

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 SUBMITTED BY CERTAIN FLORIDA MUNICIPALITIES**

Comments Submitted by:  
Village of Bal Harbour, Florida  
City of Coconut Creek, Florida  
City of Coral Gables, Florida  
City of Miramar, Florida  
City of Golden Beach, Florida  
City of Homestead, Florida  
Islamorada Village of Islands, Florida  
City of Weston, Florida, and  
City of Winter Haven, Florida

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February 13, 2006

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**COMMENTS SUBMITTED BY CERTAIN FLORIDA MUNICIPALITIES**

**I. Introduction**

These Comments are filed on behalf of the following Florida municipalities: Bal Harbour Village, Coconut Creek, Coral Gables, Miramar, Golden Beach, Homestead, Islamorada Village of Islands, Weston, and Winter Haven (hereinafter referred to collectively as "Florida Cities") in response to the Federal Communications Commission's ("Commission") November 18, 2005, Notice of Proposed Rulemaking ("NPRM").<sup>1</sup> First and foremost, it must be emphasized that the Florida Cities have a strong desire for competition in cable services. While there may be more than one franchised cable operator providing service in some of the Florida Cities, for the most part, franchised cable operators have not overbuilt each others' cable systems. In fact, only one of the Florida Cities has a franchised "overbuilder" providing competing service with another cable operator.<sup>2</sup> Based on the experience of the Florida Cities as well as other local governments in Florida, it is clear that the franchising process, however, has not deterred a franchised overbuilder or competitor. Several of the Florida Cities have in fact taken far-reaching steps to attract a competitor, only to find that potential competitors were not interested or unable to offer competitive service for business reasons. Despite the tremendous population growth and economic vitality of the Florida Cities, it does not appear that potential competitive cable franchisees will seek to offer service in the Florida Cities, or for that matter throughout much of Florida, for several years.

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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. 05-311, FCC No. 05-189, Notice of Proposed Rulemaking (released November 18, 2005).

<sup>2</sup> In the Florida Cities, there are many private cable operators offering service to select private homeowner and condominium associations and multiple dwelling properties ("MDUs"), as well as Direct Broadcast Satellite providers. However, these are not franchised cable operators that offer service to individual residents who do not reside within such associations or MDUs.

While the Florida Cities span large geographic areas within the State and range greatly in size, they share a number of things in common. First, they welcome and in fact encourage competition in video services and in many cases have issued franchises to allow competition. Second, they must comply with Florida law, which contains certain requirements local governments must follow when granting new and competitive cable franchises, although such requirements are not overly burdensome and do not create a barrier to competitors. Third, they operate under Florida's unique communications services tax as the method of compensating local governments for use of their rights-of-way, which places all communications and cable service providers, incumbents and new competitors alike, on equal footing. Finally, they have all experienced severe hurricanes and must have appropriate authority to prepare for and recover from hurricanes.

While the Florida Cities in many respects are very diverse, they all remain committed to maintaining local authority to franchise cable services. The Florida Cities currently realize significant benefits for their residents as a result of their existing franchises and their franchise authority. The Florida Cities are of the firm belief that the Commission would be acting inappropriately, both from legal and policy standpoints, if it interfered with local franchising authority.

The framework for these comments is as follows. The Florida Cities first respond to the Commission's questions regarding the existence of state law regarding franchising, including level playing field statutes. This is followed by a response to the Commission's questions and tentative conclusions concerning its legal authority to address competitive cable franchising. The final section addresses whether, as a policy matter, the Commission should adopt rules or regulations governing competitive franchising.

As a preliminary matter, the Florida Cities agree with and therefore adopt the comments filed by the National Association of Telecommunications Officers and Advisors, Inc. ("NATOA") in this proceeding. As NATOA pointed out, the Commission does not have the legal authority to issue rules or guidelines to implement Section 621(a)(1) of the Cable Act<sup>3</sup> nor can the Commission act as a forum to hear complaints arising out of such section. Moreover, local governments are the most appropriate regulatory entities to ensure that franchises for new cable entrants are issued on a timely basis and on reasonable terms, just as they have for established cable service providers and existing competitors for many years.

## **II. Level Playing Field Statutes, Such As Florida's, Are Legal and Are Not A Barrier to Competition.**

In the NPRM, the Commission asked if states have level playing field statutes or other laws governing franchising and the effect of such laws on the ability of competitors to obtain franchises. NPRM, at ¶14. Florida is one of several states that enacted a level playing field statute. Florida law provides:

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<sup>3</sup> Section 621(a)(1) of the Cable Act, 47 U.S.C. §541(a)(1) (hereinafter cited as "Section 621(a)(1)"); Cable Communications Policy Act of 1984, 47 U.S.C. §§601 *et. al.* (hereinafter cited as "Cable Act").

(3) No municipality or county shall grant any overlapping franchises for cable service within its jurisdiction on terms or conditions more favorable or less burdensome than those in any existing franchise within such municipality or county.<sup>4</sup>

In addition, pursuant to Florida law, local governments must, at a public hearing, consider the following factors when awarding a new franchise:

- (a) The economic impact upon private property within the franchise area;
- (b) The public need for such franchise, if any;
- (c) The capacity of public rights-of-way to accommodate the cable system;
- (d) The present and future use of the public rights-of-way to be used by the cable system;
- (e) The potential disruption to existing users of the public rights-of-way to be used by the cable system and the resultant inconvenience which may occur to the public;
- (f) The financial ability of the franchise applicant to perform;
- (g) Other societal interests as are generally considered in cable television franchising;
- (h) Such other additional matters, both procedural and substantive, as the municipality or county may, in its sole discretion, determine to be relevant.<sup>5</sup>

None of these factors however, are unusual or overly burdensome for the government to consider when processing a franchise application. Further, the Florida Cities are unaware of any court decisions reversing an award of a new franchise on the ground that a local franchise authority failed to take these factors into consideration.

As a preliminary matter, courts have recognized that such level playing statutes are legal under the Cable Act. In Cable TV Fund 14-A, LTD v. City of Naperville, 1997 WL 280692 (N.D.Ill 1997)(“Naperville”), the court found that it was reasonable to deny an additional franchise when the potential competitor was only willing to compete unfairly pursuant to a franchise that, taken as a whole, contained terms more favorable or less burdensome than those in the existing franchise. The court found that that there was no conflict between a state’s level playing field statute and either Section 621 or the pro-competitive purposes of the Cable Act. Id. at 16-17. The Commission does not have authority under the Cable Act to preempt state level playing field statutes.

Nor should the Commission attempt to issue guidelines as to what requirements

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<sup>4</sup> Section 166.046(3), Florida Statutes.

<sup>5</sup> Section 166.046(2), Florida Statutes.

should or should not be imposed to satisfy state level playing field statutes. In applying such level playing field statutes, the courts have not required that a franchise authority require that the overbuilder satisfy the exact same terms and conditions as required of the incumbent franchisee. Rather, courts recognize that the terms of an incumbent's franchise should be viewed as a whole and that there may be valid and reasonable reasons not to place certain requirements on an overbuilder.

Florida's level playing field statute has not proven to be a hindrance or burden to awarding competitive franchises. In Florida, there have been only a few instances in which an incumbent cable operator challenged the grant of a competitive or "overbuild" franchise as being in violation of the level playing field statute. Rather than providing evidence of any burden to achieving competition, this demonstrates that local franchise authorities are capable of following the law to achieve competition.

For example, franchise authorities in Florida, including several of the Florida Cities, have awarded franchises that did not have a build out requirement, although the incumbent cable operator's franchise did contain such a build out requirement.<sup>6</sup> Franchise authorities, including the Florida Cities, also have recognized with respect to information required for franchise applications, that form must govern over substance, and have not allowed incumbent cable operators to deter competition by raising arguments that did not go to the merits of a new entrant's application. In short, the Florida Cities and other local franchise authorities in Florida have not erected procedural or other barriers to competitors but they have done more than what they were required to do, but within the bounds of the law, at times subjecting themselves to legal challenges, in an effort to achieve competition.

