

GRAY ROBINSON
ATTORNEYS AT LAW

Gary I. Resnick
Attorney At Law

954-761-8111

GARY.RESNICK@GRAY-ROBINSON.COM

401 EAST LAS OLAS BLVD.
SUITE 1000
POST OFFICE BOX 2328 (33303-9998)
FORT LAUDERDALE, FLORIDA 33301
TEL 954-761-8111
FAX 954-761-8112
gray-robinson.com

BOCA RATON
FORT LAUDERDALE
FORT MYERS
GAINESVILLE
JACKSONVILLE
KEY WEST
LAKE LAND
MELBOURNE
MIAMI
NAPLES
ORLANDO
TALLAHASSEE
TAMPA
WASHINGTON, DC
WEST PALM BEACH

February 5, 2019

Via ECFS MB Docket No.: 05-311

Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street SW
Washington, D.C. 20554

**Re: NOTICE OF EX PARTE:
Implementation of Section 621(a)(1) of the Cable Communications Policy Act
of 1984 as Amended by the Cable Television Consumer Protection and
Competition Act of 1992; MB Docket No.: 05-311: Response to Reply
Comments of NCTA-Internet & Television Association**

Dear Ms. Dortch:

We represent the City of Port Orange, Florida ("Port Orange") as outside counsel. This letter is submitted in response to comments filed by the NCTA dated December 14, 2018, that referenced Port Orange and conveyed inaccurate information. In an Appendix to its Reply Comments, as "Examples of Franchising Authority Overreach," NCTA mentioned Port Orange, stating the following:

4. Port Orange, Florida, has imposed new obligations on all communications providers, including cable operators, to operate in the rights-of-way. In addition to its obligations under its state-issued cable franchise, the cable operator is being asked to purchase security bonds and obtain additional municipal authority to operate and construct in the rights-of-way that essentially duplicates requirements in the operator's state-issued authorization to provide cable service.

NCTA is not correct with respect to this assertion. As a preliminary matter, Port Orange is not a franchising authority. Florida eliminated local cable franchising years ago, and adopted state cable franchising whereby the Florida Secretary of State issues a state certificate of franchise authority to cable providers. Local governments are prohibited from issuing franchises. *See Chapter 610, Florida Statutes*. Accordingly, Port Orange could not "overreach" through its franchising authority, since it has none.

Secondly, NCTA is not correct that Port Orange is "asking cable operators to purchase security bonds and obtain additional municipal authority to operate and construct in the rights-of-

Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
February 5, 2019
Page 2 of 3

way that essentially duplicates requirements in the operator's state-issued authorization to provide cable service." As part of the State franchising requirements, the State does not issue permits for construction in local public rights-of-way. Rather, Florida statutes provide that "notwithstanding any other provision of law, a municipality or county may require the issuance of a permit in accordance with and subject to Section 337.401[, Florida Statutes] to a certificate holder that is placing and maintaining facilities in or on a public right-of-way in a municipality or county." *See Section 610.114(2), Florida Statutes.* In addition, Chapter 601 provides that such permits may require that the cable provider be responsible for damage that the terms of the permit be consistent with construction permits issued to other providers of communications services placing or maintaining facilities in public rights-of-way. Accordingly, Port Orange, and other Florida local governments have permitting authority over cable operators' construction, not the State, and must treat permitting for cable facilities consistently with permitting requirements applicable to other communications infrastructure.¹

Florida recently amended Section 337.401, Florida Statutes, to adopt the Advanced Wireless Infrastructure Deployment Act. With communications and cable industry input, Port Orange adopted an ordinance to implement the amended Statute and to govern the placement and maintenance of all communications infrastructure in its rights-of-way. Pursuant to Section 337.401, Florida Statutes, municipalities and counties in Florida may require a registration for communications providers placing facilities in the rights-of-way, and as part of that registration, may require a security fund to guarantee compliance with their ordinances. *See Sections 337.401(3)(a), (7)(d)(12), and (7)(g), Florida Statutes.* The ability of local governments to require security to ensure compliance with ordinances has long been recognized by Florida courts under local government police powers for management of rights-of-way.

Accordingly, the permit requirements that Port Orange has imposed on cable operators, including the \$50,000 security bond, are (1) authorized expressly by Florida Statutes and case law, (2) consistent with Port Orange's permit requirements for communications providers placing and maintaining facilities in the rights-of-way, and (3) entirely reasonable and necessary to protect the public interest. The placement and maintenance of such facilities in the rights-of-way has created and will continue to create issues for Port Orange and other municipalities.

Excavation to install and to repair underground communications facilities regularly damages other utilities in the rights-of-way as well as the rights-of-way themselves. Recently, another municipality in Florida had its sewer main damaged by a fiber installation, causing over 30 million gallons of sewage to leak out, requiring emergency notices, and costing over \$1.4 million to repair.² Municipalities have had to file lawsuits to force communications providers to pay for repairs to rights-of-way and utilities damaged during construction. Unfortunately, these

¹ Chapter 610 also details the requirements for cable operators with respect to public, education, and government access channels, and services to schools and government facilities; these are not controlled at the local level.

² <https://wsvn.com/news/local/sewage-break-creates-stinky-situation-for-pompano-beach-residents/>

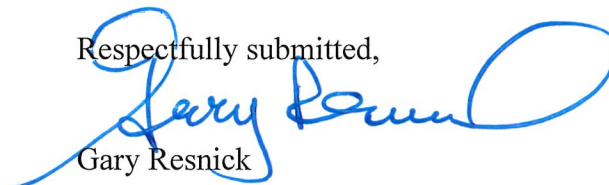
Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
February 5, 2019
Page 3 of 3

events occur regularly in Florida. In addition, communications providers on occasion, have installed infrastructure illegally, and have abandoned infrastructure in the rights-of-way, causing municipalities to incur expenses. In addition, as one would expect, Florida has a strict building code for above-ground communications facilities, necessitating permitting and inspections.

Accordingly, NCTA is incorrect when it claims Port Orange is “overreaching” its franchising authority to require cable operators to purchase unnecessary security bonds or duplicate requirements under its State franchise. The State does not issue permits for construction in local rights-of-way, nor does the State address damages or illegal and abandoned infrastructure. Rather, this is purely left to local governments. Port Orange’s requirements are entirely consistent with Florida law, with its permitting requirements for all communications providers in the rights-of-way, and are reasonable and demonstrate sound public policy to manage the rights-of-way.

As the Commission moves forward with this important proceeding, please accept this letter to correct the record. Should you have any questions, please feel free to contact us.

Respectfully submitted,



Gary Resnick

GIR/js

cc: Matthew J. Jones, Deputy City Attorney, City of Port Orange
National League of Cities, Inc.