

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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Federal Communications Commission
Office of Secretary

In the Matter of

Implementation of Section 621(a)(1) of the
Cable Communications Policy Act of 1984
as amended by the Cable Television
Consumer Protection and Competition Act
of 1992

MB Docket No. 05-311

DOCKET FILE COPY ORIGINAL

**COMMENTS OF ANNE ARUNDEL COUNTY, CARROLL COUNTY, CHARLES
COUNTY, HOWARD COUNTY, AND MONTGOMERY COUNTY**

Nicholas P. Miller
Frederick E. Ellrod III
Gerard Lavery Lederer
Miller & Van Eaton, P.L.L.C.
1155 Connecticut Avenue, N.W. #1000
Washington, D.C. 20036-4306
202-785-0600

Counsel for Anne Arundel County, Carroll County,
Charles County, Howard County, and Montgomery
County

February 13, 2006

No. of Copies rec'd 0+4
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SUMMARY

Anne Arundel County, Carroll County, Charles County, Howard County, and Montgomery County (the “Maryland Counties”) oppose the Commission’s proposal to create an unnecessary “third tier” of regulation of the local franchising process.

Local franchising has produced great benefits for local communities in Maryland. Local needs and interests differ, and effectively addressing those needs and interests requires local franchising, not a cookie-cutter template imposed from above. And local franchising does not impede, but rather enables, cable competition in Maryland.

Anne Arundel County is served by two franchisees, Millennium and Comcast, and is currently in negotiations with Verizon. Approximately 65% of the County’s cable subscribers, located in the central part of the County, have had a choice of two wireline cable providers for the last fifteen to twenty years. The County’s cable-related needs and interests have evolved over time. Thus, the 1990 Millennium agreement provided (among other things) for a gradual increase in the franchise fee from 3% to 5% and for a gradual build-out over seven years to increasingly low-density areas, along with a system upgrade; emergency alert capability in aid of public safety; public, educational, and governmental (“PEG”) access channels and capital support. The Comcast franchise, renewed in 2000, mirrored many of these obligations, but with adjustments due to the passage of time and changing conditions. These two franchises have provided County residents with PEG programming that includes extensive telecourses from Anne Arundel Community College, as well as programming from the elementary and secondary

schools, and an all-fiber institutional network (“I-Net”) that allows the County government to provide new services to its residents and to serve with greater efficiency.

Carroll County’s 2000 franchise agreement provides for a five percent franchise fee, use of the emergency alert system, bonding and other enforcement measures. An upgrade was not necessary, but the County reserved the right to require the system’s capabilities to meet the state of the art during the latter half of the term. The County uses four access channels, but includes a number of separately incorporated municipalities, hence a fifth channel is used for programming by these municipalities. Given the geographic dispersion of the County, the franchisee provides for a two-part I-Net: dark fiber connecting six key locations, and cable modem connectivity to 86 other locations.

Until relatively recently, **Charles County** did not see a need to franchise its cable operator. In light of the potential for improving service, advancing economic development, and increasing revenue, however, the County implemented a franchise agreement with Comcast in 2002. The Charles County agreement incorporates system performance requirements; four PEG channels, plus two digital access channels for training purposes; and a dark fiber I-Net connecting educational and governmental facilities. PEG and the I-Net are supported by capital grants amounting to one percent of Comcast’s gross revenues. Upstream carriage for PEG is handled over the I-Net. Franchise fees (at five percent, § 5(a)) and PEG grants were phased in during 2003 to avoid “rate shock.” The PEG and I-Net requirements provide numerous benefits for schools, public safety, network and facility management, and in-service training.

Howard County has recently reached an agreement with Verizon in addition to the franchise of its incumbent cable operator Comcast. The terms include a gradual

buildout schedule, emergency alert capabilities, and a PEG grant of \$0.20 per subscriber per month. Howard County's relatively lower requirements, particularly in the area of PEG support, exemplify the variability in local needs and interests across communities as well as over time.

Montgomery County is served by two cable operators, Comcast and RCN. The Montgomery County-Comcast agreement provided for a four-year rebuild of the then-existing system to modern standards and potential further improvement. Consumer protection is a major focus of cable oversight in the County, reflected both in the franchise provisions themselves and in the County's dedicated procedures for resolving cable complaints. The franchise agreement provides the County with thirteen PEG channels, plus a digital set-aside for PEG purposes; a series of capital grants; upstream transmission links; and institutional network assets that the County has combined with assets from other sources to form its mission-critical FiberNet.

These examples show that local franchising is of vital importance to local communities, and also that in many of these areas, communities want different things. They show that local franchising drives, rather than hindering, the expansion of advanced cable networks. Among the additional benefits due to local franchising are the effective enforcement of customer service standards and other key requirements; PEG channel capacity, capital grants, and upstream transmission links; cable drops and service to public buildings; institutional networks; franchise fees; and emergency alert capability.

