

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of Implementation of	§	MB Docket No. 05-311
Section 621 (a) (1) of the Cable	§	
Communication Policy Act of 1984 as	§	FCC 05-189
amended by the Cable Television	§	
Consumer Protection and Competition		
Act of 1992		

TEXAS COALITION OF CITIES FOR UTILITY ISSUES' ("TCCFUT") COMMENTS
ON CABLE FRANCHISING NPRM

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TABLE OF CONTENTS

I. OVERVIEW..... 6

II. TEXAS CABLE FRANCHISING PRIOR TO SEPTEMBER 1, 2005- EFFICIENT AND REASONABLE WITH MUNICIPALITIES AS THE "FRANCHISING AUTHORITY"..... 9

III. TEXAS CABLE FRANCHISING AFTER SEPTEMBER 1, 2005- STREAMLINED UNDER 2005 TEXAS CABLE FRANCHISING STATUTE..... 18

IV. WHAT DOES "MAY NOT UNREASONABLY REFUSE TO AWARD AN ADDITIONAL COMPETITIVE FRANCHISE" MEAN? 24

V. ADDITIONAL COMMENTS ON CABLE FRANCHISING NPRM QUESTIONS..... 26

VI. THE COMMISSION NOR CONGRESS MAY NOT TAKE PUBLIC PROPERTY WITHOUT COMPENSATION ANY MORE THAN IT CAN TAKE PRIVATE PROPERTY WITHOUT COMPENSATION..... 29

VII. CONCLUSION..... 35

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**TEXAS COALITION OF CITIES FOR UTILITY ISSUES' COMMENTS ON CABLE
FRACHISING NPRM**

COMES NOW the Texas Coalition of Cities for Utility Issues (Referred to as "TCCFUI"¹) and files these Comments in the Federal Communications Commission (hereinafter "FCC" or "Commission") Notice of a Proposed Rulemaking concerning cable television franchising under Section 621 (a) (1) of the Cable Communication Policy Act of 1984, as amended by the Cable Television Consumer Protection and Competition Act of 1992. ("Cable Franchising NPRM").² The Cable Franchising NPRM poses, in essence, two question (to paraphrase): 1.) Are local franchising authorities unreasonably refusing to award additional competitive cable franchises, and if so, 2.) have cable providers documented such refusals?³ The short answer to

¹ Attached as Exhibit A is a representative list of City members of TCCFUI.

² *In the Matter of implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984, as amended by the Cable Television and Consumer Competition Act of 1992*, MB Docket No. 05-255, Notice of Proposed Rulemaking (released November 18, 2005).

³ Cable Franchising NPRM ¶¶ 12, 13.

both of these questions, from TCCFUI's Texas perspective, is an emphatic no. Local Texas franchising authorities (nor the State after September 1, 2005) have not unreasonably refused to award additional cable franchises nor have cable providers provided any evidence to the contrary. Of course the Cable Franchising NPRM questions as posed are a classic challenge to prove a negative—to “prove” something cities did not do. Cities are requested to “prove” the negative that they did not unreasonably refuse to award an additional competitive cable franchise. And through these comments TCCFUI will establish that in Texas, before September 1, 2005, such refusals did not occur, nor can they occur post- September 1, 2005. There is no evidence at all that Texas cities have unreasonably refused to grant an additional competitive franchise, and after September 1, 2005, such competitive franchises are, by a new state law, awarded in 17 business days based on a short application and with clear state wide standards.⁴ The answer, at least in Texas, is that neither the State nor any local franchisor is responsible for any unreasonable refusals to award a franchise.

⁴ CHAPTER 66, TEXAS UTILITY CODE (Supp. 2005), on state-issued cable and video franchise (“2005 Texas Cable Franchising Statute”).

I. OVERVIEW

The Cable Franchising NPRM specifically addresses the implementation of Section 621(a) (1) of the Communication Act of 1992, as amended in 1992.⁵ The provision specifically at issue reads: “A franchising authority . . . may not *unreasonably refuse to award an additional competitive franchise*. [emphasis supplied].”⁶ Through an overview of local cable franchising in Texas during the fourteen-year period since the enactment of the 1992 Cable Act, these Comments will demonstrate how Texas municipalities have frequently, and timely, awarded additional competitive cable providers in the face of scant and unsubstantiated anecdotal allegations that additional competitive franchises have been unreasonably refused. Texas cities recognize two fundamental concepts inherent in the quoted language: (1) A franchising authority retains the right to *reasonably refuse* to award any cable franchise; and (2) Once an initial cable television franchise has been awarded, an *additional competitive* franchise may not be unreasonably denied.

Texas municipalities have encouraged and sought additional competitive cable providers during the last fourteen years, not only because additional competitive cable providers may keep cable rates lower for the local community, but

⁵ Now codified as 47 U.S.C. Sec. 541 (a) (1) this provision was added in 1992 through the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, Stat. 1460 (the “1992 Cable Act”).

⁶ 47 U.S.C. § 541(a) (1).

because they may also enhance customer service among the competitors. When subscribers have a choice, service calls are answered more promptly, installation windows are shorter and are more often met, and programming is more expansive than if there were no competing providers. Municipalities in Texas share the Commission's view that such benefits may flow from the competitive pressures of additional franchises in a city.

Further, new technologies have been encouraged by local governments and their elected officials. Competing technologies and companies result in other tangible benefits to a city. Businesses and residents often judge the quality of their choice of city based on access to the latest in technology. Cities often find themselves in competition with each other, so the prompt and efficient franchising of video providers benefits municipalities and their citizens.

