Before the
FEDERAL COMUNICATIONS COMMISSION
Washington, DC 20554

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

COMMENTS OF THE CITY OF ST. PETERSBURG, FLORIDA

These Comments are filed by the City of St. Petersburg, Florida, in support of the comments filed by the National Association of Telecommunications Officers and Advisors ("NATOA"). Like NATOA, the City of St. Petersburg, Florida, believes that local governments can issue an appropriate local franchise for new entrants into the video services field on a timely basis, just as they have for established cable services providers. In support of this belief, we wish to inform the Commission about the facts of video franchising in our community.

In our community we have two cable "franchisees" (providers). The cable franchises were adopted in the form of an ordinance, the terms of which were negotiated between the parties. The effective dates were contingent upon approval by the providers. These documents are collectively referred to as the "franchise" below.

Cable Franchising in Our Community

Community Information

St. Petersburg is a city with a population of 250,000. Our franchised cable providers are Bright House Networks, and Knology Broadband of Florida. Our community has negotiated cable franchises since the early 1980's. The franchise for Bright House (then Paragon) was approved in 1989. The franchise for Knology (then GTE Media) was approved in 1996.

Our Current Franchise

The City of St. Petersburg has historically encouraged competition between and among cable service providers. Our City has never refused to award a cable franchise, nor have we ever been accused of taking such an unreasonable time to negotiate a franchise that we have effectively refused to award a franchise. Our current franchise with Bright House began on July 20, 1989 and expires on July 20, 2009. Our current franchise with Knology Broadband of Florida began on September 9, 1996 and expires on September 9, 2009. 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 we are not currently negotiating a franchise renewal with the incumbent provider.

Our franchises required the cable operator to pay a franchise fee to the city in the amount of 5 % of the cable operator's revenues. The franchise fees were imposed upon the gross revenues of the operator, in accordance with the Federal Cable Act. Currently, the providers do not pay a franchise fee to the City but instead pay a tax to the State of Florida which is shared with local communities, pursuant to the Florida Communications Service Tax Simplification Act (Chapter 2001-140, Laws of Florida).

We require the cable operator to provide the following capacity for public, educational, and/or governmental ("PEG") access channels on the cable system. We currently have 2 channels devoted to educational access, 1 channel devoted to government access, and 1 channel for non-cable communications at a 6 MHz frequency.

Our franchise requires that our PEG channels be supported in the following ways by the cable operator: The Bright House franchise requires that the provider maintain a studio and business office within city limits; and provide a mobile production studio with engineer or studio time 12-16 hours per week for production or post production video services to be used for governmental activities. The Knology franchise requires that the provider make available a mobile production unit (truck) for City use, in lieu of providing an engineer or weekly studio time. In addition, Knology provided the city a $210,000 grant paid in consideration of extending the term of the franchise by three years. As a consequence of the extension of the term, the two cable franchises will expire in 2009, allowing the City to negotiate the extension of both franchises at the same time.

Our franchise contains the following requirements regarding emergency alerts: The cable provider in the case of an emergency or disaster shall upon request make its system available to the city at no charge for use during the emergency or disaster period. The provider is encouraged to cooperate with surrounding cable companies in the formulation of a city-wide network for the purpose of emergency communication services and the dissemination of information that may be of interest to all citizens of the Tampa Bay area.

Our franchise contains the following customer service obligations, by which we are able to help ensure that the cable operator is treating our residents in accordance with federal standards and the terms it agreed to in its franchise. Cable provider shall render efficient service, make repairs promptly, and interrupt cable service only for good cause and for the shortest time possible. Such interruptions will be proceeded by notice to customers and occur during periods of minimum use of the system. Provider will maintain a business office in the county and be open during usual business hours with telephone service. Customers at this business may make payments, order service, and drop off for repair or pick up set top boxes. Provider will also staff and provide a local or toll free number for 24 hour customer service, 365 days a year, with trained customer service representatives for the purpose of customers requesting repairs and registering complaints regarding service, equipment and billing matters.

