

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, DC 20554

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

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**COMMENTS OF THE CITY OF WEST PALM BEACH, FLORIDA**

These Comments are filed by the City of West Palm Beach, Florida (hereinafter referred to as the “City”) in response to the Federal Communications Commission’s (hereinafter “FCC” or “Commission”) Notice of Proposed Rulemaking (“Cable Franchising NPRM” or “NPRM”).<sup>1</sup> The NPRM specifically addresses the implementation of Section 621(a)(1) of the Communications Act of 1992, which provides that “A franchising authority...may not unreasonably refuse to award an additional competitive franchise.”<sup>2</sup> The City of West Palm Beach has not unreasonably refused to award additional competitive cable franchises. In fact, the City has encouraged and sought additional competitive cable providers, since competition promotes low cable rates and because competition enhances customer service among competitors.

It is the City’s position that local governments are the most qualified entities to ensure the proper issuance of cable franchises for new entrants into the video services field on a timely basis, while ensuring the achievement of Congressionally-stated policy goals, including responsiveness to local community needs. In support of this position, the City would like to inform the Commission about the recent history of cable television franchising in the City’s jurisdiction, and to respond to certain positions taken and questions posed by the Commission in its NPRM.

**Introduction**

The local cable franchising process promotes competition by giving equitable opportunities to *all providers* who want to use the rights of way to provide video service. Creating an exception for telephone companies that want to offer video service, by exempting

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<sup>1</sup> *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. 05-189, Notice of Proposed Rulemaking (released November 18, 2005).

<sup>2</sup> See 47 U.S.C. §541(a)(1).

them from requiring a franchise agreement, creates an unnecessary competitive advantage for these companies. Local cable franchising ensures that providers are permitted access to the rights of way in a fair and evenhanded manner, that other users of the rights of way are not unduly inconvenienced, and that uses of the rights of way, including maintenance and upgrade of facilities, are undertaken in a manner which is in accordance with local requirements. Local cable franchising also ensures that the City's local community's specific needs are met and that local customers are protected. Without the franchising process, the City would be unable to provide this important supervisory function.

Congress did not intend for the Commission to preempt or supersede local government's franchising authority. Congress delegated specific powers to local franchising authorities which are not anti-competitive as some new entrants assert. The Cable Act acknowledges that municipalities are best able to determine a community's cable-related needs and interests. Accordingly, it would not be appropriate for the Commission to question the City in its identification of such needs and interests. The House Report states:

It is the Committee's intent that the franchise process take place at the local level where city officials have the best understanding of local communications needs and can require cable operators to tailor the cable system to meet those needs. However, if that process is to further the purposes of this legislation, the provisions of these franchises, and the authority of the municipal governments to enforce these provisions, must be based on certain important uniform Federal standards that are not continually altered by Federal, state or local regulation.<sup>3</sup>

Furthermore, in *Union CATV v. City of Sturgis*, the Court concluded that, "judicial review of a municipality's identification of its cable-related needs and interests is very limited. A court should defer to the franchising authority's identification of the community's needs and interests..."<sup>4</sup> There is no reason in fact or law supporting the Commission's implementation of a different standard from that of the court. Thus, franchising should remain at the local level and any unreasonable denials should be reviewed by the judiciary.

The City has an interest and the right, delegated by Congress to prevent economic redlining, to establish and enforce customer service standards and to ensure the provision of adequate public, educational and governmental access channel capacity, facilities or financial support. Furthermore, for the minority of communities that may abuse their authority, the solution is not to undermine the entire franchising process. There is no need to create a new Federal bureaucracy in Washington to handle matters of specifically local interest.<sup>5</sup>

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3 See H.R. REP. NO. 98-934, at 24, reprinted in 1984 U.S.C.C.A.N. at 4661.

4 See *Union CATV v. City of Sturgis*, 1997 FED App. 0075P (6th Cir.).

5 The City's franchising process ensures that customer service complaints, in most cases are handled within 24 hours or at the most, within 72 hours. The City has a rapport with the cable operator to ensure that issues are resolved. This type of relationship is a direct result of the local franchising process. It is inconceivable that a state or federally held franchise with dispute resolution maintained at the state or federal level is going to be comparable to the current service standards in the City. Finally, the Commission does not have the staff, budget or resources for handling complaints in such a timely manner.