For over twenty years the cable franchising process as laid out in the 1984 Cable Act has worked very well in Texas.⁷ As will be noted in the comments below, at least in Texas, if there has been any delay or refusal to award a cable franchise, it has largely arisen due to actions of parties other than the city acting as the local franchising authority in the negotiations. While it is axiomatic that in any negotiations, there are at least two parties (in this case the local franchising authority and the prospective competitive cable provider), frequently the incumbent cable provider interjects itself into the process by monitoring the negotiations

⁷ Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779, codified as 47 U.S.C. § 521, *et. seq.* (The "1984 Cable Act").

through open records requests, participating vocally in open meetings,⁸ advancing arguments on any “objectionable” provisions from its perspective (i.e. that could “raise the bar” at the time the incumbent’s franchise expires), and essentially are demanding to have a place at the negotiation table and “insisting” that any new franchises be tailored to the incumbent’s franchise. Even if every “party” to the negotiations is reasonable, the cable franchising process can be delayed by such requests of the incumbent. Unfortunately, prospective competitive cable providers have on occasion demanded unreasonable terms or failed to agree to reasonable terms, exposing the local franchising authority to the incumbent’s claims of discriminatory franchising. These tactics, combined, can and have significantly delayed the local cable franchising process. As noted above, Texas is one of the first states in the nation to enact a new, streamlined statewide cable and video franchising process by the adoption of the 2005 Texas Cable Franchising Statute, which now provides by state law that a cable franchise is to be granted by the State in a matter of a mere 17 business days from the date of the submittal of a brief

⁸ Incumbents’ requests for city records are governed by the Texas Public Information Act which establishes liberal standards for disclosure of government documents, including draft franchise agreements in some instances and requires most City Council Meetings to be open to the public. TEX. GOV’T CODE ANN. § 552, *et. seq.* (Supp. 2005). In addition, some Texas cities such as the City of Houston, are prohibited by Charter from conducting so-called ‘executive’ City Council or Council sub-committee sessions closed to the public. Houston City Charter, in Article VII, Section 3, provides that "all meetings of the Council and all committees thereof shall be open to the public." *See Shackelford v. City of Abilene*, 585 S.W.2d 665,667-668 (Tex.1979).

application,⁹ Detailed terms and provisions for the state-issued franchises are embedded in the 2005 Texas Cable Franchising Statute. As before September 1, 2005, Texas cities welcome the opportunity to work with prospective competitive cable and video providers under the 2005 Texas Cable Franchising Statute.

II. TEXAS CABLE FRANCHISING PRIOR TO SEPTEMBER 1, 2005-EFFICIENT AND REASONABLE WITH MUNICIPALITIES AS THE "FRANCHISING AUTHORITY"

Cable services cannot be provided unless there is a cable franchise granted by the franchising authority.¹⁰ "Franchising authority" is defined as "any governmental entity empowered . . . to grant a franchise."¹¹ The designation of the "franchising authority", whether it is a municipality, a county or the state, is determined by state law. In Texas from, 1858 until September 1, 2005, the local franchising authority--the entity "empowered . . . to grant a franchise"-- has been the municipality.¹²

⁹ 2005 Texas Cable Franchising Statute, § 66.003 (b).

¹⁰ 47 U.S.C. § 541(d).

¹¹ 47 U.S.C. § 522(10).

¹² The Texas state legislature in 1858 originally delegated "exclusive control" of the streets to cities in Texas. *City of Waco v. Powell*, 32 Tx. 258 (Tex. 1869), see also *West v. Waco*, 294 S.W. 832 (Tex. 1927). Texas law codifies this municipal authority to grant franchises in several enactments. The more prominent references appear in the TEXAS TRANSPORTATION CODE, § 311.001, *et seq.* and in Texas Civil Article 1175(1) which provides in pertinent part that a city may prohibit "the use" of public rights-of-way by "any telegraph, telephone, electric light, . . . gas company or other character of public utility without first obtaining a consent" of the city and "upon paying compensation . . . and upon such condition as may be provided."

Efficient franchising demands that both parties participate in reasonable, good faith negotiations.

As with any bargaining process, the length, cost and ultimately the efficiency of the negotiations depends on the extent to which each party participates in reasonable, good faith negotiations. TCCFUI cites examples bearing on this point in these comments. During the 147-year period in Texas when cities were the sole franchising authority, they negotiated literally thousands of initial cable franchises, renewal franchises, amendments, and dozens of additional competitive cable franchises, all the result of reasonable, good faith negotiations. During the almost 14 years following the revision of 47 U.S.C. Sec. 541 (a) (1) in 1992, there has not been even one reported legal action lodged against a Texas city for unreasonable refusal to grant a franchise, let alone a successfully one. As Verizon acknowledged in its comments before the FCC last year, Verizon itself successfully negotiated several competitive cable franchises in Texas.¹³ While Verizon acknowledges that it has successfully negotiated cable franchises in Texas, it does not supply any detail regarding the particular franchises or the length of time consumed in negotiations. The Texas franchises mentioned were successfully negotiated in a matter of months of actual negotiation time, despite Verizon's refusal to negotiate on certain standard

¹³ Comments of Verizon, MB Docket No. 05-15, (filed September 19, 2005) ("*Verizon Comments*"). See *Verizon Comments*, page 5 on the reference to Texas franchises. The Verizon Comments were filed *In the Matter of Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming* and were referred to several times in the Cable Franchising NPRM, *i.e.* ¶¶ 5, 8 and 13.

and reasonable franchise terms. There is a specific reference in the Cable Franchising NPRM to the cable franchise Verizon negotiated with the City of Keller, Texas.¹⁴ Keller initially presented Verizon with franchise terms that were substantially similar in the totality to the incumbent's franchise agreement. Unfortunately, Verizon refused to accept those terms, and Verizon's unreasonable bargaining posture directly resulted in a protracted negotiation process.

Keller, like other Texas cities, recognized the risk of potential litigation should it award a franchise to Verizon on terms more favorable than the incumbent's renewal franchise. Indeed, incumbent cable providers have either asserted that in their view such a franchise would be unlawful as unequal treatment to a similarly situated provider and/or have indicated that they would request a modification pursuant to 47 U.S.C. § 545.¹⁵ As a result, to protect itself from the risks of potential litigation cost while granting the franchise on the terms Verizon demanded, Keller (and later other cities) sought Verizon's indemnification for the city's cost of such litigation. Keller's position balanced Verizon's demand to enter the market on terms that arguably discriminated in its favor vis a vis the City of Keller's risk of exposure to litigation for granting terms later found to be unlawful or discriminatory. Verizon refused to indemnify any city in this manner.

¹⁴ Cable Franchising NPRM, Footnote 35. Keller is a city located between Ft. Worth and Dallas. It is primarily residential, with a growing population of just over 30,000.

¹⁵ Such a modification under federal law would entail litigation. In other Texas cities, the incumbent argued that if the new Verizon franchise was not "substantially similar" then the city, in granting it, would violate the "level playing field" provisions in the incumbent franchise.

