

**Before the
Federal Communications Commission
Washington, D.C. 20554**

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

**COMMENTS
OF
SOUTH SLOPE COOPERATIVE TELEPHONE COMPANY**

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Chief Executive Officer

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TELEPHONE COMPANY

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South Slope Cooperative Telephone Company (South Slope or Company) submits these comments in response to the Commission's Notice of Proposed Rulemaking (NPRM) in the above-captioned docket.

I. INTRODUCTION

South Slope is the largest independent cooperative telephone company in the state of Iowa, serving the communities of Amana, East Amana, West Amana, High Amana, South Amana, Middle Amana, Homestead, Ely, Fairfax, Newhall, North Liberty, Norway, Oxford, Solon, Shueyville, Tiffin, Walford, Watkins, Western, and parts of Cedar Rapids and Coralville along the Interstate 380 Corridor. As a member-owned cooperative, South Slope is committed to providing its members and other customers in its service areas with reliable, high quality communications services at the lowest practicable cost. In direct response to the evolving communications needs of the members and communities it serves, the Company has made and will continue to make substantial capital investments in network upgrades, including the rollout of fiber to the

premises (FTTP) technologies and advanced voice, video and high-speed Internet (triple play) services.

At the present time, South Slope holds a nonexclusive certificate of public convenience and necessity from the Iowa Utilities Board (IUB) to operate as the incumbent local exchange carrier (ILEC) in 6 local exchange areas encompassing all or parts of 19 local communities:

<u>Local Exchange Area</u>	<u>Communities Included</u>
North Liberty	Cedar Rapids* Coralville**, Oxford, Solon, Tiffin
Ely	Shueyville, Western
Fairfax	Walford
Norway	Watkins
Newhall	Newhall
Amana	Amana, East Amana, West Amana, High Amana, South Amana, Middle Amana, Homestead

* *areas of south Cedar Rapids, including recently planned or annexed developments*

** *areas of north Coralville, including recently planned or annexed developments*

Under Iowa law, South Slope is obligated to provide reliable voice services and facilities to all eligible customers within its certified local exchange areas.¹ In order to comply with this universal service obligation, South Slope has invested heavily in deploying, upgrading and maintaining modern telecommunications plant throughout its ILEC service territory. In order to justify and support its investment in upgraded facilities and technology, South Slope has been actively pursuing alternative revenue streams, including through the accelerated rollout of advanced service offerings.

In 2003, South Slope made the decision to enter the multichannel video programming distributor (MVPD) market through the provision of digital video service as an alternative to conventional cable television and direct broadcast satellite (DBS) providers. In 2004, South Slope's video rollout began in those communities where the Company's new or existing facilities permitted the delivery of high quality video service

¹ Iowa Code § 476.29(5); § 476.29(9).

at a competitive rate. At that time, South Slope made the decision to voluntarily pursue competitive cable franchises on a community-by-community basis. South Slope provides or intends to provide competitive video service throughout its ILEC service territory, including each of the following communities:

<u>Community</u>	<u>Franchise Status</u>	<u>Population</u>	<u>Available Video Customers</u>	<u>Competition</u>
Amana Colonies	N/A	1,678	855	Incumbent DBS providers
Cedar Rapids	TBD	120,758	1,924	Incumbent DBS providers
Coralville	TBD	15,123	1,542	Incumbent DBS providers
Ely	Franchised	1,149	1,946	DBS providers
Fairfax	TBD	889	1,042	Incumbent DBS providers
Newhall	TBD	886	557	Incumbent DBS providers
North Liberty	Franchised	5,367	3,924	Incumbent DBS providers
Norway	TBD	601	728	Incumbent DBS providers
Oxford	Franchised	705	711	Incumbent DBS providers
Shueyville	Franchised	250	110	Incumbent DBS providers
Solon	Franchised	1,177	1,579	Incumbent DBS providers
Tiffin	Franchised	975	1,142	Incumbent DBS providers
Walford	Franchised	1,224	470	DBS providers
Watkins	N/A	N/A	N/A	DBS providers
Western	N/A	N/A	N/A	Incumbent DBS providers

N/A – local franchise not currently required by LFA

TBD – plans for video/triple play rollout to be determined

Population – community population based on 2000 Census

Available Video Customers – estimate of total potential video customers residing in South Slope's service territory based on current or planned residential and commercial development

