. Under the bill, DFI must, without scrutiny, grant providers such as AT&T, Time Warner,

and Charter Communications statewide franchises and must act on all other applications for such franchises within 15 days of receipt of an application. The bill allows cable operators and video service providers to walk away from their current local franchise agreements and to opt into a DFI-granted franchise.

**Franchise Fees/Services.** While the bill preserves a municipality's right to collect a five percent "video service provider fee" from all video service providers using local rights-of-way, municipalities may no longer require the provider to pay a fee to support local PEG channels, and any right-of-way permitting fees imposed by the municipality may be deducted from the video service provider fee. The bill is unclear, however, with regard to whether a municipality that currently requires a franchise fee of less than five percent can increase the fee to the five percent maximum. It also appears that municipalities may no longer require video service providers to provide free basic service to municipal buildings, public libraries, or schools.

**Public, Educational, and Governmental TV.** The bill will make it more difficult for communities to maintain their PEG access channels. It will likewise be very difficult for new PEG channels to be created in communities that currently do not have PEG. The bill allows municipalities to require a new video service provider to provide the same number of PEG channels provided by the incumbent cable operator. However, no new PEG support fees can be required of either the incumbent or the new provider and existing PEG support fee requirements in local franchises will sunset after three years. In addition, the municipality will have to pay the cost to deliver its PEG signal to the provider in a manner that is compatible with the technology or protocol used by the provider to deliver video service. The bill lacks any requirement, however, for the quality of the PEG transmission on the provider's system. This will

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### SPEAKERS FORUM

February 4, 2008  
Eminent Domain Law in Wisconsin  
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Mark A. Steichen

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# Wisconsin Court of Appeals Directs Police Department to Disclose Records of Emergency Mental Health Detention in Response to Open Records Request

Government record custodians in Wisconsin face a challenging task in responding to requests made under the Open Records Act, Wis. Stat. §19.35. The general policy of the law is open disclosure, but there are numerous exceptions and countervailing policies to consider. One such countervailing policy is set forth in Chapter 51 of the Wisconsin Statutes, the Mental Health Act, which provides statutory protections against disclosure of mental health treatment records.

So what is a police department to do when presented with an open records request for the paperwork maintained by the police in connection with an emergency mental health detention under Chapter

51? In a decision issued on November 6, 2007, the District I Court of Appeals answered that question by requiring disclosure of the emergency detention records. *See Watton v. Hegerty*, 2006AP3092. *Watton* provides helpful guidance, but, because it was decided on particularized facts, it probably should not be regarded as setting forth a bright line rule applicable across the board to all requests for emergency detention records maintained by a governmental entity.

The plaintiff in the case, Michael Watton, is an attorney representing the family of a man shot and killed by Sidney Kente Gray, a person who had been subject to an emergency detention under Chapter 51. The killing occurred the day after Gray was released from custody. Watton asserted that the release was the result of negligence by the Milwaukee Police Department.

Pursuant to the Open Records Act, Watton sought disclosure of police records relating to the emergency detention of Gray. The Milwaukee Police Department declined to produce the requested records on the grounds that they were protected from disclosure by: 1) Wisconsin's Mental Health Act; 2) the confidentiality afforded to medical treatment records; and 3) the privacy interests of Sidney Kente Gray. Watton filed a petition for writ of mandamus to compel production of the records. After a hearing, the trial court agreed with the police department that disclosure of the records was not warranted because "treatment records" are confidential under Wis. Stat. §51.30(4). Watton appealed the trial court's decision and succeeded in getting it reversed.

The Court of Appeals analyzed the definition of "treatment records" in the Mental Health Act and concluded that the emergency detention reports maintained by the police department did not fall within the statutory definition. Therefore, they were not exempt from disclosure under Wis. Stat. §51.30.

Next, the Court of Appeals considered whether the emergency detention records were exempt from disclosure because of the confidentiality that attaches to records created pursuant to the physician/patient privilege. The Court found that any such privilege had been waived because, in criminal proceedings arising from the murder, Gray had put his mental health in issue by requesting and obtaining a competency evaluation and later by entering a plea of not guilty by reason of mental disease or defect. Therefore, he had waived any privilege of confidentiality.

For similar reasons, the Court concluded that disclosure of the detention records would not violate Gray's statutory right of privacy, as set forth in Wis. Stat. §995.50. Because Gray had made his mental condition a matter of public record, he could no longer claim that disclosure of the requested records would constitute an invasion of his privacy.

The criminal proceedings against Gray and his reliance on his mental condition as a defense to the criminal charges formed part of the backdrop for the decision in *Watton*. When similar circumstances do not obtain and a police department is asked to disclose emergency mental health detention records, the decision in *Watton* will provide guidance, but perhaps not the full answer. Thus, for governmental record custodians responding to open records requests for sensitive documents, the difficult balancing act continues.

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## Wisconsin's Cable Franchise Bill

### Passes the Senate *Continued from front page*

allow AT&T, and others, to use lower quality streaming video to deliver PEG programming to their customers.

**Universal Service.** There is nothing in the bill that would promote or ensure universal service and there are no build-out requirements on incumbent cable TV operators. The lack of such requirements has led to speculation that many residents, especially those in the more rural areas of the state, will have fewer, rather than more, land-line based video service options. The fear is that underserved areas of the state may no longer have any land-line based providers.

**Right-of-Way Management.** With respect to use of local rights-of-way, cable operators and video service providers will be treated as public utilities in most respects. That is, the providers may place their facilities in local rights-of-way, subject to the "reasonable regulation" of the municipality in which the facilities are located. The providers may also file complaints with the Public Service Commission of Wisconsin to challenge any such regulations believed to be unreasonable. The commission may void the regulation if, after a hearing, it determines that the regulation is unreasonable.