Keller, as a compromise on the issue, agreed to an intervention requirement of Verizon in any suit challenging its competitive franchise for twelve months from the effective date of the franchise. This was not a reimbursement or indemnification of any city litigation cost. At least in the instance of Keller, it would appear that the franchise could have been granted several months earlier had Verizon accepted the duty to indemnify Keller for its litigation cost risk arising from granting a franchise with the terms Verizon demanded.

Additional delay in the negotiations in Keller was caused by Verizon's refusal to agree to a reasonable time for a build-out of its system to provide cable service to all households in the City, despite the express provisions of federal law, which is a requirement the Commission characterized as not being "unreasonable" in the Cable Franchising NPRM.¹⁶ Keller's original proposal allowed Verizon a "reasonable time" for its cable system to become capable of providing cable service to all households in the City (i.e. a city-wide built-out). Verizon rejected that proposal, refusing any requirement to provide cable service to the entire city by any specified time. While rejecting a build-out provision that was consistent with federal law, Verizon did agree to a limited build-out requirement applicable only in the area covered by Verizon's existing telephone service footprint. Keller compromised and accepted this limited build-out in order to obtain a competitive provider for at least a portion of its citizens, subject to the continuing risk of challenge by the incumbent. Only the City of Keller's ingenuity and tenacity brought competitive cable service to

¹⁶ 47 U.S.C. § 541(a) (4) (A); Cable Franchising NPRM, ¶ 20

the community.¹⁷ Even with this somewhat protracted negotiation, there appears to have been no delay in deployment of Verizon's cable services because Verizon completed its fiber build-out and video testing at about the same time the franchise was granted, all within the process prescribed for a local cable franchise under the 1984 Cable Act.¹⁸ Verizon remains a competitive cable provider in Keller, Texas under its locally granted franchise.

In larger urban communities across Texas, such as Arlington, Austin, Dallas, Houston and Irving, competitive cable franchises are not unusual. The typical competitive cable franchise is granted over a matter of months in actual negotiation time in the cities mentioned, which are some of the major cities in Texas. Additional competitive franchises will typically contain provisions substantially similar to the incumbent cable provider's franchise. If agreeable, these franchises can be negotiated over a four to eight month period. Most delays in *competitive franchise* negotiations result from the incumbent cable provider's demands that competitive providers' franchises contain virtually identical terms. This, in turn, causes delay in the negotiations because the new providers are often resistant to some of the terms,

¹⁷ Verizon also refused to agree to other fairly common cable franchise requirements, some contained in the incumbent's agreement, such as that a franchisee's non-compliance is subject to liquidated damages during the term of the agreement, as an interim-relief alternative to termination, or that appeals from a franchise termination was "as allowed by law." Verizon insisted these were to be *de novo*, which precluded any legislative presumptions the city may have been afforded "as allowed by law". In spite of Verizon's unreasonableness, Keller granted a franchise to Verizon in a matter of months of actual negotiations.

¹⁸ The Keller franchise was not granted under the new the 2005 Texas Cable Franchising Statute.

including city wide build-out (even over extended periods of time-5-7 years), customer service standards, Institutional network ("I-Net") and public, educational and governmental access channel ("PEG") requirements, and to a lesser extent, indemnity, insurance, and liquidated damages for noncompliance. However, additional cable franchises can and are negotiated in a timely manner when all parties participate reasonably.

The City of Arlington (population approx 362,972) was approached in October of 2000 by a competitive cable provider, Wide Open West, a Colorado-based cable overbuilder, interested in obtaining a cable franchise. Wide Open West's initial proposal was to have a "level playing field" with the incumbent provider's franchise. The incumbent cable provider at the time was AT&T Broadband. The incumbent franchise was effective March 2, 1993 and was for a fifteen year term. After the negotiations began Wide Open West would not agree to provide the same PEG support as the incumbent in the form of providing broadcast studio, equipment, production, etc. Instead they offered to provide capital contributions for PEG support correlated to the incumbent's contribution but which corresponded to their relative market share at a \$0.30 cents per subscriber fee. This was accepted by the City. Wide Open West agreed to building out the same area as the incumbent within 60 months. By late March the City had an agreed franchise on these terms. But at that time Wide Open West requested a "brief hold" on the negotiation. In May of 2001 there was a request for an additional hold on the negotiations when Wide Open West announced plans to acquire existing cable systems from Ameritech

New Media in Illinois, Michigan and Ohio. In July, Wide Open West asked that negotiations be put on hold indefinitely due to the dramatic change in the financial markets. That is the last that the City heard from Wide Open West and the franchise as "agreed" to with Wide Open West was never granted.

The incumbent cable provider did "monitor" the Wide Open West negotiations, and made request of the city relative to that franchise. While AT&T did not "threaten" the City with litigation, it made its concerns known through two letters raising "level playing field" concerns. On December 4, 2000, AT&T wrote that while AT&T did not wish to interfere with negotiations, "we are concerned that there might be provisions contemplated in any proposed competitive agreement that might impact AT&T's current franchise agreement. Consequently, we respectfully request that the City provide a copy of the proposed agreement to AT&T for review so that we might have an opportunity to submit comments prior to the City Council's consideration and approval of such agreement." This was followed by an April 12, 2001 letter expressing the same desire to make comments prior to approval by the Council: "Should the City choose to not impose the same burdens or conditions in a new franchise as currently required of AT&T, then we would expect the City to offer AT&T the opportunity to equalize those requirements effective upon passage of the new franchise by its acceptance of the elimination of any burdens in its current agreement not contained in any competitive agreement." The incumbent cable provider of AT&T changed to Comcast Corporation, due to a transfer in 2002, and later, due to a transfer request in November of 2005, to C-

Native Exchange II, L.P., a subsidiary of Time Warner Cable, which is still subject to the transfer of control being completed prior to October 1, 2006.

The City of Austin, Texas (population of 650,000 plus) quickly negotiated several additional competitive franchises over a matter of months in early 2000 with Grande Communications, Wide Open West, and Western Integrated Networks. The three applications for cable franchises were submitted in February 2000. All three providers agreed to provisions substantially similar to those contained in the incumbent cable franchise, which had been renewed three years earlier. The incumbent cable franchisee, Time Warner, insisted on such requirements. By the next month, March 2000, the proposed additional competitive franchises were on the City Council Agenda for the first of three City Charter readings; and were finally approved the next month, April 2000. Some revisions to the Grande franchise affecting the sequencing of areas in the city-wide build-out (and some later modification of the time frame for the build-out) followed. Only Grande actually commenced service and still operates in Austin today (albeit, under a new state-issued franchise, as discussed below).