## The Franchising Process

### Initial Franchise

Cable service cannot be provided unless there is a cable franchise granted by the franchising authority.<sup>6</sup> “Franchise” means the “*non-exclusive* right granted by the City to a Franchisee in a Franchise Agreement to construct, maintain and operate a Cable System to provide Cable Services under, on, and over Streets, roads and any other public ways, rights-of-ways, or easements within all or specified areas of the City...”<sup>7</sup> The City is empowered by the cable television regulations of Title 47 of the United States Code to act as a Local Franchising Authority (LFA) with all of the powers and authority that status provides, including but not limited to negotiating and granting cable television franchises.

The public policy is that cable television regulations should include franchise procedures and standards which encourage the growth and development of cable systems and assure that cable systems are responsive to the needs and interests of the local community; and should promote competition in cable communications and minimize unnecessary regulation of cable systems.<sup>8</sup> Accordingly, an LFA may not unreasonably refuse to award a competitive cable television franchise.<sup>9</sup>

A cable franchise functions as a contract between the local government, operating as the local franchising authority, and the cable operator. Like other contracts, its terms are reasonably negotiated. Under the Federal Cable Act it is the statutory obligation of the local government to determine the community's cable-related needs and interests and to ensure that these are addressed in the franchising process. However derived, whether requested by the local government or offered by the cable operator, once the franchise is approved by both parties the provisions in the franchise agreement function as contractual obligations upon both parties.

The City is authorized to regulate the construction, installation, operation and maintenance of Cable Television Systems pursuant to federal, state and local law. The City's franchise provides that changes in law which affect the rights or responsibilities of either party under the Franchise agreement will be subject to and shall be governed by the Communications Act, and any other applicable provision of federal, state or local law.

### Public Hearing

Local government officials encourage competition and new technologies since competing technologies and companies result in tangible benefits to the City and its residents. Public hearings provide an opportunity for residents, government officials and providers to voice their interests and concerns.

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6 See 47 U.S.C. §541(d).

7 See The City of West Palm Beach Cable Television Ordinance, codified at Chapter 78, Article IX of the City Code of Ordinances (“Cable Ordinance”).

8 See 47 U.S.C. § 521.

9 See 47 U.S.C. § 541(a)(1).

Florida law requires that no local government may grant a cable franchise unless it does so after holding a public hearing in which it considers the economic impact upon private property, the public need for the franchise, the capacity of the public rights of way to accommodate the system, the present and future use of the public rights of way to be used by the cable system, the potential disruption to existing users of the rights of way, the financial ability of the franchise applicant to perform, societal interests generally considered in cable television franchising, and any other substantive or procedural matters which may be relevant to consider.<sup>10</sup>

While a franchise is negotiated by the local government as a contract, the process provides the cable operator additional due process rights, and consequently additional obligations on the local government. For instance, in the City of West Palm Beach cable franchises are approved by Resolution. The City's Cable Ordinance provides:

The City shall hold a public hearing to consider an Application or Applications. The Applicant(s) shall be given at least ten (10) days prior notice of the hearing and shall be given an opportunity to be heard. Based upon the Application(s), the testimony presented at the public hearing, any recommendations of the City Administrator or staff, and any other information relevant to the Application(s), the City shall decide by resolution whether to grant or deny a Franchise Application.<sup>11</sup>

### **Local Franchising/Local Oversight**

If telephone providers, such as SBC, AT&T and Verizon are permitted to offer cable service without first obtaining a cable franchise from an LFA, these providers will be exempt from local oversight and will be less accountable to the local communities in which they operate than the cable systems with which they will be competing. This would be competitively unfair and harmful to local communities and their residents who would lose the ability to manage the rights of way. Such local oversight provides important consumer and public protections.

The City is the most familiar with the local needs of its residents. Establishing and ensuring compliance with local building and zoning codes, and public safety regulations are performed at a local level. For example, the City's Cable Ordinance provides,

Except to the extent required by law, a Franchisee shall, at its expense, protect, support, temporarily disconnect, relocate, or remove, any of its property when required by the City by reason of traffic conditions, public safety, Street construction, Street resurfacing or widening, change of Street grade, installation of sewers, drains, water pipes, power lines, signal lines, tracks, or any other type of municipal or public utility improvements; provided, however, that the

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10 See Fla. Stat. § 166.046(2).

11 See The City of West Palm Beach Cable Television Ordinance, codified at Chapter 78, Article IX of the City Code of Ordinances ("Cable Ordinance").