**Consumer Protection.** While the bill will allow municipalities to require companies holding statewide video franchises to comply with some of the customer service standards contained in the Federal Communications Commission's ("FCC") regulations, municipalities will have no power to enforce such standards through penalties or any other means. Only those municipalities where there is only one video service provider which is not subject to "effective competition" from a satellite provider may require compliance with the FCC standards. Existing state standards will be enforced by the Department of Agriculture, Trade, and Consumer Protection, whose jurisdiction will now extend to satellite-delivered video services. The state standards, however, offer less protection and cover fewer areas than the FCC's standards.

**Open Questions.** There are a number of questions the bill raises but does not clearly address. For example, if a municipality is currently collecting a two percent franchise fee, can it increase the fee to five percent? Likewise, will communities that have received a capital equipment loan from the incumbent cable operator have to pay back any balance on the loan that exists after the three year PEG support fee sunsets? These, and many other questions, may need to be addressed in court actions over the coming years.

— Anita T. Gallucci

— Catherine M. Rottier

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## Struggle Over Waste Transfer Station Siting Focuses On Village's "Official" Zoning Map

The next chapter in the struggle between the Village of Hobart and Brown County over the siting of a waste transfer station at a closed landfill in Hobart was written in *Village of Hobart v. Brown County and Brown County Solid Waste Management Board*, 2007 AP891, when the Court of Appeals decided that the Village was entitled to an injunction preventing Brown County from operating the waste transfer station in Hobart.

The dispute began in early 2002, when the County and the Village began discussions about the County siting a waste transfer station at a closed landfill in Hobart. Village representatives told the County at that time that the zoning at the closed landfill was appropriate for a waste transfer station, and in May 2002, they entered into a Memorandum of Understanding stating the Village's intention to approve a waste transfer station at the closed landfill. By September 2002, however, the Village changed its mind and informed the County that it would not issue any permits to the County for the waste transfer station. In October 2002, the Village notified the County that it had voted unanimously to rescind its approval of the memorandum.

The County, however, had already invested time and money in planning for the waste transfer station, and it wished to proceed. The County consulted with legal counsel who opined that the County could legally proceed with its waste transfer station without any approval or permits from the Village. The County thereafter began constructing the waste transfer station, and the Village brought suit seeking an injunction to prohibit the County from building and operating the waste transfer station.

In the litigation, the County argued that the Village was equitably estopped from asserting that the County's waste transfer station violated the Village's zoning ordinance. The trial court agreed, but both the Court of Appeals and the Supreme Court rejected this argument. See *Village of Hobart v. Brown County*, 2005 WI 78, 281 Wis. 2d 628, 698 N.W.2d 83. The case was sent back to the trial court to determine whether the County violated any Village ordinance, and if it did, then to weigh equitable considerations in determining whether to issue the Village's requested injunction.

On remand, the trial court found that the waste transfer station did not violate the Village zoning ordinance, and that even if there had been a zoning violation, equity would prevent its issuing an injunction because the County's reliance on the ability to proceed was reasonable, the Village had "unclean hands," and no public interest would be served by closing the station.

On October 18, 2007, the Court of Appeals reversed. In determining that the waste transfer station did violate the Village zoning ordinance, the Court focused its attention on the Village's zoning ordinance, which incorporated the official zoning map. There was confusion, however, regarding what constituted the official zoning map. The Village contended that the

zoning districts were as set forth in the original October 6, 1986 zoning map that was referenced in the ordinance. This map showed the site of the waste transfer station as an exclusive agricultural district that would not allow waste transfer stations. However, the Village had printed and distributed other later versions of the zoning map which designated the waste transfer station site as "public use." The County asserted that these later versions of the zoning map were "amendments" to the Village's official map, which the zoning ordinance said were to be incorporated into the zoning ordinance. The Court, however, found that the County was unable to demonstrate that official Village Board action had been taken to amend the official zoning map, and that in the absence of evidence showing official Village action to amend the official zoning map, the original zoning map controlled. The Court noted that a change in zoning must be adopted in an official meeting in order to safeguard the public from unnoticed or secret changes in zoning. A village may not effect a zoning change by simply printing a new map.

The Court of Appeals also rejected the County's argument that the waste transfer station was a legal non-conforming use because the site was previously used as an operating landfill. The Court indicated that the construction and operation of a waste transfer station is not an expansion of a closed landfill, but rather is a change in use that is not entitled to legal non-conforming status.

Having found that the County did violate the Village's zoning ordinance, the Court of Appeals next determined that equitable considerations did not advise against granting an injunction prohibiting the transfer station. The County argued that the Village's actions in repeatedly telling the County that the closed landfill was properly zoned for a waste transfer station caused the County to reasonably rely on those assurances in constructing a waste transfer station there. The Court of Appeals held, however, that prior to beginning construction the County knew that the Village no longer planned to approve the waste transfer station, and that at that point, the County was no longer relying upon the Village's statements but instead was proceeding based upon its own evaluation. The Court of Appeals concluded by stating that public interest would not be served by denying an injunction: "We have said that '[t]he municipalities, and the citizens who reside there, have a right to enforce their zoning laws.' Further, 'zoning may be the most essential function performed by local government in that it permits, the municipality to protect its citizens' quality of life.' On a balance of equities, we cannot say this is 'one of those rare cases where equity overcomes the [Village's] legal right and duty to secure compliance with its zoning classification.'"

— Lawrie Kobza

# MUNICIPAL LAW NEWSLETTER

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