Several of the Florida Cities are located in Miami-Dade County.<sup>7</sup> Several years ago, after the Telecommunications Act of 1996 allowed telephone companies to own and operate cable systems,<sup>8</sup> a subsidiary of Bellsouth, the incumbent local exchange carrier, applied for a cable franchise in Miami-Dade County. Miami-Dade County amended its cable ordinance to eliminate the build out requirement and then issued a cable franchise to Bellsouth. Seven incumbent cable operators sued Miami-Dade County in both state and federal court. The cable companies argued in state court that the County failed to follow its own application process as contained in its Cable Ordinance. The County countered that it applied the substance if not necessarily the form of its requirements for a franchise application and that the Cable Ordinance was not intended to serve as a barrier to entry to protect incumbent cable monopolies. The state court entered summary judgment for the County, which was upheld on appeal.<sup>9</sup>

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<sup>6</sup> A build out requirement generally requires the franchisee to construct its cable system throughout the entire franchise area over a certain period of time.

<sup>7</sup> Bal Harbour Village, Coral Gables, Golden Beach and Homestead.

<sup>8</sup> 47 U.S.C. §533(b).

<sup>9</sup> The trial court's order was a one-sentence order entering judgment for the County without opinion and the appellate court's decision was per curiam, also without opinion, so there is no published citation. After the State court litigation ended, the federal court granted summary judgment on res judicata grounds.

In federal court, the cable companies maintained that the County violated its constitutional rights and the Florida level playing field statute by eliminating the build out requirement for Bellsouth.<sup>10</sup> The County argued that previous courts had upheld the elimination of build out requirement as reasonable to eliminate an obstacle to competition and that even if the incumbent franchisee had a build out requirement, the Florida level playing field statute did not require a local franchising authority to require a build out of an overbuilder.<sup>11</sup> Ultimately, Miami-Dade County and Bellsouth prevailed on both lawsuits.<sup>12</sup> The franchising process under the Cable Act and Florida law, though, allowed the local franchise authority to do what it needed to attract and to achieve competition, even going the extra mile to amend its requirements to accommodate an overbuilder and then defending its decision in state and federal court. Bellsouth constructed its cable system in portions of Miami-Dade County and serves currently thousands of subscribers.

The Florida Cities understand that certain local exchange carriers have argued at the Commission that the local franchising process and state level playing field statutes are barriers to competition. Perhaps they claim that franchising authorities are fearful of being exposed to litigation under level playing field statutes. The Florida Cities, however, are not aware of any franchise authority in Florida delaying or refusing to issue a competitive franchise out of fear of challenge under Florida's level playing field statute. In fact, as the efforts of Miami-Dade County demonstrate, franchise authorities are perfectly capable and willing to follow the law and to defend their actions in court to achieve competition.

With respect to the experience of the Florida Cities, the City of Homestead awarded an overbuild franchise covering only a portion of the City. That overbuilder, Strategic Technologies, Inc. ("STI") was primarily interested in providing service to a particular area of the City under a "bulk" contact with the developer. The City, however, attempted to obtain competition for other residents in the City and worked with STI to expand the area it must serve, affording STI a seven year period to construct its system and providing incentives to STI if it met this schedule. STI is currently serving several thousand subscribers in the City, in competition with the incumbent cable provider Adelphia, and is expanding its system as new homes are being built.<sup>13</sup> Homestead did not attempt to hinder or to delay processing the competitor's application or the issuance of the overbuild franchise. Quite the contrary, the City worked within federal and Florida law and, in a relatively short timeframe, completed the franchising process to achieve competition.

Level playing field statutes, including Florida's, are designed to ensure fair competition, a goal that does not conflict with pro-competitive purposes of the Cable Act or the Commission's goals as expressed in the NPRM. The Florida Cities submit, as the

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<sup>10</sup> Rifkin/Miami Management Corp. v. Metropolitan Dade County and Bellsouth Interactive Media Services, Inc., Case No. 97-1567-CIV-GRAHAM (S.D. Fla. 1997).

<sup>11</sup> The County cited Southeast Florida Cable, Inc. d/b/a Adelphia v. Martin County Board of County Commissioners, Case no. 94-14209-CIV-Paine (S.D. Fla. 1995).

<sup>12</sup> The federal court found for the County on res judicata grounds, not reaching the merits.

<sup>13</sup> Homestead is currently processing an application by another overbuilder to construct and operate a cable system in other portions of the City.

above examples show, that they and other local franchise authorities are most familiar with the circumstances in their communities. They are fully capable of working within such level playing field statutes to address competitive franchises and to promote competition. In addition, because they are intimately familiar with the circumstances in their communities, local franchise authorities are best equipped to know what requirements are needed for the benefit of their residents. On the other hand, if the Commission were to get involved in franchising, the Commission would not be in a position to know the specific circumstances in a particular community and what would be appropriate to do to achieve competition. Further, it would be impossible for the Commission to issue guidelines with respect to state level playing field and other requirements that would be appropriate to apply in all instances.

### **III. The Commission Does Not Have Legal Authority To Address The Cable Franchising Process.**

#### **A. The Commission Has No Authority to Issue Specific Rules for Franchise Authorities to Grant Or to Deny Competitive Franchises.**

##### **1. The Commission Does Not have Authority to Adopt Rules or Guidelines for Implementing Section 621(a)(1) or to Take Any Action Pursuant to Section 621(a)(1) for Competitive Franchises.**

In the NPRM, the Commission sought comment on its tentatively concluded that Section 621(a)(1) of the Cable Act empowers the Commission to ensure that local franchising does not unreasonably interfere with the ability of a potential new entrant to provide service or undermine the well-established policy goal of increased competition.<sup>14</sup>

Section 621(a)(1) provides, in pertinent part:

A franchising authority may award, in accordance with the provisions of this subchapter, 1 or more franchises within its jurisdiction; except that a franchising authority may not grant an exclusive franchise and **may not unreasonably refuse to award an additional competitive franchise.** Any applicant whose application for a second franchise has been denied by a final decision of the franchising authority may appeal such final decision pursuant to the provisions of section 555 of this title for failure to comply with this subsection.<sup>15</sup>

The Commission's tentative conclusion that it has authority to adopt rules or guidelines to implement Section 621(a)(1) goes against long-standing precedent. Federal agencies only have authority to issue rules or guidelines pursuant to a federal statute if the statute

<sup>14</sup> NPRM, at ¶15.

<sup>15</sup> Section 621(a)(1), 47 U.S.C. §541(a)(1)(emphasis added).

itself provides for the creation of such rules or if the statute is unclear or ambiguous and requires guidance and interpretation from the agency. Moreover, in regards to the “unreasonably refuse” provision of Section 621(a)(1), there is no statutory mandate to the Commission to issue rules. There is no gap in the statute to give it the full meaning that Congress intended, and the provision is clear and unambiguous. Accordingly, as explained below, the Commission has no legal authority to issue rules or guidelines to implement Section 621(a)(1).

When Congress has directly spoken to a precise question at issue, and the intent of Congress is clear, agencies must give effect to the unambiguously expressed intent of Congress. Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842-43 (1984)(“Chevron”). The Commission’s discretion in interpreting Section 621(a)(1)’s “unreasonably refuse” clause, therefore, is limited by the terms of the statute. Only if there are ambiguities in those provisions may the Commission substitute its own judgment for that of the Congress.