Franchisee shall, in all such cases, have the privilege of abandoning any property in place.<sup>12</sup>

Additionally, in order to manage the rights of way for vehicles, pedestrians and utility-type providers, the City's Cable Ordinance requires that the cable operator "keep full and complete plats, maps and records showing the exact locations of its facilities located within the public Streets, ways, and easements of the City."<sup>13</sup>

Accordingly, the Commission cannot bypass the City's franchising process by considering establishing rules applicable only to telephone companies seeking to use the City's rights of way to offer a video product. The effect of these rules would be to usurp the statutory process established by Congress for cable franchise renewals to ensure that local needs are met.

### **Florida's Level Playing Field Statute**

The public policy of the State of Florida is that cable television LFAs should grant overlapping franchises under terms and conditions which are not more favorable or less burdensome than those of other franchises.<sup>14</sup> Furthermore, section 166.046(5) provides "Nothing in this section shall be construed to prevent any...city considering the approval of an additional cable service franchise in all or any part of the area of such...city from imposing additional terms and conditions upon the granting of such franchise as such...city shall in its sole discretion deem necessary or appropriate."

## **Cable Franchising in the City of West Palm Beach, Florida**

### **Community Information**

The City of West Palm Beach has a population of approximately 89,000 people. The City's franchised cable provider is Adelphia Cablevision of West Palm Beach IV, LLC, a subsidiary of Adelphia Communications Corp. On October 11, 2005, the City consented to the sale and assignment of the Adelphia cable television Franchise to Cable Holdco II, a subsidiary of TWNY, and the subsequent transfer of control of Cable Holdco II to Parnassos, a subsidiary of Comcast.

### **Competitive Cable Systems**

The City does not have competitive cable systems. In the 1980's, the City had non-overlapping multiple franchises, however, through mergers and acquisitions, there is only one Franchisee. Furthermore, the Commission has determined that effective competition exists in the City, since the Commission denied the City's objection to Adelphia's Petition for Effective Competition.

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12 See Id.

13 See Id.

14 See Fla. Stat. § 166.046(3).

## **West Palm Beach's Current Franchise**

The City granted a renewal to Adelphia on October 25, 2004, for a term of twelve years, which expires on October 24, 2016. Under the statutory timeline laid out in the Federal Cable Act, the cable operator has a 6-month window beginning 36 months before the expiration of the franchise in which to request a renewal under the Federal Act. As a result, at this time the City is not currently negotiating a franchise renewal with the incumbent provider.

### **Customer Service**

Because service issues are local, customer service must be handled at the local level. These complaints are made and addressed within the community. There are thousands of customer service complaints across the country, which are addressed at the local level. The State or the Commission is simply not equipped with handling the sheer number of these customer service complaints.

The City's Franchise provides that the Franchisee agrees to comply with and to implement and maintain any practices and procedures that may be required to monitor compliance with customer service requirements set forth in Section 78-299 of the City's Cable Television Ordinance which applies to all cable operators. The Ordinance requires specific information relating to the Franchisee's "full schedule and description of services, service hours and location of the customer service office of the Franchisee or offices available to Subscribers, and a schedule of all rates, fees and charges for all Cable Services provided over the Cable System."<sup>15</sup> Below are a few customer service obligations which help the City ensure that the cable operator is treating the residents in accordance with federal standards and the terms agreed to in its Franchise.

- The Franchisee shall maintain all parts of its Cable System in good condition and in accordance with standards generally observed by the cable television industry
- Franchisee shall maintain a publicly-listed local, toll-free telephone number and employ a sufficient number of telephone lines, personnel and answering equipment or service to allow reasonable access by Subscribers and members of the public to contact the Franchisee on a full-time basis
- Franchisee shall notify the City Administrator or designee immediately if a service interruption affects two hundred (200) or more Subscribers for a time period greater than four (4) hours
- Franchisee shall develop written procedures for the investigation and resolution of all Subscriber or City resident complaints that are received by the City. Such procedures shall be submitted to the City Administrator or designee. A Subscriber or City resident who has not been satisfied by following the Franchisee's procedures may file a written complaint with the City Administrator or designee who will investigate the matter and in consultation with the Franchisee, as appropriate, attempt to resolve the matter.

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<sup>15</sup> See Id.