Our franchise contains the following reasonable build schedule for the cable operator: Provider shall provide 25% of franchise area base with access to the system within 18 months of construction start and have 95% franchise area with access to the system within 42 months.

Our franchise requires that the cable operator currently provide service to the following areas of our community: Provider will maintain a performance bond in the amount of $1,000,000 payable to the city to assure that 95% of the subscriber base with in the franchise area shall have access to the system within 42 months from the construction start.

In order to ensure that our residents have access to current telecommunications technologies, our franchise contains the following rebuild or upgrade requirements: The provider is to transmit signals of strength and quality, and use such materials and components, as are necessary to insure that subscribers will receive a quality of cable service in keeping with the prevailing highest standards of the cable industry (Bright House franchise), or in conformance with NCTA cable performance standards (Knology franchise). Because of these requirements, and also because of competition between the providers, Bright House and Knology have upgraded and maintained their systems with the most current technology. Both providers offer bundled cable television, internet access, and dial-tone broadband services.

Our franchise specifically prohibits a provider from preferential or discriminatory practices. A provider may not deny service to potential subscribers because of income of a resident of the local area in which they reside. The provider shall strictly adhere to applicable federal, state and local civil rights laws and regulations, as they may be amended from time to time, including Title VII, and all applicable EEOC regulations

Our franchise contains the following insurance and bonding requirements: Provider shall maintain through out the term of the franchise comprehensive general liability, property damage liability coverage and commercial auto liability coverage, and umbrella coverage in the amount of $1,000,000 each occurrence and annual aggregate insurance of $3,000,000. Additionally, a provider must maintain $1,000,000 coverage from the infringement for copyrights if commercially available at a reasonable rate, as determined by the city,$1,000,000 for all other types of liability, and a $25,000 performance bond.

Our franchise grants the cable operator access to the public rights of way and compatible easements for the purpose of providing cable television service. Apart from the franchise, the cable provider is required to obtain a permit from the appropriate municipal office as well before it may access the public rights of way. The city has a one time telecommunication service provider registration process. A $300 registration fee is required as well as the completion of the registration form. The city has a construction permitting process that a provider must follow. This is the same process that any entity performing construction within a right of way must follow. Some of the steps in the process include applying for construction permits, supplying drawings of requested construction, adherence to minimum interference of right of way and property owners' requirements, restoration and removal requirements, insurance and surety/performance bond requirements.

Our franchise provides for the following enforcement mechanisms by which we are able to ensure that the cable operator is abiding by its agreement: The city has a telecommunication service provider registration process to keep track of all providers. Each provider must apply for construction permits for each separate construction project. A provider must maintain insurance and a surety/performance bond pursuant to city requirements, and the city diligently inspects and audits construction and maintenance of all work performed within a right of way.

The Franchising Process

Under the law, 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 negotiated even when (as has been the case in St. Petersburg) the franchise is adopted in the form of an ordinance. 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 – to the extent that is economically feasible. 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.

Our franchise provides that changes in law which affect the rights or responsibilities of either party under this franchise agreement will be treated as follows: (a) our franchise specifically prohibits a provider from preferential or discriminatory practices. A provider may not deny service to potential subscribers because of income of a resident of the local area in which they reside. (b) The provider shall strictly adhere to applicable federal, state and local civil rights laws and regulations, as they may be amended from time to time, including Title VII, and all applicable EEOC regulations. (c) The provider shall comply with the National Electrical Code and other technical codes, as the same may be amended, and with applicable rules and regulations of this Commission, the Florida Public Service Commission or other public regulatory commission, or the State of Florida.