In this case, the statutory language is so plain as to foreclose the Commission’s rationale and conclusion for creating guidelines and rules for competitive cable operators. The “unreasonably refuse” language of Section 621(a)(1) shows a clear and unambiguous Congressional intent. A franchising authority may not “unreasonably refuse” to award an additional competitive franchise and, if it does, the affected applicant may appeal the final denial decision to the courts pursuant to the provisions of Section 635.<sup>16</sup>

Moreover, the judiciary, and not an agency, is the final authority on issues of statutory construction and courts reject administrative constructions which are contrary to clear congressional intent. See, e.g., FEC v. Democratic Senatorial Campaign Committee, 454 U.S. 27, 32 (1981); SEC v. Sloan, 436 U.S. 103, 117-18 (1978); FMC v. Seatrain Lines, Inc., 411 U.S. 726, 745-46 (1973); Volkswagenwerk v. FMC, 390 U.S. 261, 272 (1968); NLRB v. Brown, 380 U.S. 278, 291 (1965); FTC v. Colgate-Palmolive Co., 380 U.S. 374, 385 (1965); Social Security Board v. Nierotko, 327 U.S. 358, 369 (1946); Burnet v. Chicago Portrait Co., 285 U.S. 1, 16 (1932); Webster v. Luther, 163 U.S. 331, 342 (1896).

In the NPRM<sup>17</sup>, the Commission cites City of Chicago v. FCC, 199 F.3d 424 (7<sup>th</sup> Cir. 1999)(“City of Chicago”) for the proposition that it has regulatory authority to implement rules on “unreasonable refusals” pursuant to Section 621(a)(1). However, City of Chicago only resolved that the Commission has authority to interpret Section 621 for the purpose of determining what types of “systems” are exempt from franchising requirements.<sup>18</sup> City of Chicago did not address the “unreasonably refuse” language of Section 621(a)(1) nor did the court provide the Commission with blanket power to issue rules on “unreasonable refusals” to issue competitive cable franchises.

<sup>16</sup> Section 635 of the Cable Act, 47 U.S.C. § 555 (“Section 635”).

<sup>17</sup> NPRM, at ¶ 15.

<sup>18</sup> The “systems” that City of Chicago dealt with involved Satellite Master Antenna Television (“SMATV”) systems that do not use the public rights-of-way, unlike the wired cable systems that local exchange carriers are installing and that use the public rights-of-way.

The "power of an administrative agency to administer a congressionally created ... program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." Chevron at 843-44; Morton v. Ruiz, 415 U.S. 199, 231 (1974). Indeed, courts have held that if Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Chevron at 843-44. However, the "unreasonably refuse" language of Section 621(a)(1) leaves no gap for the agency to fill. To the contrary, Congress explicitly provided that if there is an unreasonable denial of a competitive franchise from a franchising authority the applicant must appeal to the courts pursuant to Section 635 to resolve the "unreasonable" issues.

Further, courts have held that the granting of a franchise is a legislative act. See Union CATV, Inc. v. City of Sturgis, 107 F. 3<sup>rd</sup> 434, 441 (6<sup>th</sup> Cir. 1997); Communications Systems, inc. v. City of Danville, 800 F.2d 887, 891 (6<sup>th</sup> Cir. 1989) ("legislative act performed by a municipality in awarding a franchise cannot be set aside in the absence of fraud, collusion, or dishonesty."); Cox Cable San Diego, Inc. v. City of San Diego, 233 Cal. Rptr. 735, 742 (Cal. Ct. App. 1987). The Commission does not have authority to interfere with legislative functions of state and local governments.

For all the above reasons, it is clear from section 621(a)(1) of the Cable Act that the Commission does not have authority to adopt rules or guidelines for LFAs to follow when deciding whether to issue competitive franchises or to take any action in response to a franchising authority's unreasonable denial of a competitive franchise.

**2. The Commission Does Not Have Authority To "Ensure" That The Local Franchising Process Does Not Unreasonably Interfere With The Ability Of A New Entrant To Provide Competitive Cable Service.**

Section 621(a)(1) expressly states that any unreasonable denial of a competitive franchise should be appealed to the courts pursuant to Section 635 of the Cable Act, not to the Commission. Section 621(a)(1) provides a specific remedy for any unreasonable denials of a competitive franchise. Congress' intent was for the courts to handle unreasonable denials, not the Commission. In fact, courts have adjudicated several cases dealing with the "unreasonable" provision of Section 621(a)(1). Qwest Broadband Services, Inc. v. City of Boulder, 151 F.Supp.2d 1236 (D.Co. 2001)(court decided that municipal ordinance providing for voter approval of cable franchises was an implied unreasonable refusal to award a competitive franchise and therefore was invalid pursuant to Section 621(a)(1)); Naperville, at 15-16 (court held that Illinois level playing field statute for cable overbuilders was not an unreasonable refusal of a competitive franchise nor is inconsistent with the pro-competitive purpose of the Cable Act); I-Star Communications Corp. v. City of East Cleveland, 885 F.Supp. 1035, 1042 (N.D.Ohio 1995) (dismissing a Section 621(a)(1) claim based on plaintiff's failure to allege submission and denial of an application for a second competitive franchise).

This is consistent with other remedies involving improper franchising decisions by a franchising authority. If a franchising authority unreasonably refuses to grant a transfer of a franchise in violation of the Cable Act, the appeal is to the court, not the Commission.<sup>19</sup> Also, if a franchise authority denies a modification of a franchise, the cable operator may appeal to the courts through Section 635.<sup>20</sup> Similarly, if a franchise authority refuses to grant a renewal of a franchise, the appeal is to court, not the Commission.<sup>21</sup> It is clear that Congress established the scheme in the Cable Act where the courts, and not the Commission, have authority to address allegations of improper franchising decisions.

Moreover, the review and appeal process mandated by Congress in Section 621(a)(1) for unreasonable refusals to issue competitive franchises is only available when the franchising authority denies the competitive franchise application. Unless and until an applicant submits - and the franchise authority refuses- an actual request for a second competitive franchise, the applicant cannot appeal to the courts under Section 621(a)(1). NEPSK, Inc. v. Town of Houlton, 283 F.3d 1, 10 (1<sup>st</sup> Cir. 2002); I-Star Communications Corp. v. City of East Cleveland, 885 F.Supp. 1035, 1042 (N.D. Ohio 1995).

Competitive franchise applicants should wait until the franchising process is over and their final action has been taken before filing an appeal or complaint in a court pursuant to Section 635. See Weissman v. Fruchtman, 700 F.Supp. 746, 755-57 (S.D.N.Y. 1988)(explaining that plaintiffs' procedural due process claims were premature where city agency had not yet made a "sufficiently final decision"). Accordingly, not only it would be inappropriate for the Commission to interfere with a court's jurisdiction to address a claim that a franchise authority denied unreasonably an application for a competitive franchise, but it is not permitted or authorized by the Cable Act. The Cable Act clearly provided jurisdiction for these type of Section 621(a)(1) appeals or complaints to the courts and not the Commission.

### **3. The Legislative History of Section 621(a)(1) Demonstrates that Congress Intended Franchise Authorities to Determine the Reasons for Franchise Refusals.**

Section 621(a)(1) merely provides that a franchise authority may not "unreasonably" deny an additional franchise. The legislative history of this section explains that an additional franchise may reasonably be denied under Section 621(a)(1) if

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<sup>19</sup> 47 U.S.C. § 537; Charter Communications v. County of Santa Cruz, 133 F.Supp.2d 1184 (N.D. Cal. 2001), judgment reversed on other grounds by 304 F.3d 927 (9<sup>th</sup> Cir. 2002) (court had jurisdiction over county's denial of franchise transfer).

<sup>20</sup> 47 U.S.C. § 545(b)(1); RCN Corp. v. Newton Township, 2004 WL 315175 (E.D. Pa. 2004); RCN Corp. v. Newton Township, 2003 WL 21054359 (E.D. Pa. 2003); Cablevision Systems Corp. v. Town of East Hampton, 862 F.Supp. 875 (E.D. N.Y. 1994), affirmed by 57 F.3d 1062 (2<sup>nd</sup> Cir. 1995)(court had jurisdiction over town's denial of modification request).