The Ordinance also provides enforcement remedies where customer service requirements are not met. For example:

(u) The City Administrator or designee shall have the authority to assess fines for violations of this Section 78-299 in accordance with the schedule set out below or as otherwise provided in a Franchise Agreement. The fines listed are to be assessed on a per violation basis with each day of a continuing violation constituting a separate violation, except for those customer service standards set forth in Subsections (d) and (e) above which are measured on a quarterly basis. With respect to such standards that are measured on a quarterly basis, the fines for such violations shall be assessed on a quarterly basis as follows; \$5,000 per quarter if the Franchisee falls below such standards by 10% or less; \$10,000 per quarter if the Franchisee falls below such standards by 20% or less and \$15,000 per quarter if the Franchisee falls below such standards by 25% or more. For example, if Franchisee has answered the telephone standards set forth in Subsection (d) on a quarterly basis 75% of the time, instead of the 90% required herein, the quarterly fine shall be \$10,000. Prior to assessing any fines set forth in the schedule below, the City Administrator or designee shall following the procedures set forth in Section 78-305 of this Ordinance.

Single fine violations range from \$250 - \$500 per violation.

- (1) Prior to assessing a fine, the City Administrator or designee shall consider any justification or mitigating factor advanced in Franchisee's written response, including, but not limited to rebates or credits to the Subscriber, a cure or commencement of a cure of the violation, and the payment of any penalty to Palm Beach County for the same violation. The City Administrator or designee may, after consideration of the response of the Franchisee, waive or reduce any proposed fine.
- (2) Subsequent to the notice of proposed fine to Franchisee and consideration of the Franchisee's response, if any, and after following the procedures set forth in Section 78-305 hereof, the City may issue an assessment of fine. Any fine will commence as of the date of the written notice specifying the violation at issue. The fine shall be paid within thirty (30) days of written notice of assessment to the Franchisee. The City may enforce payment of the refund or fine in any court having jurisdiction or if Franchisee challenges the assessment in a court of competent jurisdiction, within thirty (30) days of a final non-appealable decision that the assessment is valid. This fine shall constitute liquidated damages to the City for the violation and the City may enforce payment of the fine in any court having jurisdiction. It is the intent of the City to determine fines as a reasonable estimate of the damages suffered by the City and/or its Subscribers, whether actual or potential, and may include without limitation, increased costs of administration, enforcement and other damages difficult to measure.

## **Technical/Engineering Audit**

In 2003, the City hired The Kramer Firm, Inc., an Engineering Firm to conduct a technical audit and found that the Franchisee was in violation of the Cable Ordinance and Franchise agreement related to the installation, operation and maintenance of the cable system in the City. The engineer inspected the cable plant within the boundaries of the City and found that the Franchisee (1) repeatedly failed to comply with applicable plant safety rules, including the National Electric Code and the National Electrical Safety Code and (2) had failed to take such actions as would be necessary to complete the rebuild of its System as provided in the Ordinance.

The Kramer Firm, Inc.'s inspection of the Adelpia system indicated pervasive violations of the Franchise and Ordinance. The violations described below were representative of those commonly found in Adelpia's system in the City of West Palm Beach. The Engineer noted that the violations are not the only violations observed, or the only categories of violations likely to be found by a close (months long) inspection of the plant. However, it was estimated by the Engineer that there exist ten thousand (10,000) instances of the following violations in the City.

- (a) Observed plant conditions primarily implicate violations of the National Electric Safety Code. Most notably, not exclusively, Adelpia has failed to insure that its system complies with the National Electrical Safety Code and the National Electrical Code regarding cable plant and drop minimum clearances from power on poles.
- (b) Adelpia has failed to perform required plant maintenance of its cable system endangering the public. Observed plant conditions also primarily implicate violations of the National Electric Safety Code.
- (c) Adelpia has failed to perform required overhead plant inspections as required by NESC Section 214. This finding is supported by the significant number of violations readily observed from driving through the City and merely observing the cable plant. Either Adelpia's field staff is not properly trained to detect and /or report plant safety code violations, or those reports are not being processed to resolution by the system management. In either case, the public and Adelpia's workers are unnecessarily placed at risk of bodily injury or worse.
- (d) Adelpia's underground plant system, particularly its pedestals, is generally not maintained to insure public safety and fails to conform to the requirements of the National Electrical Safety Code and the National Electrical Code.
- (e) Adelpia has failed to perform required overhead plan inspections as required by NESC Section 313. Once again, and for the same reasons described above, the public and Adelpia's workers are unnecessarily placed at risk of bodily injury or worse.

The City sent a “Notice of Violation and Demand for Compliance” to the Franchisee pursuant to the provisions in the City’s Ordinance, requiring that the Franchisee cure all of the violations, commence to cure the violations or be subject to the imposition of liquidated damages.