In 2000 the City of Dallas (population 1.2 million plus) granted an additional competitive franchise to Western Integrated Systems, which briefly provided minimal service and then filed bankruptcy and is no longer operating. Wide Open West participated in the negotiations, but elected not to be a third franchisee. The incumbent cable provider in Dallas, as of 2006, is Time Warner Cable, Inc., based

on a franchise negotiated in 2000, effective January 1, 2001, that was subsequently transferred to the company last year.

The City of Houston (population two million plus) has granted a number of cable franchises since the 1980's through which a variety of providers continue to serve Houston under renewed or transferred cable franchises. Phonoscope, a so-called niche provider, began operations in Houston during the 1950's serving large commercial operations such as the Texas Medical Center and NASA and multi-family dwellings (i.e. apartments and condominiums primarily), first in their need for local television and later on the more typical expanded cable programming services.¹⁹ TVMAX, Northland Cable and Cebridge each provide cable service in a non-ubiquitous fashion in the city.²⁰ Texas Cable Partners (Time-Warner operates under three assigned cable franchises formerly held by TCI TKR, NTT and Warner Cable) provides incumbent cable services throughout much of, but not the entire, City.²¹ In 2000, additional competitive franchises were granted to Grande

¹⁹ Phonoscope was first issued a CATV franchise by City of Houston, Texas Ordinance No. 86-1500 and currently provides non-ubiquitous service under City of Houston, Texas Ordinance No. 2003-422.

²⁰ The predecessor in interest to TVMAX, as the current cable franchisee, was first granted a CATV franchise by City of Houston, Texas Ordinance No. 89-338; TVMAX currently provides non-ubiquitous service under City of Houston, Texas Ordinance No. 2005-582. Northland Cable provides non-ubiquitous service under City of Houston Ordinance No. 2002-1083. The ultimate predecessor in interest to Cebridge, as the current franchisee, was first granted a CATV franchise under City of Houston, Texas Ordinance No. 98-15 necessitated by the annexation of the Kingwood area by the City of Houston, Texas. Cebridge currently provides non-ubiquitous service under City of Houston, Texas Ordinance No. 2003-691 approving the assignment of Ordinance No. 2002-458.

²¹ City of Houston, Texas Ordinance 98-1044 documents the assignment of three pre-existing cable franchise agreements to a newly formed umbrella entity Texas Cable Partners to provide service to three distinct areas of the City of Houston, comprising much, but not all, of the City of Houston.

Communications and Western Integrated Networks. Neither of these providers has provided cable service in Houston to date.²²

In 2000, the City of Irving (population 200,000 plus) was approached by Wide Open West and Western Integrated Networks with requests for cable franchises. Western Integrated Networks withdrew its request, but after about 60 days of negotiations, the city granted an additional competitive franchise to Wide Open West in May 2000 based on the incumbent's cable franchise, then Paragon, now Time Warner. During our franchise negotiations with Wide Open West, Paragon (Time Warner) protested that there was not a level playing field monetarily. Wide Open West voluntarily relinquished its franchise October 2001.

TCCFUI suggests that all the concrete evidence to date is that Texas cities have not unreasonably refused to award additional cable franchises. Instead, they have developed a record of cooperative, expeditious good faith negotiations to bring competitive providers into the local marketplace.

III. TEXAS CABLE FRANCHISING AFTER SEPTEMBER 1, 2005- STREAMLINED UNDER 2005 TEXAS CABLE FRANCHISING STATUTE

Texas is one of the first states in recent years to dramatically revise—and streamline—its cable franchising regime. The revision was accomplished, effective September 1, 2005, when the 79th Texas Legislature in its 2nd Called Special Legislative Session, enacted SB 5 (“2 SB 5”). 2 SB 5 was enacted only after

²² Both franchises were carried on the same City Council Agenda and ultimately approved on third reading as City of Houston, Texas Ordinances Nos. 2000-678 (Western Integrated Networks) and 2000-679 (Grande). Each franchisee subsequently sought and obtained various modifications of its

extensive and lengthy negotiations that began in January and culminated in September 2005 among the various stakeholders, including municipalities, incumbent telecommunication providers, such as Verizon and SBC, and cable industry representatives, at least during the initial phases of the process. A portion of 2 SB 5 Texas specifically addressed cable and video franchising in Texas and is codified as a new Chapter 66 in the Texas Utility Code.²³ The 2005 Texas Cable Franchising Statute revised the cable franchising authority in Texas from the local municipality to the State, acting through the Public Utility Commission of Texas (“PUCT”).²⁴ The 2005 Texas Cable Franchising Statute not only dramatically streamlined the cable franchising process but having a short application to one state agency, it also established standardized state-wide requirements for the new cable franchisees. Under this streamlined process, once the completed (and brief) application is submitted to the PUCT a state-issued cable franchise certificate is granted on the 17th business day.²⁵ Several potential competitive cable providers supported this legislation as adopted. As Verizon stated in its comments filed at the Commission just after adoption of the 2005 Texas Cable Franchising Statute:

“[T]he State of Texas recently enacted legislation that permits video services (sic) providers to obtain authorization from the state to provide video services in place of individually negotiated, local

build-out requirements by Ordinance Nos. 2001-1054 (Western Integrated Networks) and 2003-1191(Grande).

²³ CHAPTER 66, TEXAS UTILITY CODE (Supp. 2005).

²⁴ 2005 Texas Cable Franchising Statute, § 66.001.

²⁵ *Id.*, § 66.003 (b).

franchises. Verizon applauds any such efforts to streamline the cumbersome franchising process, and anticipates that the result will be accelerated deployment of competitive video services in the state.”²⁶

The Commission itself noted that the new Texas legislation was among “recent efforts at the state level [that would] ... facilitate entry by competitive cable providers.”²⁷

The 2005 Texas Cable Franchising Statute streamlines the Texas cable franchising process.