While a cable franchise is negotiated by the local government as a contract, the process provides the cable operator additional due process rights, and consequent additional obligations on the local government. For instance: (a) The franchise grants rights to the provider which are in the nature of property rights, including the right to install infrastructure within, and to provide service to its customers through, public rights of way. (b) The City may not exercise its rights of termination or forfeiture without giving at least 30 days notice to the provider, and then only by the City Council's adopting an ordinance following a public hearing at which the provider shall have the right to appear and be heard by the City Council. (c) Pursuant to the City's ordinance of general applicability governing the use of rights of way by providers of communications services and cable services, all completed and accepted registration application forms will be sent to the city council for consideration and action. All applications will be placed on City Council agenda as a public hearing. The city council may require applicants to respond to specific concerns relating solely to the usage of rights of way that may be raised by members of the public at the public hearing. The registration application may be subject to denial; provided however, that information related to the issues which are preempted by federal or state law shall not be required, other than a showing that the applicant is in compliance with applicable federal or state requirements.

Competitive Cable Systems

The City of St. Petersburg welcomes and encourages multiple telecommunications providers within the city. A healthy competitive atmosphere and a level playing field for providers will ensure that our citizens receive the latest technology, enhanced customer service, and competitively priced services. Our City has never refused to award a cable franchise, nor

have we ever been accused of taking such an unreasonable time to negotiate a franchise that we have effectively refused to award a franchise.

The City of St. Petersburg successfully negotiated 2 cable franchise agreements that were each transferred twice, with no unreasonable delays or difficulties. The original term of each franchise was amended to co-terminate in 2009. Our original franchise started with Paragon Cable in 1989. Paragon Cable transferred the franchise to Time Warner, then Bright House. Our second franchise originated with GTE Media Ventures in 1996. GTE transferred the franchise to Verizon, which transferred the franchise to Knology. Throughout this process the city maintained a good working relationship with all of the providers. All providers cooperated with the city to maintain a level playing field in negotiations, and each franchise was competitively negotiated resulting in comparable agreements. Both providers were required to reach a 95% build out requirement. Paragon was required to build out the franchise area in 3 phases over 2 years and 4 months, whereas GTE was required to build out the franchise area in 7 phases over 42 months.

The local cable franchising process functions well in the City of St. Petersburg. As the above information indicates, we are experienced at working with cable providers to see that the needs of the local community are met as well as the practical business needs of cable providers are taken into account.

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 which is in accordance with local requirements. Local cable franchising also ensures that our local community's specific needs are met and that local customers are protected.

Local franchises thus provide a means for local government to appropriately oversee the operations of cable service providers in the public interest, and to ensure compliance with applicable laws.

Finally, local franchises allow each community to have a voice in how local cable systems will be implemented and what features (such as PEG access, institutional networks or local emergency alerts) will be available to meet local needs. These factors are equally present for new entrants as for existing users.

The City of St. Petersburg, Florida therefore respectfully requests that the Commission do nothing to interfere with local government authority over franchising or to otherwise impair the operation of the local franchising process as set forth under existing Federal and State law with regard to either existing cable service providers or new entrants.

Additional Comments As Requested by the Commission

Franchise Requirements For Entities That "Already Have" Franchises.

This Commission has requested comment on the issue of whether an LFA can justify requiring a cable franchise with respect to entities that "already have" franchises that authorize their use of public rights of way. NPRM, paragraph 22.[1]

The City has granted franchises to a power company (Florida Progress) for the installation of infrastructure in public rights of way for the distribution of power, and 2 telephone companies (GTE, now Verizon, and KMC Telecom III, now TelCove) for the installation of infrastructure in public rights of way for the provision of telecommunications services.

Because of the enactment of the Florida Communications Service Tax Simplification Act in 2001 (Chapter 2001-140, Laws of Florida), cities and counties may no longer require that franchises be awarded to communications service providers (not including cable services) for the use of public rights of way. Franchises may be (and are) required for the use of public rights of way by cable service providers. Providers of communications services (including cable service providers) are no longer subject to franchise fees payable directly to the cities and counties; instead, they pay a communications service tax directly to the State of Florida. With the exception of franchise fees, cable service providers continue to be subject to local franchising requirements. (An unresolved issue may exist with respect to the extent to which the Florida Legislature could impair the obligations of franchise agreements with communications service providers then in effect, but that issue is beyond the scope of the Commission's NPRM and this response.)