For South Slope, the deployment of FTTP technology and rollout of competitive video/triple play service is being impeded by local franchising requirements. As discussed below, universal service requirements serve as a direct barrier to entry in the communities of Cedar Rapids and Coralville. Effectively, South Slope is prohibited from offering video service to members and customers residing in neighborhoods or subdivisions that are or may be annexed into the city limits of those communities. This denies South Slope access to significant revenue streams and creates an inequality of service between cooperative members residing in different parts of the Company's service territory. In communities where South Slope has participated in the local franchising process, the incumbent cable operator has engaged in promotional discounts and targeted marketing campaigns, artificially reducing demand for competitive service. Combined with the disadvantages and uncertainties inherent in launching any competitive service, the costs and delays imposed by the local franchising process serve as further disincentives to competitive video entry.

II. COMMENTS

Unlike large wireline voice carriers such as Verizon and SBC, South Slope is not actively engaged in a massive rollout of video service in hundreds of communities across several states. Instead, South Slope's entry into the competitive video market has been limited to the Company's existing ILEC service territory and is motivated by the straightforward goal of offering competitive video and triple play services to all cooperative members and customers on a nondiscriminatory basis. While common sense might suggest that competitive entry by a truly local service provider would be welcomed at the state and municipal level, South Slope has faced many of the same barriers to entry identified by Verizon and other ILECs in this and other Commission proceedings.² South Slope notes that these barriers to entry are magnified for small MVPDs and rural ILECs competing (or attempting to compete) in small markets amidst an increasingly complex federal-state-local legal and regulatory environment.

² Comments of Verizon, MB Docket No. 05-255 at 6 (filed Sept. 19, 2005).

A. Potential Competitors' Current Ability to Obtain Franchises.

In spite of its best efforts to plan for such contingencies, South Slope has experienced firsthand the delays in time-to-market and increased costs of entry imposed by Iowa's local franchising process.

1. Iowa Franchise Election Law.

In Iowa, cities are the designated local franchising authorities (LFAs) responsible for granting cable television franchises.³ Under this franchise power, a city may grant a nonexclusive cable franchise to any cable provider for a term not to exceed 25 years.⁴ If a city grants more than one cable franchise, the material terms and conditions of the additional competitive franchise may not give undue preference or advantage to the competitive provider.⁵ In particular, a city is prohibited from granting an additional competitive franchise that does not include the same service territory as that of the incumbent operator.⁶

When considering whether to grant a competitive franchise, a city is required to hold a public hearing on the question.⁷ Notice of the public hearing must be published in a newspaper of general circulation not less than 4 nor more than 20 days prior to the date of the hearing.⁸ Following the public hearing, a competitive franchise may be granted only by an ordinance approved via a regular or special city election called for that purpose.⁹ Notice of the election must be published in a newspaper of general circulation not less than 4 nor more than 20 days prior to the date of the election.¹⁰ The date of election, form of notice and form of ballot are determined by the county commissioner of

³ Iowa Code § 364.2(4)(a).

⁴ Id.

⁵ Id. § 364.2(4)(g).

⁶ Id.

⁷ Iowa Code § 364.2(4)(a).

⁸ Id.

⁹ Id. § 364.2(4)(b).

¹⁰ Id. § 364.2(4)(c).

elections, who is responsible for conducting the election pursuant to state law.¹¹ The results of the election are canvassed by the county board of supervisors and certified by the commissioner of elections.¹² Regardless of whether a franchise is approved or denied, the potential video competitor is responsible for the costs of the election, including the costs of the required notice.¹³

For reasons that should be obvious, Iowa's franchise election law is a significant source of cost and delay for a potential video competitor required to negotiate franchises on a community-by-community basis. In many instances, cities have interpreted the law to require that the final terms and conditions of a franchise agreement be negotiated prior to the public hearing or franchise election, leaving the provider with no guarantee that the necessary authority will be granted. In South Slope's experience, negotiation of a competitive franchise agreement may take as long as 6 months. Assuming a franchise can be successfully negotiated, the law establishes no set timeline for completion of the franchise election process and no right to appeal an adverse election result. In addition to creating uncertainty with regard to a potential competitor's time to service, the delays inherent in Iowa's local franchising process provide the incumbent cable operator (which is often able to subsidize such pricing with monopoly rates charged in noncompetitive franchise areas) with the opportunity to offer deep discounts and launch targeted marketing campaigns just prior to rollout, depressing customer take rates for competitive video and triple play offerings.