Under the 2005 Texas Cable Franchising Statute²⁸:

- No cable services may be provided without a state issued franchise unless there is an existing municipal franchise, which are “grandfathered “ to continue until they expire.²⁹ (Section 66.003(a)).
- An application for a cable franchise is filed with the PUCT and a franchise is to be granted within 17 business days of its filing. (Section 66.003(b)).
- In the application for a franchise, the applicant must agree to comply with applicable federal and state statutes and regulations and the applicant agrees to comply with all applicable municipal regulations

²⁶ *Verizon Comments*, page 7, footnote 8.

²⁷ Cable franchising NPRM ¶ 9.

²⁸ Citations are to the codified sections of CHAPTER 66, TEXAS UTILITY CODE.

²⁹ In a striking example of the incumbent cable providers trying to delay competition, the eligibility criteria and other transitional “grandfathering” provisions as to incumbent cable providers have been challenged by the Texas Cable & Telecommunication Association in litigation filed September 8, 2005 in the U.S. District Court in Austin (Western District of Texas, Case No. 05-CV-721).

regarding the use and occupancy of the public rights-of-way, including the police powers of the municipality. (Section 66.003(b) (2)-(3)).

- The franchising certificate as issued by the PUCT is granted subject to the law of the state, including the police powers of the municipalities (Section 66.003(c) (2)).
- The franchise fee is standardized at 5% of the gross revenue, as defined in the statute. (Section 66.005(a))
- Municipal franchise fee compliance review of the provider's records is preserved. (Section 66.005(b))
- Public, educational, and governmental access channels ("PEG Channels") are grandfathered to the lower of existing activated channel levels or stated minimum number of PEG channels in cities without existing PEG channels as of September 1, 2005. (Section 66.009(a)-(c)).³⁰
- An interconnection to provide distribution of PEG Access Channels is required and cannot be withheld by the incumbent provider. (Section 66.009(h)).
- PEG Channel capital contributions ("PEG Fees") are preserved at the existing per subscriber level paid by the incumbent cable provider until the incumbent's franchise expires and then each city may elect to

³⁰ Three PEG Channels for Cities over 50,000 and two for cities under 50,000.

accept a flat 1% of gross revenue fee or the prior per-subscriber fee that was in the expired franchise. (Section 66.006(a) and (b)).³¹

- Institutional network capacity and “free” cable drops to city and school facilities provided under franchises existing on September 1, 2005 are grandfathered until the expiration of the franchise or January 1, 2008, whichever is later. Thereafter these services are paid at the providers “actual incremental cost”. (Section 66.006(b)).
- Municipal police powers to manage the public rights-of-way are expressly preserved. (Section 66.011(a)).
- A city may require a provider’s map records to locate facilities and business records to verify compensation calculations. (Section 66.011(a) (2) and (3)).
- A city may require a construction permit. (Section 66.011 (b)).
- Build-out requirements are prohibited. (Section 66.007).

³¹ Even though such percentage PEG fees have been expressly approved by the FCC in a staff letter opinion of June 25,1999, Cable Services Bureau Action Letter to City of Bowie, DA 99-1252, CSB-ILR 99-2 (1999 WL421044 (F.C.C.)), in part as they are separately authorized by the Cable Act in 47 U.S.C. § 531, 47 U.S.C. § 541 (a) (4) (B) and 47 U.S.C. § 544 (b) (1), as well as being expressly excluded from the definition of a “franchise fee” 47 U.S.C. § 542 (g) (2) (C), the 1% PEG fee is being challenged by Time Warner as exceeding the 5% gross revenue cap of 47 U.S.C. § 542 (b) in litigation filed in the U.S. District Court in Houston styled *Texas and Kansas City Cable L.P., d/b/a/ Time Warner Cable v. City of West University Place, et al.*, Case No. H 05-4177, U.S. District, Court, Southern District of Texas, filed December 12, 2005. (“*Cable’s One % PEG Fee Suit*”). Another example of an incumbent cable provider trying to delay competition.

- FCC Customer service standards apply until customers can choose between two or more wire line providers. (Section 66.008)³².
- A standardized indemnity provision applies. (Section 66.012).
- The PUCT has no authority to review cities' police power regulations. (Section 66.011(e) and Section 66.012(c)).
- A municipality may require registration of contact information for each local cable provider, and it may enact guidelines concerning use of PEG Channels. (Section 66.013(1)-(2)).
- Discrimination to potential residential subscribers based upon income is prohibited. (Section 66.014(a)).

To date, all applicants for a PUCT-issued cable or video franchise have been granted within the 17 business days allowed. These include the following, which have either been granted a franchise or have applications pending at the PUCT at the time these Comments are being submitted: Verizon, SBC [now AT&T], Charter, Cox and Grande Communications.³³ As can be clearly seen, the 2005 Texas Cable

³² The FCC customer standards may continue to apply due to federal preemption of the state law by the FCC rules, 47 C.F.R. § 76.309 (c). "Effective July 1, 1993, a cable operator shall be subject to the following customer service standards".

³³ Verizon and SBC are the two principal incumbent local exchange carriers in Texas. Charter, Cox and Time Warner are incumbent cable providers in a number of Texas cities. These state issued franchises were issued to them where their locally granted franchises had expired. Grande Communications serves cable customers in what is commonly known as the I-35 Corridor (including San Antonio, San Marcos, and Austin, Texas well as Corpus Christi, Texas in the lower coastal bend area of Texas. Under 2005 Texas Cable Franchising Statute, Section 66.04 (b), Grande terminated

Franchising Statute addresses a number of the objections in the cable franchising process mentioned by Verizon in its comments to the Commission to achieve an efficient streamlined cable franchising process, with reasonable standards.³⁴ Those standards should not be diminished by the Commission in this rulemaking.

IV. WHAT DOES “MAY NOT UNREASONABLY REFUSE TO AWARD AN ADDITIONAL COMPETITIVE FRANCHISE” MEAN?

As mentioned earlier, TCCFUI recognizes two fundamental concepts inherent in 47 U.S.C. Sec. 541 (a) (1): (1) A franchising authority retains the right to *reasonably refuse* to award any cable franchise; and (2) Once an initial cable television franchise has been awarded, an *additional competitive* franchise may not be unreasonably denied. Implicit in the language of 47 U.S.C. Sec. 541 (a) (1) is the notion that should an applicant fail to agree to a reasonable requirement, a local franchising authority can lawfully refuse to grant an additional competitive franchise.