Thus, in the Florida context, the issue should be whether an LFA can justify requiring a cable franchise with respect to entities that obtained franchises for telephone services using public rights of way prior to the enactment of the Florida Communications Service Tax Simplification Act.

Electric power service and telecommunications services are fundamentally different than cable services in several respects. One important difference is that Congress has never mandated that power service and telephone service providers refrain from discriminating on the basis of income of the residents of the local area in which the residents reside. The "level playing field" laws, which require (among other things) a "build-out" to serve an entire franchise area,[2] do not apply to the power and telephone companies as they do to the cable industry. Historically, the power and telephone service providers have tended to extend their facilities so as to serve the entire community. In contrast, the cable industry from its inception has engaged in "red-lining" communities, or "cherry-picking" the "high-value" customers, which lead Congress to enact the prohibition against discrimination on the basis of income; 47 U.S.C.S. §§ 541(a)(3), 543(e).

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[1] As used herein, "NPRM" means the notice of proposed rule making published at 70 Federal Register, page 7393 (MB Docket No. 05-311; FCC 05-189). "LFA" means Local Franchising Authority; in Florida, a municipality or a county.

[2] A "level playing field" law requires a Local Franchising Agency that grants "overlapping" franchises for cable service to impose terms or conditions not more favorable and not less burdensome than those in any existing franchise. See, for example, Section 166.046(3), Florida Statutes. Observing this law requires the LFA to impose upon the second or subsequent franchisee a requirement to "build out" to serve the entire franchise area, but only if an earlier franchise contained such a provision. Similar laws apply to the regulation of communications services generally. See, for example, Section 337.401, Florida Statutes (the regulation of rights of way must be nondiscriminatory and competitively neutral).

It is ironic that potential competitors complain to the Commission of a requirement that the pioneers in the industry invited upon themselves. The City of St. Petersburg experienced "red-lining" by Paragon, the earliest cable franchisee in the City. Paragon extended a cable through a large, low-income area of the City without providing a single drop for service so it could serve a wealthier neighborhood to the west. This experience, still fresh in the memory of at least one incumbent City Council member, justified the Congressional mandate against "red-lining" and is a reasonable basis for LFA franchise requirements to serve the entire franchise area.

The residents of our community deserve to have a locally enforceable mechanism to see that this Congressional mandate is carried out by requiring service throughout the community. The franchise is a well-suited mechanism to achieve that objective.

Build-Out Requirements: An Unreasonable Barrier To Entry?

The Commission has also requested comment on whether build-out requirements are creating unreasonable barriers to entry. This issue has been raised in two different contexts, the first being the general context of a new entrant facing the application of a "level playing field" law, and the second being in the context of entry by facilities-based providers of telephone and/or broadband services. NPRM, paragraphs 14, 23.

"Level playing field" laws are founded upon the concept of fairness and equity. Congress has mandated that states and local government authorities may not impose requirements and regulations upon providers of telecommunications service that are not "competitively neutral" and nondiscriminatory. 47 U.S.C.S. § 253. This law has been construed as not requiring local authorities to seek out opportunities to level the telecommunications playing field. The law is a negative restriction requiring that regulations by a local authority avoid creating "unnecessary competitive inequities" among telecommunications providers. Cablevision v. Public Improvement Commission, 184 F.3d 88 (1st Cir., 1999).

For the same reason, the "level playing field" concept has been extended to the law of cable franchising. The principles of fairness and equity continue to be important and in the public interest. Recently, Senators Conrad Burns and Daniel Inouye issued a series of principles they believe are essential for any legislation the Senate Commerce, Science, and Transportation Committee might consider on video franchising reform. These principles include allowing new franchisees to enter markets with level playing fields in order to "promot[e] competitive entry on fair terms," to meet each community's needs in a fair and equitable manner," with similar (but not necessarily identical) responsibilities attending to any would-be franchisee so that consumers can enjoy the benefits of such services on a non-discriminatory basis. (Source: Press release, "Burns, Inouye Release Principles for Video Franchising Reform," issued on February 2, 2006, for immediate release.)