The Franchisee and the City ultimately fully resolved the issues. As discussed, the City’s Ordinance and Franchise agreement provide enforcement remedies, in the event the Franchisee fails to comply with all safety practices required by law in the placement, maintenance and repair of facilities in the rights of way. With respect to specific technical standards applicable to all providers, Section 26-315 of the City’s Cable Ordinance provides:

(a) Any Cable System within the City shall meet or exceed the technical standards of the FCC or other applicable federal or state technical standards, including any such standards as hereinafter may be amended or adopted. Antennas, supporting structures, and outside plant used in the Cable System shall be designed to comply with all generally accepted industry practices and standards and with all federal, state, County, City and/or utility laws, ordinances, rules and regulations.

(b) All construction, installation and maintenance shall comply with the National Electrical Safety Code, the National Electric Code, and all local codes, laws and accepted industry practices, and as hereinafter may be amended or changed.

Section 26-322 of the City’s Cable Ordinance regulates the use of streets, providing that Franchisee’s are required to:

(1) Install and maintain its wires, cables, fixtures and other equipment in accordance with the requirements of the City’s Building Code and Electrical Safety Ordinances and any other applicable Building or Electrical Safety Code, and in such manner that they will not interfere with any installations of the City.

(2) Keep and maintain in a safe, suitable, substantial condition, and in good order and repair, all structures, lines, equipment, and connections in, over, under, and upon the Streets, sidewalks, alleys, and public ways or places of the City, wherever situated or located.

**PEG**

A franchising authority may in its request for proposals require as part of a franchise, and may require as part of a cable operator’s proposal for a franchise renewal, that channel capacity be designated for public, educational, or governmental use, channel capacity on institutional

networks be designated for educational or governmental use, and may require rules and procedures for the use of the channel capacity designated pursuant to this section.<sup>16</sup>

Accordingly, LFAs have the right to establish franchise requirements regarding channel capacity for government and education access programming. Furthermore, an LFA may require assurances that the cable provider will provide adequate educational and government access channel capacity, facilities, and financial support.

The City requires the cable operator to provide capacity for public, educational, and/or governmental ("PEG") access channels on the cable system. The City currently has one (1) full-time government access channels. Pursuant to the Franchise agreement, the City is entitled to one additional access channel for the City's exclusive use, provided certain usage conditions are met. PEG channels are extremely important to the City and the residents of West Palm Beach.<sup>17</sup>

The City's franchise requires that PEG channels be supported in the following ways by the cable operator:

- The cable operator shall cablecast live all City Commission Meetings over the Cable System
- The City is responsible for the operation, management and administration of PEG access
- The Franchisee's cable system shall be configured so that programming delivered to the cable system on any return line required may be delivered downstream on any of the activated downstream access channels to all subscribers, from access facilities and equipment located at the City
- Failure to provide PEG channels required in the Franchise agreement may result in the imposition of liquidated damages

Federal law specifies that communities can only require money to be used for facilities, not operations. Consistent with federal law, the cable operator agreed to pay the City a capital grant for PEG equipment, facilities and other capital requirements in the amount of \$1,190,000, acknowledging that pursuant to FCC rules, the Capital Grant could be passed through to Subscribers.

### **Service to Public Buildings and to Schools**

The City's Franchise contains the following requirements:

- Service to Public Buildings: Franchisee shall provide one cable location without charge to each government building in the Franchise Area, or any such building that is located within 125 feet of the Franchisee's coaxial distribution plant. Service beyond the 125 feet shall be at the City's expense based on the Franchisee's actual costs. Failure to comply with this provision may result in the imposition of liquidated damages.

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<sup>16</sup> See 47 U.S.C. § 531(b).

<sup>17</sup> See James W. Clark's Declaration.

- Service to Schools: Franchisee provides, without charge, one cable drop per location and the basic and expanded basic tiers of cable service to all accredited K-12 schools within the City. Franchisee also established a voluntary initiative to provide, upon request, cable internet service to all State accredited K-12 schools within the City which receive cable service.

### **Build Out**

Build out requirements ensure that there is a simple, objective, easily administered test of economic feasibility as to where cable service has to be available. Having a clear test helps to ensure that the cable company's facilities are extended into all neighborhoods meeting this test and that service is offered to all residents in such neighborhoods, regardless of race, age, income or other extraneous factors.

Since the test must be locally tailored so as to take into account local geography, demographics, and other factors which affect population density and ability to provide service, a test applied statewide or nationally would be ineffective. Since the rights of way are public property, maintained using public funds, the rights of way cannot be used in a discriminatory fashion. It is the City's responsibility to ensure that public property is used to provide service wherever there is sufficient population density.