But what does the phrase “**A franchising authority . . . may not *unreasonably refuse to award an additional competitive franchise.***” mean? It is not without importance that these words have been the federal law for almost 14 years with little judicial construction. Either no controversy exists or it is a controversy that cable providers have chosen not to litigate. Based on the hundreds of cases

some of its local franchises, as permitted for non-incumbent, non-dominate providers, i.e. those with less than 40% subscriber penetration.

³⁴ *Verizon Comments*, p. 19-25.

construing federal law in this area, cable providers have not been reluctant to litigate numerous other issues arising under either the 1984 or 1992 Cable Act. Verizon itself noted this total lack of judicial construction as to what constitutes an “unreasonable” refusal to award an additional competitive cable franchise in its recent comments before the Commission.³⁵ Verizon cites only two cases that construe the quoted language in the context of an additional competitive provider. In one case, the court found that the process to award cable franchises *may* be unreasonable; in the other, the court did not find that the city acted unreasonably in refusing to award an additional competitive franchise because one had not been applied for in the city.³⁶ It should also be noted that the two mentioned cases arose only in recent years (2001 and 2002) almost a decade after the adoption of the quoted language in the 1992 Cable Act.³⁷ Verizon attributes the undeveloped case law to a lack of Commission enforcement! Verizon overlooks that what is not brought forward cannot be resolved. It is the cable provider’s right to institute the legal action that could ultimately result in judicial construction. The industry’s decision to forego the opportunity to seek enforcement should not allow them now to suggest (as Verizon intimates from Verizon’s perspective) that little hope of FCC

³⁵ Id., p. 20.

³⁶ *Verizon Comments*, page 20, footnote 13.

³⁷ *Quest Broadband Services, Inc. v. City of Boulder*, 151 F. Supp. 2nd 1236, 1242-44 (D. Colo. 2001), where the district court found that the process for granting a franchise constituted unreasonable refusal to award, and the second case was *Netsk, Inc. v Town of Houlton*, 283 F. 3rd 1, 9-11 (1st Cir.

enforcement exists or, as TCCFUI contends, that local franchising authorities have not unreasonably refused to award additional competitive franchises and that no additional FCC enforcement is warranted.

V. ADDITIONAL COMMENTS ON CABLE FRANCHISING NPRM QUESTIONS

The Cable Franchising NPRM also reaches several tentative conclusions and poses several other questions, which are commented on below.

The Cable Franchising NPRM tentatively concluded in paragraph 20 that “it is not unreasonable for a LFA [Local Franchising Authority], in awarding a franchise, to: [1] ‘assure that access to cable service is not denied to any group of potential residential cable subscribers because of the income of the residents of the local area in which such groups reside;’³⁸ [2]‘allow [a] cable system a reasonable period of time to become capable of providing cable service to all households in the franchise area;’³⁹ and [3]‘require adequate assurance that the cable operator will provide adequate public, educational, and governmental channel capacity,

2002), in which the court concluded that the company did not have a cause action as it had not filed an application for a second franchise.

³⁸ 47 U.S.C. § 541(a) (3).

³⁹ 47 U.S.C. § 541(a) (4) (A).

facilities, or financial support.”⁴⁰ The Commission further states that such requirements “promote important public policy goals.”⁴¹

TCCFUI agrees with those tentative conclusions of the Commission-- that it is not unreasonable for a franchising authority to require an applicant to meet these requirements for a franchise award because they do “promote important public policy goals.” Indeed, such terms were routinely required as a common practice by Texas cities before September 1, 2005, and are now codified in the 2005 Texas Cable Franchise Statute.

The Cable Franchising NPRM also inquires whether the Commission should establish procedures and other requirements concerning the awarding of franchises.⁴² TCCFUI would urge that should the Commission establish any such procedures or requirements, that the Commission must ensure that any such procedures or requirements do not reduce or otherwise diminish the standards established in the 2005 Texas Cable Franchise Statute. The 2005 Texas Cable Franchise Statute standards are reasonable and clear and they apply statewide. And they meet the Commission’s tentative criteria for reasonableness.⁴³ At a minimum, the standards in the 2005 Texas Cable Franchise Statute provide

⁴⁰ 47 U.S.C. § 541(a) (4) (B).

⁴¹ Cable Franchising NPRM ¶ 20.

⁴² Id. At ¶ 21.

⁴³ They are consistent with the Commission’s tentative conclusions in paragraph 20 of the Cable Franchising NPRM.

threshold standards for any franchising process that may be established by the Commission.

The Cable Franchising NPRM also seeks comment on whether there should be a minimum amount of time for competitive cable providers to build-out a system.⁴⁴ The 2005 Texas Cable Franchise Statute prohibits any franchise area wide build-out requirement.⁴⁵ However, as the Commission tentatively concludes in the NPRM, a franchising authority must “allow [a] cable system a reasonable period of time to become capable of providing cable service to all households in the franchise area”, consistent with 47 U.S.C. § 541(a) (4) (A). Thus while a build-out may be required for cable service to be available to all households in a city; the only issue is how long is a reasonable time for this build-out? One size does not fit all. A reasonable period of time will vary depending on a number of factors, such as material availability and build out design. Two principal factors are the size of the area to be served and the residential density of the area. A city of five square miles that is very dense with overhead lines can be built out fairly quickly, whereas a larger city, with less density and which has required underground utilities will require additional time. The time frame allowed may also depend on a reasonable amount of time for the cable provider to reasonably recoup its capital investment for such a build-out. So the cost of the build-out and the revenue/ business plan of the cable provider may be relevant. Should the Commission undertake to establish a

⁴⁴ *Id.* At ¶ 23.

⁴⁵ TEXAS UTIL. CODE ANN. § 66.007 (Supp. 2005).

minimum timeframe, TCCFUI would urge flexibility that takes into account both business and local conditions.