<sup>21</sup> 47 U.S.C. § 546(e)(1); Better TV, Inc. of Bennington v. Public Service Bd. of State of Vermont, 42 Fed.Appx. 498 (2<sup>nd</sup> Cir. 2002); Southeast Florida Cable Inc. v. Martin County, 173 F.3d 1332 (11<sup>th</sup> Cir. 1999); Union CATV v. City of Sturgis, 107 F.3d 434 (6<sup>th</sup> Cir. 1997) (court had jurisdiction over city's denial of franchise renewal).

the additional franchise: "is technically infeasible. However, the Committee does not intend technical infeasibility to be the only justification for denying an additional franchise."<sup>22</sup> Nevertheless, the Conference Committee on the 1992 Amendments adopted the Senate Bill's version of Section 621 rather than the House Bill's version, which contained a specific list of "reasonable" grounds for denial of a franchise.<sup>23</sup>

In Naperville, the court concluded that by choosing not to adopt a federally mandated list of reasonable grounds for denial Congress intended to leave franchising authorities with the power to determine the bases to grant or to deny additional franchises, with the only caveat being that the basis for denial must be "reasonable."<sup>24</sup> As additional support for this conclusion, the court noted that several overbuild (also referred to as level playing field) statutes were in effect when the 1992 Amendments to the Cable Act were under consideration.<sup>25</sup> Congress could certainly have expressly preempted level playing field laws and their standards if it had intended to prevent franchising authorities from denying additional franchises based on such laws. See Amsat Cable Ltd. v. Cablevision of Connecticut, 6 F.3d 867, 876 (2d Cir.1993) (finding significant that state laws under consideration were in effect when Cable Act was passed and were not expressly preempted or otherwise limited by the Act).

Accordingly, it is clear under Section 621(a)(1) that the Commission does not have the statutory authority to issue rules or guidelines to govern franchise authorities when determining whether to grant or to deny competitive franchises. Similarly, the Commission does not have authority to issue a list of what would be considered "unreasonable" under Section 621(a)(1), or to serve as a forum to resolve allegations that franchise authorities "unreasonably" refused to grant such franchises. As courts have noted, franchise authorities enjoy discretion under the Cable Act and appeals from such decisions rest with the courts, not the Commission.

#### **B. The Cable Act Mandates That Cable Providers Obtain a Cable Franchise.**

The Cable Act<sup>26</sup> and Florida law<sup>27</sup> require that a provider of cable services obtain a franchise. Section 621(a)(1) states that "a franchising authority . . . may not unreasonably refuse to award an additional *competitive franchise*. Any applicant whose application for a *second franchise* . . ." (emphasis added). Congress' selection of the words "competitive franchise" and "second franchise" in this section provides a clear and unambiguous language that explicitly requires all competitors to incumbent cable companies to get a franchise from the franchising authority. No exceptions were written in Section 621 for these types of competitive franchises. Therefore, the Commission can not create a regulatory exception that would allow cable competitors to operate without a franchise where the Cable Act does not provide for any such exception.

<sup>22</sup> S.REP. NO. 92, 102d Cong., 1st Sess. at 185 (1991).

<sup>23</sup> CONF.REP. NO. 862, 102d Cong., 2d Sess. at 168-69 (1992).

<sup>24</sup> Naperville, at 16-17.

<sup>25</sup> Id.

<sup>26</sup> Section 621(b)(1) of the Cable Act, 47 U.S.C. § 541(b)(1).

<sup>27</sup> Fl. Stat. 337.401(3)(a)(2); See also Fl. Stat. 166.046. Congress did not preempt state law requirements regarding cable franchising.

**C. There are Certain Areas in which the Commission Does Not have Authority to Preempt State and Local Governments' Rules for Incumbent and Competitive Franchises.**

Through the Cable Act, Congress recognized cable's multifunctional nature and codified a mixed scheme of federal, state and local regulation. The Cable Act also restricted the Commission's rulemaking and adjudicatory roles, placing the enforcement of statutory standards in the hands of state and federal courts,<sup>28</sup> thereby clearly delineating the powers between the Commission and the courts. Additionally, the Cable Act established a uniform set of regulations delineating issues of federal concern and left the remaining regulatory authority to state and local governments. The Cable Act also solidified the bifurcated regulatory power and vested local authorities with extensive control over granting cable franchises. Local franchise authorities have regulatory authority over some cable issues that are not preempted by the Cable Act, regardless of whether the cable franchise is for an incumbent or competitive cable company.<sup>29</sup>

**1. Under the Cable Act Franchise Authorities Have Substantial Regulatory Jurisdiction over Cable Matters.**

When Congress enacted the Cable Act, it delineated the Commission's limited jurisdiction and defined the scope of its authority.<sup>30</sup> The Cable Act, however, specifically preserved state and local laws and lawmaking authority that are not inconsistent with the Cable Act's rules and standards.<sup>31</sup> In Section 636 of the Cable Act, Congress demonstrated its intent to preempt state and local regulatory authority sparingly where

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<sup>28</sup> Robert F. Copple, Cable Television and the Allocation of Regulatory Power: A Study of Government Demarcation and Roles, 44 Fed. Comm. L.J. 1, 43 (1991).

<sup>29</sup> Neither the Cable Act nor its legislative history evince congressional intent to upset the traditional spheres of state and federal power, absent an express provision in the Cable Act dictating the relegation of a specific area to either state or federal power. See Warner Cable v. Borough of Schuylkill Haven, 784 F.Supp. 203, 214 (E.D.Pa.1992).

<sup>30</sup> It has been hypothesized that Congress' intent to restrict the Commission's authority over cable television was based on a goal of establishing a cohesive national policy for cable communications in the form of specific "standards that would withstand the changing winds of regulatory behavior" and on an intent to prevent the Commission from both further deregulating cable television and preempting state and local regulation. Copple, *supra* note 26, at 44-45; Michael I. Meyerson, The Cable Communications Policy Act of 1984: A Balancing Act on the Coaxial Wires, 19 GA.L.REV. 543, 548-50 (1985).

<sup>31</sup> As provided in Section 636 of the Cable Act, 47 U.S.C. §556 (hereinafter cited as "Section 636"): Coordination of Federal, State, and local authority.

(a) Regulations by States, political subdivisions, State and local agencies, and franchising authorities.

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.

(b) State jurisdiction with regard to cable services.

Nothing in this subchapter shall be construed to restrict a State from exercising jurisdiction with regard to cable services consistent with this subchapter.

(c) Preemption. Except as provided in section 557 of this title, any provision of law of any State, political subdivision, or agency thereof, or franchising authority, or any provision of any franchise granted by such authority, which is inconsistent with this chapter shall be deemed to be preempted and superseded.

such action is required as a matter of national policy while leaving intact existing state and local authority. Congress, in other words, intended only to preempt selective state and local regulatory power. Under selective preemption, state and local regulators possess all regulatory power not explicitly or implicitly preempted by the Cable Act.

In formulating its statutory approach to cable regulation, Congress recognized the legitimacy of state and local control. As explained in the House Report:

[The Cable Act] establishes a national policy that clarifies the current system of local, state and Federal regulation of cable television. This policy continues reliance on the local franchising process as the primary means of cable television regulation while defining and limiting the authority that a franchising authority may exercise through the franchise process.<sup>32</sup>

Congress intended the Cable Act to provide for a mixed scheme of regulation with only specific preemption on certain issues.