Finally, the City has a duty to ensure that modern communications services are offered broadly to as large a number of the residents of the City as reasonably possible, without regard to age, race, and income or other improper service criteria.

The City's Franchise provisions were negotiated with the cable operator, taking into consideration the cable operator's business needs, engineering and construction requirements and the need to provide access to service on a non-discriminatory basis. The Franchise agreement requires that the cable operator currently provide service to the following areas of the City:

Franchisee shall promptly furnish, maintain, and continue to provide all Cable Services distributed over the Cable System to any person at his/her place of residence at which Franchisee has the right to install equipment and located within the City where such residential location is not receiving Cable Service by any other franchised cable operator, provided that the number of actual residential dwelling units to be passed by any requested extension equals or exceeds twenty (20) homes per mile as measured from the nearest activated point on the Cable System to the furthest location to be served by the requested extension.

### **Annexation**

As a result of service requirements set forth in the Ordinance, all of the City's residents have cable service and cable-based broadband service available to them. The reason that the residents have all of these services is because these terms were negotiated into the cable Franchise. The City's Ordinance provides:

Except for Cable Systems in operation on the effective date hereof pursuant to Franchises initially granted or renewed in areas annexed by the City subsequent to said initial grant or renewal, a Franchise Agreement shall require that a Franchisee make Cable Service available to every dwelling within the City of West Palm Beach or as otherwise provided in a Franchise Agreement. If the City annexes any new areas after the date of this Ordinance, Franchisee shall be required to provide Cable Service at standard installation rates to such areas subject to this Ordinance and any Franchise granted hereto. Notwithstanding anything to the contrary, a Franchisee shall not be required to provide Cable Service to any area already served by a franchised cable operator.

In the event a Franchisee lawfully operating in a Franchise Area that is less than the entire City desires to provide service to an area of the City already being served by a franchised cable operator, then the Franchisee wishing to expand service shall agree to construct and operate its Cable System on terms no more favorable and no less burdensome than those pursuant to which the existing operator is subject.

### **State-of-the Art**

A Franchise entered into ten or fifteen years ago no longer meets the needs of the City as the demographics have changed. In order to ensure that the City's residents have access to current telecommunications technologies, the City's Franchise agreement contains the following upgrade provisions:

- The City may, by written notice, require the Franchisee to provide the functional equivalent of such Cable System capacity or Cable Services that are not then available on the Cable System in the City but are available on the Florida Systems
- Franchisee shall implement the same or functional equivalent of such Cable System capacity or Cable Services within twelve (12) months of receipt of notice, or as otherwise agreed to by the City and the Franchisee

### **Insurance and Security/Bonding Requirements**

The City has a duty to protect its residents by ensuring that obligations are met and injured members of the community are compensated if the provider should encounter financial difficulties or file for bankruptcy. The City's Franchise agreement contains the following insurance and bonding requirements:

- Franchisee shall maintain liability insurance coverage insuring the City to the extent applicable and the Franchisee: worker's compensation and employer liability insurance to meet all requirements of Florida law and commercial general liability insurance with contractual coverage with respect to the construction, operation and maintenance of the Cable System, and the conduct of Franchisee's business in the City, in the minimum

amounts of \$1,000,000 per occurrence, for bodily injury or death, broad form property damage liability, and insurance to cover infringement of copyrights

- Franchisee shall keep on file with the City certificates of insurance evidencing the above insurance coverage and evidencing that the City, its officers, boards, commission, commissioners, agents and employees are listed as additional insureds on the general liability policy.
- Franchisee shall, at its sole cost and expense, indemnify, hold harmless, and defend the City, its officials, boards, commissions, commissioners, agents, and employees, against any and all claims, suits, causes of action, proceedings, judgments for damages or equitable relief, and costs and expenses arising out of the willful or negligent acts or omissions of the Franchisee or its officers, agents, employees or contractors relating to construction, maintenance or operation of its Cable System, and the conduct of Franchisee's business in the City
- Security fund: the City requires a Franchisee to post with the City a cash security deposit to be used as a security fund to ensure the Franchisee's faithful performance of and compliance with all provisions of this Ordinance, the Franchise Agreement, and other applicable law, and compliance with all orders, permits and directions of the City, and the payment by the Franchisee of any claims, liens, fees, or taxes due the City which arise by reason of the construction, operation or maintenance of the Cable System.