**VI. THE COMMISSION NOR CONGRESS MAY NOT TAKE PUBLIC
PROPERTY WITHOUT COMPENSATION ANY MORE THAN IT CAN TAKE
PRIVATE PROPERTY WITHOUT COMPENSATION**

The Commission also inquires “[H]ow the primary justification for a cable franchise – *i.e.*, the locality’s need to regulate and receive compensation for the use of public rights-of-way – applies to entities that already have franchises that authorize their use of the rights-of-way.”⁴⁶ The Commission further inquires whether 47 U.S.C. Sec. 541 (a)(1) authorizes the Commission to have a different and higher standard of “reasonableness” that franchising authorities must meet as to entities with preexisting franchises (or other authority) to use the public rights-of-way that now want to provide cable services. In Texas, the entities claiming a “pre-existing franchise” or other authority to use the public rights-of-way are the incumbent telephone providers, such as Verizon and SBC, other certificated telecommunication providers (discussed below), and franchised electric transmission and distribution utilities. As discussed above, Texas has already addressed the issue of additional competitive cable providers—those with and without preexisting authority to use the public rights-of-way—by the adoption of 2005 Texas Cable Franchising Statute. However, for the Commission to get a

⁴⁶ Cable Franchising NPRM ¶ 22.

clearer picture of what entities are authorized to use the public rights-of-way in Texas for limited purposes, additional comments are warranted.

Texas telecommunication providers are required to be certificated by the PUCT to provide local exchange telephone services.⁴⁷ Under a 1999 state law a certificated telecommunication provider (“CTP”) is granted a state-wide franchise for access to the public rights-of-way in municipalities for the limited purpose of providing *telecommunication services*.⁴⁸ Under the TEXAS CHAPTER 283 statutory compensation scheme, CTPs are only authorized to provide *telecommunication services*, and the *compensation they pay to cities is based only upon the telecommunication services (the access lines) they provide in each city*.⁴⁹ If, in fact, CTPs use the public rights-of-way to provide other services, they must obtain independent authorization to provide that service and the city must also be adequately compensated for that use. By way of illustration, Verizon was authorized to use the public-rights-of way to provide *telecommunication services* as a CTP under TEXAS CHAPTER 283, but to provide cable services they are required to

⁴⁷ CHAPTER 54, TEXAS UTILITY CODE, § 54.001.

⁴⁸ TEXAS LOC. GOV'T CODE ANN. CHAPTER 283, § 283.001, *et. seq.* (Supp. 2005) (“TEXAS CHAPTER 283”); and see TEXAS CHAPTER 283. § 283.052 (a) (1) “to provide telecommunications services”.

⁴⁹ CTPs pay compensation to municipalities for the use of the public rights-of-way based upon the number of “access lines” attributable to each provider, i.e. an access line fee. The access line fee amount is a proxy for the pre-1999 public right-of-way use compensation paid by telecommunication providers to cities which typically for decades had been a percentage of the gross revenue franchise fee, i.e. a value-based fee.

obtain (and they have obtained) a PUCT-issued franchise under the 2005 Texas Cable Franchise Statute.⁵⁰

While it has been argued that there is “no additional burden” on the rights-of-way by providing these “new” or “additional” services, this argument overlooks the historical fact that the burden on the rights-of-way is not the basis of for public right-of-way use compensation in Texas. Public right-of-way use compensation in Texas is *value*-based. A value-based fee is predicated on the concept that the more revenue attributable to the private use of the public rights-of-way, the greater its value, therefore the fee to be paid would be proportionally adjusted, typically as a percentage of that gross revenue. This is not unlike the cable franchise fee of 5% of gross revenue paid by cable providers in accordance with 47 U.S.C. § 542; a fee which has been characterized by the courts as a “street-rental fee”.⁵¹ If the revenue received is zero, then the rent is zero. If there are more services provided, such as new or different cable services, which generate additional revenue, the rent

⁵⁰ No cable services may be provided without a state issued franchise unless there is an existing municipal cable franchise. 2005 Texas Cable Franchising Statute, Section 66.003(a).

⁵¹ See *City of Dallas, Tex. v. F.C.C.*, 118 F.3d 393, 397-398 (5th Cir. 1997). In construing the cable 5% gross revenue franchise fee the court stated: “Franchise fees are not a tax, however, but essentially a form of rent: the price paid to rent use of public right-of-ways. See, e.g., [Page 398] *City of St. Louis v. Western Union Telegraph Co.*, 148 U.S. 92, 13 S.Ct. 485, 37 L.Ed. 380 (1893) (noting that the fee paid to a municipality for the use of its rights-of-way were rent, not a tax).” For additional history on municipalities receiving value-based compensation and in granting franchises, see Clarence A. West, *The Information Highway Must Pay Its Way Through Cities: A Discussion of the Authority of State and Local Governments to be Compensated for Use of Public Rights-of-Way*, 1 Mich. Telecom. Tech. L. Rev. 29 (1995).

increases proportionally. The percentage rent goes up not because of any additional burden on the public rights-of way which has occurred in providing those additional services—it goes up as additional revenue has been generated by the use of the public rights-of-way in providing those additional services-i.e. the public rights-of-way is more valuable. The same is true if other additional services are provided beyond those authorized by a pre-existing franchisee or other entity with authority to use the public rights-of-way. Although that entity may have authority to use the public rights-of-way, it is usually for a limited purpose and the compensation being paid is only for that limited purpose. If that entity desires to provide additional services outside those authorized-they must have both additional authorization to provide those services and pay the appropriate compensation for the provisions of those additional service-but only to the extent the additional services generate additional revenue. In Texas this issue has already addressed. A CTP pays “access line” fees for its use of the public rights-of-way to provide telecommunications services, per TEXAS CHAPTER 283. If those same CTPs desire to provide additional services, such as cable services, they may promptly obtain that authorization from the state and pay compensation in accordance with 2005 Texas Cable Franchise Statute.

TCCFUI would assert that neither Congress nor the Commission has authority to reduce the fee paid for the use of public rights-of-way in Texas. Under the Texas Constitution, use of the public property cannot be gratuitously granted to an individual without proper consent and authority and without proper value-based

compensation.⁵² Anti-donative provisions are not uncommon nationwide and reflect the concept that public property, such as the public rights-of-way, is held in trust for the public good rather than for individual enrichment through private use. In Texas, proper value-based compensation has usually been a gross revenue based franchise fee, similar to the current 5% gross revenue franchise fee paid by cable providers under federal law.⁵³ Value-based street rental fees as a method of compensation for use of the public rights-of-way have been upheld both by the U.S. Supreme Court and by the Texas Supreme Court.⁵⁴ In *City of St. Louis*, the U.S. Supreme Court not only held that compensation could be collected for use of the streets but also that Congress could not confiscate local public property without compensation for the same reasons it may not confiscate private property by federal statute..