## **2. Local Franchise Authorities' Cable Regulatory Powers.**

There are a host of cable policy issues that significantly bear on the configuration and operation of cable television systems, but which are more closely tied to local conditions and processes and, therefore, are not readily subject to national treatment or Commission authority. Some of these issues are addressed by the Cable Act and specifically left to state and local control, while others find no mention in the Cable Act and, due to the Cable Act's limited or selective form of preemption, are left to state and local regulation.<sup>33</sup>

### **(a) Local Franchise Authority's Jurisdiction Over General Franchise Requirements.**

In contrast to the portions of the Cable Act setting forth the rules governing the federal components of cable regulation, the section addressing general franchise requirements is distinct because of its simplicity and austerity.<sup>34</sup> The general franchise requirement section addresses what might be called the local components of cable television or those aspects of cable television regulation that most directly fall within the traditional powers of state and local governments. With a few basic and limited jurisdictional requirements, the Cable Act replaced years and volumes of Commission decisions affecting such state and local power.<sup>35</sup> The general franchise requirement section does not prescribe a detailed set of regulations covering the initial franchising

<sup>32</sup> H.REP. NO. 934, 98th Cong., 2d Sess. 19 (1984), reprinted in 1984 U.S.C.C.A.N. at 4655, 4656 (hereinafter cited as "HOUSE REPORT").

<sup>33</sup> Copple, *supra* note 26, at 113.

<sup>34</sup> See Section 621 of the Cable Act, 47 U.S.C. § 541.

<sup>35</sup> Copple, *supra* note 26, at 113.

process or the day-to-day administration of cable operations. Rather, this section articulates the Cable Act's underlying Congressional policy of relying "on the local franchising process as the primary means of cable television regulation."<sup>36</sup>

There are a multitude of regulatory components involved in the regulation and administration of cable television. These include:

- selection process for the initial franchisee,
- type of licensing process employed,
- choice of state or local agencies to govern cable regulation,
- territories to be served,
- prerequisite qualifications of the applicants,
- construction of the system,
- assurances regarding financial ability, insurance and indemnification, and
- franchise duration.

Under Section 621, all of these issues are left to local franchise authorities.<sup>37</sup> Moreover, this applies equally to incumbent and competitive cable companies. The Cable Act leaves virtually the whole of the initial franchise process to state and local control.<sup>38</sup> Thus, the Cable Act prescribes no initial franchise procedures such as notice, public hearings, application requirements, or the ultimate selection process.<sup>39</sup>

The Cable Act's very limited intervention into the franchising process is a crucial factor in ascertaining Congress' intent regarding the division of federal, state, and local authority under the Act.<sup>40</sup> This statutory scheme recognizes that state and local authorities have traditionally possessed the power to define, grant, and regulate franchises within their jurisdictions. Moreover, a close examination of the Cable Act and its legislative history, demonstrates that state governments continue to possess their traditional and inherent powers in regard to municipalities and franchising authority.

The Cable Act's section addressing the "Coordination of Federal, State, and Local Authority" specifically states that "nothing in this subchapter shall be construed to restrict a State from exercising jurisdiction with regard to cable services consistent with this subchapter."<sup>41</sup> In addition, as explained in the underlying House Report:

The Committee does not intend [the Cable Act] to upset the traditional relationship between state and local governments, under which a local government is a political subdivision of the state and derives its authority from the

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<sup>36</sup> HOUSE REPORT, *supra* note 30, at 19, reprinted in 1984 U.S.C.C.A.N. at 4656.

<sup>37</sup> Copper, *supra* note 26, at 114.

<sup>38</sup> Copper, *supra* note 26, at 122.

<sup>39</sup> For a general description of a generic franchise process see CHARLES D. FERRIS ET AL., CABLE TELEVISION LAW, ¶¶ 13.16 to .20 (1990).

<sup>40</sup> Copple, *supra* note 26, at 123.

<sup>41</sup> Section 636(b) of the Cable Act, 47 U.S.C. § 556(b).

state. A state may, for instance, exercise authority over the whole range of cable activities, such as negotiations with cable operators; consumer protection; construction requirements; rate regulation or deregulation; the assessment of financial qualification; the provision of technical assistance with respect to cable; and other franchise-related issues--as long as the exercise of that authority is consistent with [the Cable Act]. If, under ... any state law, a requirement imposed upon a cable operator must be reflected in a franchise, the state may exercise its authority over cable either by establishing a state franchising authority or by placing conditions on a local government's grant of a cable franchise.<sup>42</sup>

As such, the Cable Act allocates and preserves all power to grant franchises in general, and cable franchises in particular, to the states.<sup>43</sup>

Consistent with the Cable Act's intent to leave such matters to state and local authorities, many states and/or local franchising authorities, including the Florida Cities, have adopted franchise application processes and requirements.<sup>44</sup> Some of the requirements adopted by the Florida Cities and by the State of Florida address:

- Standards for the applying for franchises and processing applications;
- Factors that must be considered when reviewing applications for new and for competitive franchises;
- Territories to be served;
- Financial, legal, and technical qualifications of applicants;
- Facilities to be offered;
- Construction schedules;
- Franchise duration;
- Non-discrimination requirements;
- Insurance; bonds; and indemnification requirements;
- Requirements for use of public rights-of-way;
- Customer service requirements;
- Compliance with general laws and police powers; and
- Enforcement mechanisms.

The Cable Act also sanctions comprehensive state or local control of the franchising process. As explained more fully below, the Florida Cities and the State of Florida have addressed this by adopting laws requiring a franchise before providing cable services, and the imposition of criminal and/or civil penalties for failure to comply with the requirements.

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<sup>42</sup> HOUSE REPORT, *supra*, note 30, at 94, reprinted in 1984 U.S.C.C.A.N. at 4731.

<sup>43</sup> Copple, *supra* note 26, at 124.

<sup>44</sup> Copple, *supra* note 26, at 126.

**(b) Local Governments' Authority Over Public Rights-of-Way.**

The courts and the Commission have upheld the power of local authorities to issue and regulate cable television franchises based on several primary rationales. Two of these justifications are: (1) cable franchises continuously use and occupy public property;<sup>45</sup> and (2) "laying cable" constitutes a public disruption implicating a locality's police power to protect the safety, health and property of its citizens.<sup>46</sup> In other words, local franchise authority and jurisdiction stems from the rationale that cable systems create unique problems for local communities, for example: (1) the franchisees' essentially permanent use of public rights-of-way, and (2) the disruptive nature of constructing and maintaining a cable system.<sup>47</sup>

The rationale that cable operators use public streets and rights-of-way to provide cable service is usually supported by two facts: (1) physical cables occupy an essentially permanent position in public rights-of-way; and (2) cable operators must use public areas, such as roads, to install and maintain their cables. Moreover, construction of a cable system is highly intrusive on local governments.<sup>48</sup> Local authorities are in the best position to extend this permission because they can provide a "special expertness" to control public disruption.<sup>49</sup> Courts have upheld the public disruption rationale on the theory that even minimal public disruption may "provide sufficient basis for the municipality to regulate, given the substantial and important government concerns raised by any public disruption."<sup>50</sup>

Section 621(a)(2)<sup>51</sup> preserves state and local power to control the type of physical transmission facility desired by the community and to ensure that public ways are used and maintained in a manner acceptable to the franchising authority and other political subdivisions having control of public ways. Thus, the Cable Act does not affect most state and local laws regulating the use of public ways with regard to installation and construction, aesthetic requirements, relocation of cable lines mandated by other public uses, and the general maintenance of public ways. The Commission and courts have confirmed that cable's use of the public rights-of-way has been the predominant rationale

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<sup>45</sup> See Telesat Cablevision, Inc. v. City of Riviera Beach, 773 F. Supp. 383, 396-97 (S.D. Fla. 1991); Madison Cable Television v. City of Morganton, No. SH-C-86-5, 1990 U.S. Dist. LEXIS 18794 (W.D.N.C. May 14, 1990); Erie Telecommunications v. City of Erie, 659 F. Supp. 580, 594-95 (W.D. Pa. 1987), aff'd, 853 F.2d 1084 (3d Cir. 1988).