In a different context, it appears that this issue has been raised because (it is alleged) the areas served by facilities-based providers of telephone and/or broadband services "frequently do not coincide *perfectly* with the areas under the jurisdiction of the relevant LFA's." [Italics added.] NPRM, paragraphs 14, 22, 23.

In St. Petersburg, the area served by Verizon's telephone service is the entire area of the City with few exceptions, and the area to be served by existing cable franchisees is also the entire area of the City. We see no unreasonable barrier to Verizon's entry into the video market in our community arising from build-out requirements. To the contrary, Verizon as a telephone company has facilities in place which may tend to give Verizon a competitive advantage over prospective entrants which do not have such facilities in place.

If build-out requirements are a disincentive for entry into the marketplace, they are not an unreasonable disincentive. This Commission has at least tentatively agreed with that conclusion, provided that a reasonable time is allowed for a provider to reach that capability; see notice of proposed rule, paragraph 20. Congress has recognized that build-out requirements are in the public interest by prohibiting discrimination on the basis of income, as noted above. Public policy makers should be offended by plans to provide TV, voice, and high-speed Internet access services to 90 percent of a community's "high-value" customers but less than five percent of "low-value" customers, as reported in the Commission's notice of proposed rule, paragraph 6.

Negotiation Of Franchises With "10,000 Cities" As A Burden On Entry.

Verizon has commented to the Commission that the negotiation of individually negotiated franchises in each area where it intends to provide service – more than 10,000 municipalities -- is the "single biggest obstacle to widespread competition in the video services market." Verizon complains that such negotiations simply take too long. NPRM, paragraphs 2, 6.

Although 10,000 cities is an impressively large number,[3] Verizon is engaged in an impressively big undertaking to enter the video services business. Verizon plans to spend $15 billion or more over the next decade to install fiber-optic cable directly to households. About 3 million of the 30 million U.S. households that receive its phone service will be connected directly to fiber-optic lines by the end of 2005. It will be necessary to negotiate contracts with programmers to give Verizon 100-plus channels. (Source: http://www.businessweek.com/magazine/content/05_18/b3931099_mz016.htm) It will also be necessary for Verizon to negotiate with untold suppliers of equipment, owners of poles, and installers of cable to achieve their objectives. In short, the task of negotiating franchises with municipalities will not necessarily have to be done overnight. The problem is manageable, not a barrier to entry into the market.

Local Regulation Of Public Rights Of Way Serves A Vital Public Interest.

The Commission notes that there have been some efforts at the state level, such as in Texas, to facilitate entry by cable providers by providing for state-issued certificates of franchising authority. NPRM, paragraph 9.

If this is a trend, it is of vital concern to local government agencies which are charged with the fiduciary duty of seeing that public rights of way are maintained in the interests of the general public.

[3] The National League of Cities has counted 19,429 municipal governments in the United States, of which 9,361 have a population less than 1,000. Source: http://www.nlc.org/about_cities/cities_101/138.cfm

The historic rationale for requiring a franchise is that any business entity which encroaches into a public right of way in order to do business must be subject to reasonable regulation in order that the installation of poles, wires, underground conduits and other infrastructure not conflict with existing and planned uses of the right of way, and that the public be fairly compensated for the use of a public asset by a profit-making venture.

A right of way is an extremely busy piece of real estate, particularly in the urban areas. The casual viewer sees a strip of land, perhaps 50 feet wide or narrower, encumbered by the pavement for a roadway, poles supporting traffic control signs and signals, poles for utility service providers supporting overhead wires and other infrastructure, perhaps a sidewalk and bicycle path, fire hydrants, and manhole covers. The fire hydrants and manhole covers are clues as to what lies beneath the dirt, which likely includes water distribution lines, sanitary sewer collection lines, lift stations for water and sewage, storm water collection lines, natural gas transmission lines, and underground conduits for wires and cables.