It is a misconception, however, to suppose that the franchise or privilege granted by the Act of 1866 [the federal law in this instance] carries with it the unrestricted right to appropriate the public property of a State. It is like any other franchise, to be exercised in subordination to public as to private rights. While a grant from one government may supersede and abridge franchises and rights held at

⁵² Texas Constitution, Article 3, Section 52, see *Pasadena Police Association v. Pasadena*, 497 S.W. 2d 388 (Tex. Civ. App. – Houston [1st Dist.] 1993).

⁵³ 47 U.S.C. § 542.

⁵⁴ *City of St. Louis v. Western Union Telegraph Company*, 148 U.S. 92, 13 S. Ct. 485, 37 L.Ed. 380 (1893), upheld a value-based per pole fee as compensation for use of the public streets. (“*City of St. Louis*”). In *Fleming v. Houston Lighting and Power*, 138 S.W. 2d 520, 143 S.W.2d 923 (Tex. 1940) the Texas Supreme Court upheld a 4% gross revenue fee as to an electric provider franchisee. *Fleming* cited the *City of St. Louis* as authority for collecting a value-based rental charge as compensation for use of the public streets.

the will of its grantor, it cannot abridge any property rights of a public character created by the authority of sovereignty. *No one would suppose that a franchise from the Federal government to a corporation, State or national, to construct interstate roads or lines of travel, transportation or communication, would authorize it to enter upon the private property of an individual, and appropriate it without compensation.* No matter how broad and comprehensive might be the terms in which the franchise was granted, it would be confessedly subordinate to the right of the individual not to be deprived of his property without just compensation. *And the principle is the same when, under the grant of a franchise from the national government, a corporation assumes to enter upon property of a public nature belonging to a State.* It would not be claimed, for instance, that under a franchise from Congress to construct and operate an interstate railroad the grantee thereof could enter upon the state-house grounds of the State, and construct its depot there, *without paying the value of the property thus appropriated.* Although the statehouse grounds be property devoted to public uses, it is property devoted to the public uses of the State, and property whose ownership and control are in the State, and *it is not within the competency of the national government to dispossess the State of such control and use, or appropriate the same to its own benefit, or the benefit of any of its corporations or grantees, without suitable compensation to the State. This rule extends to streets and highways; they are the public property of the State.* While for purposes of travel and common use they are open to the citizens of every State alike, and no State can by its legislation deprive the citizens of another State of such common use, yet when an appropriation of any part of this public property to an exclusive use is sought, whether by a citizen or corporation of the same or another State, or a corporation of the national government, *it is within the competency of the State, representing the sovereignty of that local public, to exact for its benefit compensation for this exclusive appropriation.* It matters not for what that exclusive appropriation is taken, *whether for steam railroads or street railroads, telegraphs or telephones, the State may if it chooses exact from the party or corporation given such exclusive use pecuniary compensation to the general public* [Page 102] for being deprived of the common use of the portion thus appropriated.⁵⁵

⁵⁵ *City of St. Louis*, 148 U.S. 92, 100-101, 37 L.Ed. 380, 384. (Bold and italics added.)

TCCFUI asserts that just as Congress cannot allow the use of public rights-of-way without value-based compensation, the Commission cannot preempt state law to allow use of the public rights-of-way without the payment of value-based compensation for the use of that public right-of-way.

VII. CONCLUSION

TCCFUI urges the Commission to not further restrict, beyond what is in current federal law, the processes by which local governments, and now in Texas, the PUCT, awards a cable franchise. In the event the Commission deems it appropriate to delineate standards as to when and what constitutes an unreasonable refusal to award an additional competitive cable franchise, then those standards should be detailed strictly within the bounds of what is currently permitted and which the Commission tentatively concluded.⁵⁶ Secondly, TCCFUI urges that whatever standards or requirements are established by the Commission, if any, that those standards or requirements must not undercut or diminish the standards set out in the state-issued franchise in Texas pursuant to the 2005 Texas Cable Franchising Statute. In fact, the standards and requirements in the 2005 Texas Cable Franchising Statute should be the minimal benchmarks to be preserved in regard to what requirements are to be met by a cable provider. TCCFUI welcomes the opportunity to submit these comments and looks forward to further dialogue with the Commission.

⁵⁶ Cable Franchising NPRM ¶ 20.

Respectfully submitted,

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EXHIBIT A----TCCFUI Member Cities

1	City of Abernathy	42	City of Lancaster
2	City of Addison	43	City of Laredo
3	City of Allen	44	City of League City
4	City of Andrews	45	City of Levelland
5	City of Arlington	46	City of Lewisville
6	City of Big Spring	47	City of Longview
7	City of Bowie	48	City of Los Fresnos
8	City of Breckenridge	49	City of Mansfield
9	City of Brenham	50	City of McAllen
10	City of Brookside Village	51	City of Midlothian
11	City of Brownwood	52	City of Missouri City
12	City of Buffalo	53	City of North
13	City of Canyon	54	City of Palacios
14	City of Carrollton	55	City of Paris
15	City of Cedar Hill	56	City of Pearsall
16	City of Center	57	City of Plano
17	City of Cleburne	58	City of Ralls
18	City of College Station	59	City of Refugio
19	City of Conroe	60	City of Reno
20	City of Corpus Christi	61	City of River Oaks
21	City of Crockett	62	City of Rosenberg
22	City of Dallas	63	City of San Saba
23	City of Denison	64	City of Selma
24	City of Denton	65	City of Seminole
25	City of Dickinson	66	City of Seymour
26	City of El Lago	67	City of Snyder
27	City of Electra	68	City of South Padre
28	City of Fairview	69	City of Spearman
29	City of Flower Mound	70	City of Sugar Land
30	City of Fort Worth	71	City of Sunset Valley
31	City of Friendswood	72	City of Taylor Lake
32	City of Frisco	73	City of Terrell
33	City of Grand Prairie	74	City of Thompsons
34	City of Grapevine	75	City of Timpson
35	City of Greenville	76	City of Trophy Club
36	City of Henrietta	77	City of Tyler
37	City of Huntsville	78	City of University

38	City of Irving	79	City of Victoria
39	City of Jamaica Beach	80	City of Waxahachie
40	City of Kilgore	81	City of Webster
41	City of La Grange	82	City of Westlake