2. Iowa Level Playing Field Statute.

In addition to Iowa's franchise election law, the state's level playing field statute presents a significant and onerous barrier to competitive video entry, particularly as it relates to the requirement that any additional competitive franchise must include the same service territory as that of the existing franchise. In practice, this requires a potential

¹¹ Id. § 49.53; § 376.1.

¹² Iowa Code § 376.1.

¹³ Id. § 364.2(4)(d).

video competitor to make an up-front commitment to serve all households in the local franchise area within a reasonable period of time. By imposing this universal service obligation, the law effectively denies local communities the option to negotiate limited franchises which take into account the technology and service area requirements of an ILEC offering video over its existing wireline voice facilities.

For communities located entirely within a local exchange area served by South Slope, the Company has been willing and able to comply with this universal service obligation. In those communities, the requirement to provide video service throughout the franchise area is entirely consistent with South Slope's general commitment to offer voice, video and data service to all members and customers of the cooperative on an equal basis. The universal service requirement is problematic—and in South Slope's view constitutes an unreasonable barrier to entry—in the communities of Cedar Rapids and Coralville. In those cities, the current cable regulatory ordinance requires that a potential video competitor commit to build out and serve the entire franchise area. This requirement goes hand in hand with franchise application fees, bonding requirements and public, educational and government (PEG) commitments which assume the competitive provider will construct new facilities throughout the city and draw revenue from a customer base consisting of all households in the franchise area. An overview of anticipated fees and other financial obligations (based on South Slope's review of applicable ordinances and existing franchise agreements) is as follows:

<u>Community</u>	<u>Required Fees, Bonds and Contributions</u>
Cedar Rapids	\$5,000 upfront application fee \$10,500 processing fee \$110,000 PEG capital fee \$1,000 annual contribution for PEG production \$25,000 performance bond
Coralville	\$10,000 upfront application fee Unlimited reimbursement of all costs incurred by the City in processing application/negotiating franchise \$25,000 proposal bond \$25,000 letter of credit (when proposal bond released) \$500,000 construction bond \$26,700 PEG capital fee

Cedar Rapids and Coralville are growing population centers and will continue to expand and annex additional areas in South Slope's ILEC service territory. As these communities expand, members and customers residing in those areas are effectively cut off from the Company's video service. In an attempt to address this issue and to legally secure the right to offer all of its members a competitive choice for video service, the Company has made preliminary inquiries into obtaining a nonexclusive, limited franchise to serve those areas of each city which overlap with South Slope's ILEC service territory. As noted above, the current potential subscriber base in each community stands at approximately 1,500-2,000 potential video customers, with the promise of continuing expansion in the near term.

Initially, South Slope's formal efforts to negotiate a limited franchise have been focused on the city of Cedar Rapids. In connection with its inquiries regarding a limited franchise, South Slope has suggested that the material terms of the application process and any franchise agreement (including application fees, franchise fees, PEG requirements, and technical and customer service requirements) be reasonably comparable to those included in the franchise agreements of incumbent operators, taking into account the size and population of South Slope's proposed service area as compared to the franchise area as a whole. To the extent such arrangements may be practical or necessary, South Slope has expressed its willingness to participate in an equitable apportionment of PEG and other franchise requirements among all wireline video service providers operating within a particular community or service area.

To date, Cedar Rapids has declined to engage South Slope in the active negotiation of a competitive cable franchise for a limited service area. As a result of the resistance/regulatory inertia faced in Cedar Rapids, South Slope has not yet approached Coralville with any similar proposal for a limited franchise. Any real or perceived resistance on the part of city leaders is exacerbated by the fact that the negotiation of a limited franchise would potentially expose the city to legal or contractual liability under Iowa's level playing field statute or level playing field provisions of existing franchise agreements. Given the expense associated with an overbuild of the entire Cedar Rapids

and Coralville franchise areas, any universal service commitment presents an unreasonably high barrier to entry. Absent a limited franchise agreement, South Slope is effectively prohibited from offering video or triple play service to members and other customers in two rapidly growing service areas with a combined subscriber base nearly as large (in terms of number of potential customers) as the largest community now located entirely within South Slope's ILEC service territory. In South Slope's view, this situation is untenable and a *de facto* unreasonable barrier to the Company's entry into the competitive video market.