### **Franchise Fees**

With respect to payments by a franchisee, the Cable Act permits LFAs to collect up to 5% of gross revenues from cable providers as compensation for the use of public rights-of-way. However, in 2001, the State of Florida adopted the Florida Communications Services Tax (“CST”) Simplification Act, which superseded and preempted the authority of municipalities and counties in Florida to directly levy or collect cable television franchise fees.<sup>18</sup>

Under the CST, providers of cable, telephone and other communications services remit the communications tax directly to the Florida Department of Revenue, which takes an administrative fee and remits the balance to the respective LFAs. Rates were established by the State for each taxing jurisdiction based upon historical revenues under prior franchise fee and taxing schemes with the intent that the jurisdictions would not receive net returns significantly different than they received collectively from the prior distinct funding sources.

### **Enforcement Mechanisms**

The Franchise agreement provides for the following enforcement mechanisms by which we are able to ensure that the cable operator is abiding by its Franchise agreement:

- The City may impose fines for any violation of the Ordinance, the Franchise agreement, and/or other remedies
- For failure to provide data, documents, reports or information as required by this Agreement in a timely manner or as requested by the City consistent with FCC rules and

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<sup>18</sup> See Fla. Stat. §§ 202.13(3), 202.20(2)(b)(1)(b), and § 202.24(1).

regulations, Franchisee shall pay fifty dollars (\$50.00) per violation for each day the violation continues

- Unless otherwise provided herein, for all other violations of this Agreement or the Ordinance, except those violations of the customer service standards set forth in Section 78-299 of the Ordinance that are measured on a quarterly basis, the fines shall be one hundred dollars (\$100.00) per violation for each day the violation continues for thirty (30) days. If the violation continues beyond thirty (30) days, a fine in the amount of two hundred dollars (\$200.00) per violation per day shall be imposed. If the violation continues beyond sixty (60) days, a fine shall be imposed in the greater of the amount set forth in the Ordinance or two hundred dollars (\$200.00) per violation per day.

As previously stated, neither the State nor the Commission has the staff or the budget to respond to violations in a timely manner. In reality, City hall gets the telephone calls from the local residents, not the FCC. The City needs and expects a timely response to protect public safety and to ensure local service issues are handled in a timely manner.

### **Responses/Comments to the Notice of Proposed Rulemaking**

**The Commission does not have the legal authority to issue rules which preempt LFAs authority.**

Providers seeking to provide multichannel video service over upgraded local wireline networks have alleged that the local franchising process serves as a barrier to entry. Accordingly, the FCC seeks comment on how it should implement 47 U.S.C. § 541(a)(1), which provides that a franchising authority may not unreasonably refuse to award an additional competitive franchise. The City respectfully asserts that the Commission should not adopt rules which would preempt its duly-adopted Cable Television Ordinance, since to do so would conflict with Congress' intent and exceed the Commission's Congressionally-delegated authority. Any proposed Commission rule would interfere with the City's Congressionally-granted authority. The Cable Act states, in relevant part:

Nothing in this subchapter shall be construed to affect any authority of any State, political subdivision, or agency thereof, or franchising authority, regarding matters of public health, safety, and welfare, to the extent consistent with the express provisions of this subchapter [nor] to restrict a State from exercising jurisdiction with regard to cable services consistent with this subchapter.<sup>19</sup>

It was the intent of the Cable Act to “preserve the critical role of municipal governments in the franchise process, while providing appropriate deregulation in certain respects... [and that] the franchise process take place at the local level where city officials have the best understanding of local communications needs and can require cable operators to tailor the cable system to meet those needs.”<sup>20</sup> Moreover, Congress provided that where LFAs treated franchisees unreasonably,

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19 See 47 U.S.C. § 556(a)&(b).

20 See NPRM at n. 18, citing, H.R. Rep. No. 98-934 (1984).

franchisees had the right to seek judicial relief.<sup>21</sup> Congress did not authorize the Commission to make rules preempting local laws which are not inconsistent with the Act, nor inserting itself into the local franchise negotiation process. Thus, any proposed Commission rule which would circumvent this process would be counter to Congress' express intent that franchising take place at the local level and that any unreasonable denials are reviewed by the judiciary.

### **The local franchising process is not unreasonably causing refusals of competitive franchise grants.**

New providers, including Verizon AT&T and SBC are seeking to provide multichannel video service over upgraded local wireline networks so that they can offer a competitive "triple play" (voice, Internet and video) to cable operators' triple play. These providers want to circumvent the Cable Act's local cable franchising process via federal and state legislation and via Commission rules as reflected in this NPRM.