<sup>46</sup> See Community Communications Co. v. City of Boulder, 660 F.2d 1370, 1377-78 (10th Cir. 1981), cert. dismissed, 456 U.S. 1001 (1982); Telesat Cablevision, 773 F. Supp. at 397.

<sup>47</sup> Traditional cable systems deliver programming throughout a municipality by means of cables laid under city streets or along utility lines. They thereby make extensive use of public rights-of-way, avoiding the need to negotiate easements with countless private property owners. Guidry Cablevision v. City of Ballwin, 117 F.3d 383, 385 (8<sup>th</sup> Cir. 1997).

<sup>48</sup> City of Chicago, at 433.

<sup>49</sup> Community Communications Co. v. City of Boulder, 660 F.2d 1370, 1377-78 n.8 (10th Cir. 1981), cert. dismissed, 456 U.S. 1001 (1982) (quoting 37 Fed. Reg. 3276 (1972): "Local governments are inescapably involved in the [franchising] process because cable makes use of streets and ways and because local authorities are able to bring a special expertness to such matters ....").

<sup>50</sup> Telesat Cablevision, Inc. v. City of Riviera Beach, 773 F. Supp. 383, 398 (S.D. Fla. 1991).

<sup>51</sup> 47 U.S.C. § 541(a)(2).

for Congress' establishment of local franchising. As the Commission stated in promulgating the Cable Definition Rule:

The dual federal-local jurisdictional approach to regulating cable television service is largely premised on the fact that cable systems necessarily involve extensive physical facilities and substantial construction upon and use of public rights of way in the communities they serve.

In re Definition of a Cable Television Sys., 5 F.C.C.Rcd. 7638, 7639 (1990). The Commission also articulated this rationale throughout the pre-Cable Act period. See, e.g., Cable Television Report & Order, 36 F.C.C.2d 143, 207 (1972) (“persuasive argument against federal licensing” is that “cable makes use of [local] streets and ways”); In re Amendment of Part 76, 54 F.C.C.2d 855, 861 (1975); Orth-O-Vision, 82 F.C.C.2d at 183 (citing 1972 report); In re Earth Satellite Communications, 95 F.C.C.2d at 1235 (“[L]ocal governments are inescapably involved in the process because cable makes use of streets and ways and because local authorities are able to bring a special expertness to such matters, for example, as how best to parcel large urban areas into cable districts.”). Congress did the same in promulgating the Cable Act. See Senate Report at 7 (Senate bill “seeks to restore the jurisdictional boundaries over cable to their more traditional positions,” with the “ ‘ultimate dividing line ... [resting on cable’s] use of the streets and rights-of-way’ ”) (quoting 1975 report); 129 CONG.REC. 15,590 (1983) (“[n]o one can doubt that localities should be able to exert some control over cable because it crosses public rights of way”) (Senator Hollings).

Furthermore, before Congress enacted the Cable Act, the Commission declined to preempt the role of local governments in franchising cable systems because of the burden that would have put on the agency. Cable Television Report and Order, 36 FCC 2d 143, 325 (1972); Clarification of the Cable Television Rules, 46 FCC 2d 175 (1974). The Commission ultimately determined that it was cable television's use of public rights-of-way which was the primary rationale for local control. New York State Comm'n of Cable Television v. FCC, 749 F.2d 804 (1984).

In conclusion, local franchising authorities have authority and jurisdiction over their rights-of-way and can promulgate applicable regulations to control and manage them for cable companies. This power over public rights-of-way (“ROW”) is equally applicable to incumbent and competitive cable franchises. The Cable Act does not provide any exception for competitive franchises.

**(c) Local Governments' Jurisdiction and Authority over Franchise Formation, Administration, and Control.**

The general franchise requirements section of the Cable Act is noteworthy for what it does not include. While the bulk of the Cable Act addresses specific components of regulation that are considered national in character, the vast majority of issues faced by franchising authorities and cable companies are left to state and local regulation by their

intentional omission from the Cable Act. As explained in the House Report:

Matters subject to state and local authority include, to the extent not addressed in the legislation, certain terms and conditions related to the grant of a franchise (e.g., duration of the franchise term, delineation of the service area), the construction and operation of the system (e.g., extension of service, safety standards, timetable for construction) and the enforcement and administration of a franchise (e.g., reporting requirements, bonds, letters of credit, insurance and indemnification, condemnation, and transfers of ownership).<sup>52</sup>

These categories directly correspond to a logical breakdown of franchise provisions for the delineation of service areas; franchise duration; construction and extensions; health and safety, insurance, and indemnification requirements; record keeping and reporting requirements; and transfers of ownership. Likewise, as established by a separate section of the Cable Act addressing consumer protection,<sup>53</sup> "construction schedules and other construction-related requirements of the cable operator"<sup>54</sup> are explicitly left to the control of state and local authorities.

It is also important to emphasize that this list of matters of local concern is not exclusive. Those cable regulatory components not specifically preempted by the Cable Act are left to local regulatory discretion because of the Cable Act's selective method for the preemption of specific state and local laws.<sup>55</sup>

**(d) Local Governments' Authority Over Public, Educational, and Government Access Channels.**

The Cable Act is clear that local franchise authorities have jurisdiction over public, educational and government ("PEG") access channels, and that the Commission cannot establish rules or guidelines regarding requirements for PEG channels. Congress intended the existence and configuration of PEG channels to be a local issue to be addressed by the franchising authority in an effort to design PEG systems that best meet the needs and conditions of the individual communities.<sup>56</sup> The Cable Act explicitly authorize franchising authorities, when awarding a franchise, to "require adequate assurance that the cable operator will provide adequate public, educational, and governmental access channel capacity, facilities, or financial support."<sup>57</sup>

In making its decision to leave the bulk of PEG access regulation to state and

<sup>52</sup> HOUSE REPORT, supra note 30, at 59, reprinted in 1984 U.S.C.C.A.N. at 4696.

<sup>53</sup> Section 632 of the Cable Act, 47 U.S.C. §552.

<sup>54</sup> Section 632(a)(2) of the Cable Act, 47 U.S.C. §552(a)(2).

<sup>55</sup> Copple, supra note 26, at 145.

<sup>56</sup> *Id.*

<sup>57</sup> Section 621 (a)(4)(B) of the Cable Act, 47 U.S.C. §541(a)(4)(B).

local authorities, it is apparent that Congress viewed PEG access channels as "the video equivalent of the speaker's soapbox or the electronic parallel to the printed leaflet."<sup>58</sup> Within this conceptual perspective, Congress recognized PEG access to be a regulatory matter of local interest. As such, the Cable Act left PEG access regulation to state and local authorities to allow such authorities to fine tune access requirements to local needs, including the number and type of PEG access channels, and the rules, procedures, and method of administration for such channels.<sup>59</sup>

For purposes of this NPRM, it must be emphasized that this local authority over PEG access channels applies equally for incumbent and competitive franchisees and that no exceptions or distinctions were made in the Cable Act for competitive franchises. Accordingly, it would be inconsistent with the Cable Act if the Commission set forth guidelines for PEG access channels for competitive franchises that interfered with franchise authority discretion.

**D. The Cable Act's Authorization of the Commission To Address Certain Cable Areas Does Not Provide Authority for the Commission To Preempt Local Franchising Authority To Achieve Competition.**

The Cable Act provides for limited preemption of local regulatory efforts in certain specific areas. For the most part, the Cable Act leaves to the states and local governments the ability to control or regulate such matters as initial franchise application criteria, franchise selection, ownership transfer, and construction schedule, as well as to dictate the physical scope and configuration of a given cable system, be it an incumbent or a competitive franchise.<sup>60</sup> State and local authorities are in the position to require that a particular level of "service" for the citizens in their communities be provided by a cable system that satisfies their needs, regardless of whether the cable system is operated by an incumbent or a competitor. In other words, in the Cable Act Congress allowed state and local authorities to perform their traditional regulatory functions--the functions that are best performed at the state and local levels.<sup>61</sup>

<sup>58</sup> HOUSE REPORT, *supra*, note 30, at 30, reprinted in 1984 U.S.C.C.A.N. at 4667.