3. Other Sources of Authority under Iowa Law.

The veracity of South Slope's assertion that Iowa's local franchising process unreasonably interferes with competitive video entry is readily apparent when the process is compared to the state regulatory regime under which ILECs and competitive local exchange carriers (CLECs) are authorized to provide voice service and construct voice communications facilities in the public rights of way. In South Slope's view, the stark contrast regarding the degree of community-by-community involvement under each scheme raises significant questions as to whether local franchising is in fact necessary in order to preserve a locality's right to regulate and receive compensation for use of the public rights of way.

A certificate issued by the Iowa Utilities Board (IUB) is the only authority required for a LEC to provide competitive wireline, local exchange service in the state of Iowa.¹⁴ Ordinarily, a certificate is granted or denied within 90 days of the carrier's application.¹⁵ A certificate may not be denied, provided the LEC can demonstrate that it possesses the technical, financial and managerial ability to provide communications services consistent with the public interest throughout the local exchange area(s) it intends to serve.¹⁶ The power to regulate the conditions required and manner of use of

¹⁴ Iowa Code § 476.29(6).

¹⁵ Id. § 476.29(2).

¹⁶ Id.

the public rights of way remains with local governments,¹⁷ provided that any obligation imposed or fee charged must be competitively neutral and based on management costs caused by the LEC's activity in the public right of way.¹⁸ In the case where a local government's management costs are not attributable to any one entity, the costs must be allocated among all users of the public rights of way, including the local government itself.¹⁹ The allocation must proportionately reflect the costs actually incurred by the local government as a result of the various uses of the public rights of way.²⁰

As discussed above, South Slope is a certified local exchange carrier in each community where it intends to offer video or triple play service. As such, the Company provides or proposes to provide services over facilities for which it already has independent authority to use the public rights of way to provide communications services in the public interest. With respect to such facilities, each community has a right— independent and exclusive of cable franchise fees or regulations—to recover any management costs caused by the Company's activity in the public rights of way. Though state and federal law may be construed to require South Slope to obtain cable franchises in order to provide video programming service over its voice facilities, the imposition of franchise election costs, duplicative local franchise requirements and cost-prohibitive application fees and capital contributions is unjustified and constitutes an unreasonable barrier to competitive video entry.

B. The Commission's Authority to Adopt Rules Implementing Section 621(a)(1).

South Slope agrees with the Commission's tentative conclusion that it has authority to adopt rules implementing Section 621(a)(1) as necessary to ensure that the local franchising process does not interfere with federal policies, including the Commission's goals for enhanced video competition and accelerated broadband

¹⁷ Id.

¹⁸ Iowa Code § 480A.3.

¹⁹ Id.

²⁰ Id.

deployment in all states and communities. Under the federal-state-local jurisdictional approach to regulating cable television service and cable television systems, the role of states and LFAs is largely premised on the authority of state and local governments to adopt reasonable regulations regarding the public health, safety and welfare, including reasonable conditions to a cable operator's use and occupation of the public rights of way. To the extent that any state or local franchising process might permit an LFA to unreasonably refuse to award an additional competitive franchise or might otherwise unreasonably interfere with the ability of a potential new entrant to offer competitive video service, such process is inconsistent with Section 621(a)(1) and is deemed to be preempted and superseded under Section 636(c) of the Communications Act.²¹

C. Steps the Commission Should Take to Ensure that the Local Franchising Process Does Not Unreasonably Interfere with Competitive Cable Entry and Rapid Broadband Deployment.

In order to most rapidly facilitate enhanced video competition and accelerated broadband deployment in small and rural markets, South Slope urges the Commission to adopt rules which would exempt from the local franchising process any video service provider able to satisfy each of the following criteria:

(i) the provider is offering or proposing to offer video service in a local franchise area or a defined service area within a local franchise area which, as a result of the provider's competitive presence, will be subject to effective competition within the meaning of Section 76.905 of the Commission's rules;

(ii) the provider has established, through a process of certification or authorization at the state level, that it possesses the technical, financial and managerial ability to provide communications services consistent with the public interest to all customers in the local franchise area or a defined service area located (in whole or in part) within the local franchise area;

²¹ 47 U.S.C. § 556(c).