In Florida, these new providers, as telephone companies, have the legal right and ability to deploy an advanced network.<sup>22</sup> However, in order to offer the video component, LFAs require a franchise agreement. For example, Verizon has stated that it will deliver its FiOS television service by constructing the system primarily as a telephone system, not subject to cable television franchise authority. Verizon argues that it may begin FTTP system construction at will, even in communities where it is not actively seeking a cable television franchise, because the system will be used to provide voice and data services, which is not regulated by cable television ordinances, regardless of a cable franchise. Therefore, Verizon has been deploying its FTTP network without having yet obtained video franchises from many of the LFAs in the communities in which they are building. In those communities, it can market and use this network to bring its phone and high-speed data products to consumers, and include its wireless product in the bundle. Its video product can join that bundle as Verizon obtains franchise agreements, but there is no legal impediment to construct and begin deriving income from its advanced system while it negotiates video franchise agreements with LFAs.

Thus, these new providers, as telephone companies have an advantage over cable providers since the telephone companies have independent right of way authority and may begin construction or upgrade their facilities without LFA regulation. However, cable operators are not permitted to begin system construction until the franchise agreement is negotiated and finalized.

### **Build-Out Requirements and Red-Lining**

Build out requirements encourage competition and prevent red-lining of communities since these requirements prevent profit optimization by denying new providers the ability to select areas where high-margin customers may reside. LFAs have a congressionally-mandated duty to manage the rights of way to ensure certain members of the community are not denied

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21 See 47 U.S.C. § 555(a).

22 See Fla. Stat. §337.401.

access to service due to their race or income levels. Accordingly, a Commission rule preventing LFAs from imposing build-out requirements could perpetuate redlining.

### **The City's response to Verizon's arguments**

Verizon has stated that the local franchising process takes too long due to inertia, arcane application procedures, bureaucracy or inattentiveness by LFAs arguing that it would have to negotiate with 10,000 LFAs in order to offer video service in its current service area. However, entrants, such as Verizon, with multi-use systems have two other options to offer video service without obtaining a franchise from LFAs: satellite and OVS. Furthermore, in the case of obtaining a franchising agreement for use of the rights of way, in Florida, Verizon will be able to reach a significant number of the population by dealing with a relative few LFAs with jurisdiction over the State's various areas of dense population.

Verizon also argues that that local franchising requirements can result in "outrageous demands by some LFAs" wholly unrelated to video services or franchising rationale. However, it is evident that the City's franchising process with Adelphia illustrates that the parties were able to negotiate in good faith over the exact levels of support to be provided to the City and part of that process was the City's willingness to set forth its justifications for the requests being made.

Elected officials hear from all interested parties, and make a balanced judgment as to what level of support will be required, taking into account the LFA's future cable-related community needs and the provider's ability to make a reasonable profit on its investment in the community.

### **Conclusion**

The City disagrees with the Commission's tentative conclusion that the FCC has the authority to ensure that LFAs not "unreasonably refuse" to award competitive franchises. Congress did not grant the Commission jurisdiction to directly implement §541(a)(1). Accordingly, the Commission does not have enforcement authority since this is a function of the federal judiciary.

As to whether the Commission should address actions at the state level if they are deemed to be unreasonable barriers to entry, the City opposes any such state legislation. There are adequate judicial remedies to redress any unreasonable barriers to entry. The Commission has no authority to preempt state statutes as the NPRM suggested.

Finally, the City agrees with the Commission's tentative conclusion, that it is not unreasonable for an LFA, in awarding a franchise, 1) to 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 group resides; 2) allow a cable system a reasonable period of time to become capable of providing cable service to all households in the franchise

area, and 3) require adequate assurance that the cable operator will provide adequate access channel capacity, facilities, or financial support.

The City is concerned that its authority as an LFA not be decreased, either by FCC rule or by the Florida Legislature. Local cable franchising ensures that local cable operators are allowed access to the rights of way in a fair and evenhanded manner, that other users of the rights of way are not unduly inconvenienced, and that uses of the rights of way, including maintenance and upgrade of facilities, are undertaken in a manner in accordance with local requirements. Local cable franchising also ensures that the City's specific needs are met and that local customers are protected.

In light of the foregoing, the City respectfully requests that the Commission does not interfere with local government authority over franchising or otherwise impair the operation of the local franchising process as set forth under existing federal law with regard to either existing cable service providers or new entrants. The Commission should not permit providers to simply circumvent the local franchising process.

Respectfully submitted this 10<sup>th</sup> day of February, 2006

**The City of West Palm Beach, Florida**



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