<sup>59</sup> Copple, *supra* note 26, at 150.

<sup>60</sup> See RCN Corp. v. Newton Township, 2004 WL 315175 (E.D.Pa. 2004) (Cable Act "does allow a franchise authority to regulate, and in turn, modify, ... the facilities or equipment through which cable programming is transmitted"); Time Warner Entertainment v. Foster Management, 1996 WL 33371638 (M.D.N.C. 1996) ("The Cable Act only preempts laws which are inconsistent with it, and does not so completely occupy the field so as to preclude state law actions for breach of contract, unfair trade practices, or state common law"); Total TV v. Palmer Communications, Inc., 69 F.3d 298 (9<sup>th</sup> Cir. 1995); Cablevision of Boston v. Raymond L. Flynn, 710 F. Supp. 23, 28 (D. Mass. 1989).

<sup>61</sup> Daniel L. Brenner, Monroe E. Price, and Michael I. Meyerson, Cable Television and Other Nonbroadcast Video, § 2:22 (2005) ("Some may argue that under Crisp [Capital Cities Cable Inc. v. Crisp, 467 U.S. 691 (1984)] the FCC retains further authority to preempt local cable operators pursuant to the powers it holds as a consequence of the 1934 Communications Act. It is unlikely, given the precision of Section 623 [47 U.S.C. § 543.] or at least the painstaking effort to address allocation of jurisdiction questions, that a broad scope of residual authority would be imputed to the FCC. Additionally, Section 3 of the law specifies that the 1934 Act applies 'with respect to cable service . . . as provided in Title VI [of the Cable Communications Act, 47 U.S.C. § 152(a)].' Thus, the FCC's authority over cable may now be limited to that defined in the law, and not extend to its earlier power over common carriers under Title II, or broadcast casters under Title III [See U.S.C. §§ 151 *et seq.*]").

The Cable Act identifies several specific components of cable regulation that require uniform federal treatment and the complete or partial preemption of state and local authority. Those components are: (1) ownership restrictions; (2) commercial third-party access to cable transmission systems; (3) rate regulation; (4) franchise fee limitations; and, to a lesser extent, (5) services, facilities, and equipment requirements; (6) franchise modification; and (7) franchise renewal. However, none of the applicable sections of the Cable Act for these areas provide any explicit or implicit statutory exception for competitive franchises. Therefore, the Commission does not have any statutory authority to promulgate separate rules for competitive franchises and depart from the general rules that apply to incumbent cable franchises.

#### **IV. As A Matter of Public Policy, the Commission Should Support the Current Local Franchising Process For New Competitive Cable Entrants.**

##### **A. Local Franchising Provides Important Benefits.**

Even if, arguably, the Commission had the authority to issue rules that would not require a franchise for, or would limit the franchise requirements for, competitive cable operators, the Commission should preserve the local franchising process because there are substantial benefits achieved by locally franchising competitive cable operations. Through their local franchises, the Florida Cities have obtained substantial and important benefits for their communities. Some of these benefits include:

##### Institutional Networks

Through the franchising process, a cable operator will either construct a fiber network or dedicate capacity on a network for the use of the local government. This enables the local government to obtain capabilities for voice and data communications between various government and school facilities, saving thousands of dollars in taxpayer funds that would otherwise have to be spent for such facilities. The City of Coral Gables, for example, obtained such an Institutional Network ("I-NET") in its cable franchise, at no cost to the City, saving hundreds of thousands of dollars and vastly improving communications capabilities between various City and educational facilities. Local governments also use such I-NETS to support more efficient training of police, fire and emergency personnel, without requiring such personnel to travel to training sessions. Such communications capabilities are also essential to emergency preparation and recovery. The franchising process ensures that competitive franchisees do not have a competitive advantage by not having to make similar commitments.

##### Access Channels and Support

Several of the Florida Cities, along with many Florida local governments, obtained under their cable franchises access channels, which they control and use for government and educational programming based on their own individual communities' needs and interests. Several of the Florida Cities share one government access channel with other government entities. Whether it is video coverage of governmental meetings, information about government services, local law enforcement's most wanted, school

closings or classroom instruction, the video programming used to disseminate this information allows all local governments to better serve and interact with their constituents. Local governments continue to make innovative uses of this programming capacity as new interactive technology allows more valuable information to be available. In addition to actual channel capacity for access channels, many of the Florida Cities receive financial grants and/or equipment to produce programming for their access channels. The franchising process ensures that competitive franchisees provide similar commitments and that their subscribers are able to view access channels. The local franchise process also ensures that competitive cable operators interconnect their systems to share access programming in an efficient and equitable manner.

In fact, in Homestead, the City's franchise with the incumbent cable operator is very old and did not provide for access channels or support. While the incumbent cable operator carries City Council meetings on its cable system, the City obtained a government access channel and financial support for programming only from a competitive franchisee and the City worked with the competitive franchisee to allow it to carry the City Council meetings in the most efficient method. Coral Gables as well, under its franchise, has a robust government access channel and receives significant support to produce programming. Through its franchising process, the City was able to ensure that residents in an area that was annexed into the City but served by another cable operator were able to receive the City's access channel. This provides these residents with an opportunity to watch their government in action and to receive important information about City services.

#### Free Services

Through their franchises, the Florida Cities, again along with most Florida local governments, obtain free cable and often broadband services for government facilities, schools, libraries and community centers. The availability of free services to schools and libraries has become so common, that in fact, we take it for granted. This is often the only way many parents, teachers, students and residents have access to such services. The franchising process ensures that competitive franchisees provide similar benefits.

#### Build Out Requirements

In regards to build out requirements, an initial franchise typically gives the provider a reasonable amount of time to build and extend its cable system. Build out provisions are negotiated with the cable service provider and take into account a particular provider's business needs, engineering and construction requirements, as well as the need to provide access to service to the community. As discussed above, one of the Florida Cities negotiated similar provisions for a new competitive entrant and many other municipal and county governments in Florida have negotiated such requirements. Such negotiations must take into account the current needs of the community, as well as the potential provider's ability to extend its service and economic circumstances. To achieve competition, many local franchising authorities will not require a build out requirement, even though this may not create competition for all residents of their communities. Three of the Florida Cities are located in Broward County, Florida.<sup>62</sup>

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<sup>62</sup> Coconut Creek, Miramar and Weston.

While they have not received applications for competitive franchises, in Broward County, the County removed its build out requirement and awarded a franchise to Bellsouth to serve the unincorporated areas of the County. In response to applications for franchises, two municipalities within Broward County, Pembroke Pines, Florida, the tenth largest city in the State, and Davie, Florida awarded competitive franchises to Bellsouth with no build out requirements. The three Florida Cities within Broward County all have more than one cable franchisee operating within their jurisdiction. None of these municipalities have required that the incumbent cable providers build out the entire jurisdiction. In fact, these franchisees have not overbuilt each other and do not compete. Local governments thus, are fully capable of considering and determining build-out and construction requirements.<sup>63</sup> As the above examples demonstrate, to achieve competition, local franchise authorities often will not require a proposed competitor to build out an entire community. However, local franchise authorities are in the best position to understand their communities and the Commission should avoid attempting to create a national policy on such an important issue.

#### Time Limits for Negotiations

Local governments have experienced just as much frustration as many in the industry when the issue of timing arises regarding franchise negotiations. While it is easy to claim that local governments are the cause for delay, the Florida Cities have been equally as frustrated by the industry's not pursuing negotiations in a timely and efficient manner. Just as the industry would call upon local governments to be under some time constraint for processing a franchise application, so too should the industry be held to time frames for providing the necessary information on which a decision can be made and for responding to requests. The Florida Cities may be willing to support timeframes within which *all* parties should act, whether it is for processing an initial franchise application, franchise renewal, or transfer of franchises. It is important however, that any timeframes established must be respectful of the principles of public notice and due process and must take into consideration that the Florida Cities have obligations under their codes and Florida law to follow certain procedures to ensure that residents have an opportunity to provide input. No community should be forced to make a determination without permitting their citizens the opportunity to voice their opinion if that is the process that the government has put into place for such matters.