(iii) the provider will provide video service in the local franchise area or its defined service area over its own facilities for which it already directly possesses, under applicable state laws or regulations, independent authority to use and occupy the public rights of way;

(iv) the provider has agreed to offer video service to all households located in the provider's defined service area, regardless of density, on a nondiscriminatory basis and within a reasonable period of time; and

(v) the provider has agreed to participate in an equitable apportionment of PEG channel capacity, facilities and financial support among all wireline video service providers operating within the franchise area, taking into account the size and population of each provider's defined certified service area as compared to the local franchise area as a whole.

In addition to exempting certain providers from the local franchising process, South Slope urges the Commission to act promptly to adopt rules that would clearly prohibit any state or LFA from adopting or enforcing any law, ordinance or regulation that is or causes an unreasonable refusal to award an additional competitive cable franchise in violation of Section 621(a)(1). In defining what constitutes an unreasonable refusal to award a competitive franchise, South Slope agrees with the Commission's tentative conclusion that Section 621(a)(1) prohibits not only the ultimate refusal to award a competitive franchise, but also the establishment of procedures and requirements that have the effect of unreasonably interfering with the ability of a potential video competitor to obtain a competitive franchise, either by (a) creating an unreasonable delay in the franchising process, or (b) imposing unreasonable regulatory roadblocks which, under the circumstances, constitute a *de facto* unreasonable refusal to award an additional competitive franchise.

In connection with any rules prohibiting the unreasonable refusal to award an additional competitive cable franchise, South Slope asserts that a state or local law,

ordinance or regulation should be deemed to be or to cause "an unreasonable refusal to award an additional competitive cable franchise" if it:

(i) establishes a local franchising process that requires an election or other means of making a final decision that provides no public record from which to form the basis of an appeal from the denial of an additional competitive franchise;

(ii) establishes a local franchising process which provides no timeline by which an LFA must make a final decision or provides a timeline in excess of 90 days, exclusive of any time a provider may be granted in which to decide whether to accept the final terms and conditions of a franchise agreement;

(iii) prohibits or restricts in any manner an LFA's authority to negotiate and award a competitive franchise which authorizes or includes a defined service area different than that of the incumbent cable provider;

(iv) prohibits or restricts in any manner an LFA's authority to provide for the equitable apportionment of PEG channel capacity, facilities and financial support among all wireline video service providers operating within a franchise area;

(v) regulates or attempts to regulate video service providers in any manner which is not competitively neutral;

(vi) regulates or attempts to regulate or impose additional fees (other than to regulate matters or recover costs directly related or attributable to the use of facilities to provide video service) for the use of the public rights of way by any provider authorized to construct and maintain facilities within the public rights of way pursuant to any independent state-level franchise or similar authority;

(vii) imposes or permits an LFA to impose franchise requirements not related to the LFAs authority to regulate and receive compensation for the use of the public rights of way; or

(viii) imposes, as a condition of consideration of a competitive franchise, application fees or other fees not reasonably apportioned and directly related to costs actually incurred by the LFA in processing the application or administering the franchising process.

IV. CONCLUSION

Onerous local franchising requirements and so-called "level playing field" statutes provide a disincentive to competitive video entry by South Slope and other ILECs operating in small and rural markets. Potential video competitors are too often faced with unreasonable demands or delays in the local franchising process and are forced to incur significant costs as a condition of market entry. In most cases, the process provides no guarantee that an additional competitive franchise will be considered or negotiated in a timely, competitively neutral manner. The public nature of the process provides the incumbent cable operator ample notice of the competitive rollout and an extended opportunity to undercut the competitor's entry through deep discounts and targeted marketing, providing a further disincentive for potential competitors to invest in the technologies and facilities required to offer video and triple play services.

For these and other reasons discussed herein, the Commission should act quickly to adopt rules that will bring about meaningful reform to the local franchising process and eliminate unreasonable barriers to competitive video entry, particularly for rural ILECs and small MVPDs operating in small and rural service areas.

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Respectfully submitted,

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