The public interest requires a locally enforceable mechanism to monitor the installation of cables and related infrastructure within the public rights of way, both above ground and below ground. Franchises for all utility service providers have proven to be reasonable and workable mechanisms for that purpose. In our City, which does not own the power poles, both cable and telephone wires are typically attached to existing power poles in accordance with a code that requires minimum spacing between the wires and between the lowest wire and the ground. As additional wires are attached to a pole, the available space is at a premium and there are opportunities for a cable installer to place a cable too close to the ground. This sort of violation has happened infrequently in our community but it has occurred several times and is a threat to public health and safety when it does occur.

Of perhaps greater significance, the unregulated placement of conduits and cables below ground in public rights of way is a potential threat to public health and safety because of the likelihood that the installers, not having the benefit of review by the LFA's engineers, will break water mains, sewer mains, and natural gas transmission lines already installed. This risk is not unique to the cable industry. The installation of power or telephone lines underground carries the same risk.

For a concrete example of the perils associated with unregulated installation of utility service infrastructure, the Commission should consider the example set by Verizon in Hillsborough County and the City of Tampa, Florida. While "aggressively" installing fiber-optic cable from August to November, 2004, contractors for Verizon broke about 200 water and sewer lines, caused an estimated $103,000 in damage, interrupted service to as many as 2,600 customers, and broke a high-pressure natural gas line. The broken sewer line sucked in surrounding dirt and formed a pocket of air underground that collapsed, pulling a car underground. The broken gas line discharged sulfuric-like fumes, stalled traffic, and shut down businesses in south Tampa for more than an hour. (Source: St. Petersburg Times, "Accidents halt fiber-optic install," published November 18, 2004, and "New day, another broken gas line," published November 21, 2004.)

The Texas legislation does, on its face, appear to preserve the authority of a municipality to enforce police-power based regulations in the management of public rights of way. However, the Texas legislation protects holders of state-issued "certificates of franchise authority" by

requiring each municipality to issue construction permits without cost, by imposing upon municipalities a duty to "promptly" process applications for permits, by imposing a duty to make "every reasonable effort" not to delay or "unduly burden" the provider in the timely conduct of his business, and prohibiting a municipality from requiring that a provider obtain insurance or bonding to cover work in the municipality if the provider is "self insured." These provisions may appear benign when viewed academically but, in practice, will surely generate litigation over the meaning of "promptly" and other key terms. Also, when a LFA faces a jurisdiction-wide project such as installing fiber-optic cable to replace copper wire, protection of the public interest requires that the law give the LFA a solid foundation to avoid the kind of scenario that occurred in Hillsborough County and the City of Tampa, discussed above.

The Jurisdiction Of The Federal Trade Commission In This Docket.

This Commission has invited comment with respect to the jurisdiction of the FCC on the issue of whether the FCC is authorized to implement Section 621(a)(1) of the Communications Act of 1934, as amended; 47 U.S.C.S. § 541(a)(1).

That section states that "a franchising authority may not. . .unreasonably *refuse* to award an additional competitive franchise." [Italics added.]

The Commission's NPRM has expanded upon the clear Congressional mandate by substituting "interfere" in place of "refuse." NPRM, paragraphs 16, 19 . The NPRM also uses "impede," possibly as a synonym for "refuse." NPRM, paragraph 21.

The NPRM assumes a significantly broader standard than the Congressional mandate. This expansive reading of Congressional intent appears to be inconsistent with preserving the critical role of local governments in the franchising process. If "interference" and "impedance" is deemed to include build-out requirements by LFAs so as to provide service all residents of the community on a non-discriminatory basis, or to offer a level playing field to all new entrants, and if the consequence is to prohibit such requirements by LFAs, the public interest will not be served.

Respectfully submitted on this 9th day of February, 2006

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