#### Consumer Protection and Emergency Preparation and Recovery

The Cable Act has significant and meaningful consumer protection and privacy provisions. These are national standards with local enforcement, but include the ability of the local government to adopt and to enforce more stringent consumer protection laws. Many of the Florida Cities have adopted specific consumer protection provisions to address concerns that have arisen in their communities. The adoption and enforcement of such consumer protections are essential for the Florida Cities' residents.

In 2004 and 2005, the Florida Cities experienced an unprecedented number of Hurricanes. In fact, one of the Florida Cities, Winter Haven, actually was struck by four

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<sup>63</sup> See also Cablevision v. City of Ballwin, 117 F.3d 383, 386 (8<sup>th</sup> Cir. 1997) (“Local governments are better able to ‘parcel large urban areas into cable districts....’”).

Hurricanes during the 2004 season. It is imperative for the Florida Cities that they adopt appropriate preparation plans for hurricanes, that they provide emergency services to employees and residents, and that they have authority to facilitate recovery efforts for the safety and welfare of providers, employees and residents. Before hurricanes, the Florida Cities coordinate their hurricane preparation plans with their local cable franchisees. Such plans include having appropriate backup power at headends and in the field and complying with building codes so that facilities can withstand hurricanes and do not pose unreasonable hazards during a storm.<sup>64</sup> During storms, franchised cable operators notify the Florida Cities of damage, disruption of service, and the need for emergency medical, police and fire services to protect employees and residents. Franchised cable providers often must have representatives stationed in emergency operations centers to convey necessary information as quickly as possible. Following the hurricanes, the Florida Cities are the entities responsible for removing debris. The Florida Cities coordinate such efforts with users of the rights-of-way. Employees of users of the rights-of-way are not allowed to attempt to restore service until debris is removed and it is safe to travel on roads and streets. In addition, following the hurricanes, the Florida Cities assist cable franchisees with efforts to restore service. They further handle hundreds if not thousands of calls from residents for assistance with service restoration.<sup>65</sup> The Florida Cities through their franchises also are able to ensure that cable customers receive appropriate credits for when they did not have service.

Their franchising authority is essential for such consumer protection, disaster preparation, emergency services, and restoration efforts. If the Commission removes or alters such authority for competitive cable franchisees, this could have the unintended consequence of impairing the ability of Florida Cities to provide assistance in times of hurricanes and other emergencies to such providers, to the detriment of the providers, their employees and their customers.

Franchising of cable services conveys numerous important public benefits. The Commission should not impair such benefits in the context of competitive cable services by adopting rules that interfere with or restrict local franchise authorities' ability to achieve these benefits from potential competitive providers.

**B. The Current Local Franchising Process Encourages Competition and Has Resulted in Awarding Competitive Franchises.**

As discussed above, one of the Florida Cities, Homestead, did receive an application for a competitive franchise, processed it and awarded the competitive franchise in a relatively short timeframe. While the other Florida Cities have not received applications for competitive franchises, many have taken affirmative steps to obtain competitors. Approximately five years ago, all of the municipalities within

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<sup>64</sup> The Florida Cities are also able to use their access channels to provide necessary information to residents about storm preparations, shelters, and emergency operations. Of course, appropriate emergency management agencies are able to provide emergency notices to residents over cable and other systems.

<sup>65</sup> After Hurricane Wilma, the Miami-Dade County cable consumer office alone received over 1,000 calls from cable customers for assistance with restoring service. Residents in each of the Florida Cities called their respective city for such assistance.

Broward County, Florida, including the three Florida Cities within the county, and the county itself, joined together and issued a request of proposal for a competitive cable overbuilder to provide competing service throughout the county. These 29 municipalities and the county indicated that they would grant franchises for a provider to offer competing cable services to a combined area covering over 1.5 million residents (approximately 500,000 households). While at the time, there was significant overbuild activity occurring elsewhere in the country, no potential wireline provider of cable services responded.<sup>66</sup>

Local franchise authorities in Florida, however, have not only been willing to grant competitive franchises, they have in fact granted such franchises to Bellsouth and Verizon, the two largest local exchange telephone carriers in Florida. Further, such franchises cover virtually all of their telephone territories. With respect to Bellsouth, Bellsouth applied for and obtained several franchises after the 1996 Telecommunications Act. The Florida Cities understand that Bellsouth obtained cable franchises from Florida franchise authorities, including:

- Broward County
- Davie
- Miami Dade County
- Miami Lakes
- Orange County
- Orlando
- Pembroke Pines
- St. Johns County

Combined these areas comprise millions of residents and millions of households. It is the understanding of the Florida Cities that Bellsouth has not constructed the necessary facilities to be capable of providing cable service to all but a few thousand subscribers within these areas. While Bellsouth has chosen not to offer cable service to most of the households in these communities, it certainly was able to obtain franchises and has the legal authority to provide service.<sup>67</sup> Bellsouth has no applications for franchises currently pending. All of the Florida Cities are located within Bellsouth's telephone territory and would welcome cable competition from Bellsouth, or for that matter, other potential cable competitors. The franchising process is certainly not standing in the way of Bellsouth's offering of cable service.

With respect to Verizon, the Florida Cities believe that Verizon only fairly recently began applying for franchises in the six-county area surrounding the Tampa Bay that comprises its telephone service territory on the west coast of Florida. Verizon has obtained franchises from the following Florida franchise authorities:

- Bradenton

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<sup>66</sup> Only one satellite provider responded indicating an interest, but never actually submitted a proposal.

<sup>67</sup> Bellsouth markets DBS service through DirecTV to its telephone customers and residents throughout Florida.

Hillsborough County  
Manatee County  
Temple Terrace

Combined these areas also represent millions of residents. Verizon has several applications for franchises still pending. The Florida Cities would welcome cable competition from Verizon. However, because Verizon does not provide telephone service in any of the Florida Cities, Verizon has indicated it has no intention of offering competing cable service in these areas.

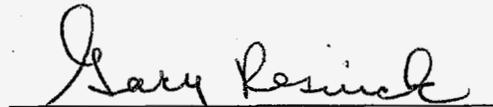
As demonstrated above, the Florida Cities, like all local franchise authorities, would welcome applications from potential cable competitors. The Florida Cities in fact would do what they could, within the bounds of the law, to achieve competition. Competitors, including, but not limited to local exchange carriers, have obtained franchises and are fully able to compete with incumbent cable operators throughout much of Florida. There is no need, therefore, for the Commission to alter the franchising process for potential competitors to encourage competition.

#### **V. Conclusion**

Level playing field statutes, such as Florida's, are legal and are not a barrier to competitive franchise operators. Not only should the Commission not intervene with such statutes, but it has no authority to do so. The Commission has no authority under the Cable Act to issue specific guidelines or rules with respect to competitive franchises or to act as a forum for complaints from competitive franchisees. Finally, as a matter of public policy, the Commission should support the current local franchising process for new competitive cable entrants. There is simply no need for new Commission rules or guidelines for competitive cable entrants. The current franchising process and requirements have proven to be necessary and beneficial for local communities and residents and encourages and achieves competition.

Respectfully submitted,

**Village of Bal Harbour, Florida  
City of Coconut Creek, Florida  
City of Coral Gables, Florida  
City of Miramar, Florida  
Town of Golden Beach, Florida  
City of Homestead, Florida  
Islamorada Village of Islands, Florida  
City of Weston, Florida, and  
City of Winter Haven, Florida**



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