The facts in these five communities show that local franchising enables and encourages competitive entry. The reluctance of potential cable operators to enter the market is a function, not of the franchise process, but of economic incentives. Local

governments are not the villains of this piece. They are more than willing to play ball; but they have nothing to swing at until some prospective cable operator is willing to make a pitch.

Any attempt to undermine local cable franchising authority in Maryland would conflict with state law. The NPRM asked for comment on the breadth of the Commission's authority pursuant to federal law, but failed to raise the issue of local property rights under state law and the constitutional protection of those rights. In Maryland, the right to franchise occupants of a community's public rights-of-way is not only protected in the state's constitution, but is to a large degree insulated from state preemption, let alone federal action as contemplated by the Commission.

Under Maryland law, a local franchise is a statutory predicate to the PSC's issuing a certificate of public convenience and necessity to any utility. State law in Maryland thus gives local communities – particularly home rule or charter counties – franchising authority independent of federal law. Maryland law subjects incumbent telephone companies, like other right-of-way users, to the general franchising authority of Maryland counties. Attempted interference by the Commission with the long-settled state law governing how a Maryland county grants permission to a private party to use the public rights-of-way would delay, not speed, competitive entry.

Congress has given the Commission no authority over local cable franchising, as pointed out in NATOA's comments. In the Cable Act, Congress placed primary responsibility for key elements of cable oversight at the local level. A franchising authority, not the FCC, is best positioned to “establish franchise procedures and standards which encourage the growth and development of cable systems and which

assure that cable systems are responsive to the needs and interests of the local community” (47 U.S.C. § 521(2)). Congress did limit local authority in specific areas, but oversight of franchising is not one of those areas. Contrary to the Commission’s suggestion, Section 706 of the Communications Act has no role to play in the franchising process. The Commission has no authority to establish time periods for franchising, and Section 617 (transfer) is in any case not a reasonable model for the grant of an initial franchise. A new franchisee might be granted a clone of the *existing* franchise in short order, but not a franchise based on the kinds of novel and unreasonable demands made by Verizon. Cable applicants’ own internal bureaucratic machinery, such as Verizon’s “two-tier” negotiating process, creates substantial delay. A community may require a cable franchise for entities that already have other franchises authorizing use of public rights-of-way for other purposes, because someone who holds a limited right to use someone’s property *for defined purposes* cannot bootstrap that right into an expanded right to use the property for *all* purposes without the permission of the property owner – particularly with respect to franchises, which are to be narrowly construed. The history of Section 541(a)(1) litigation shows local governments’ reasonableness in franchising decisions. Local governments are entitled to substantial deference when acting within their legislative capacity in granting franchises. The Commission’s contemplated preemption of local governmental powers offends the U.S. Constitution as well as the Maryland Constitution. Moreover, the Commission lacks the legal authority, the experience, and the professional staff to assume the task of arbitrating cable franchise negotiations.

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I. INTRODUCTION

Anne Arundel County, Carroll County, Charles County, Howard County, and Montgomery County (together referred to herein as the “Maryland Counties”) respectfully submit these Comments in response to the Notice of Proposed Rulemaking, FCC 05-189, released by the Commission on November 18, 2005 (“NPRM”).¹

In the NPRM, the Commission proposes to create an unnecessary “third tier”² of regulation of the local franchising process, over and above the extensive provisions of the Cable

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

² *Cf. TCI Cablevision of Oakland County, Inc., Petition for Declaratory Ruling, Preemption and Other Relief Pursuant to 47 U.S.C. §§ 541, 544(e), and 253*, FCC 97-331, 12 FCC Rcd 21,396 at ¶ 105 (1997).

Communications Policy Act of 1984, as amended, 47 U.S.C. § 521 *ff.* ("Cable Act"), and the additional provisions of state laws. For the reasons discussed in these Comments, the Commission should refrain from any attempt to impose a new layer of federal regulation on a process that has worked well to encourage the deployment of advanced communications networks and at the same time to meet local needs and interests. Whatever may account for the fact that in the ten years since the Telecommunications Act of 1996 the Bell companies have only now begun to enter the multichannel video market, it is not local franchising that is at fault.

The Maryland Counties file these comments to point out that local franchising has produced great benefits for Maryland communities. This local franchising process is rooted in state law. Maryland law gives local communities the rights of property owners, and potential users of that property must deal with the owner in order to use the property. The Maryland Counties remind the Commission that Congress delegated no authority to the Commission to interfere with state law in this area, and that the Constitution protects local governments' property rights in the public rights-of-way. The Constitution also protects the federal form of government, reserving to states and local governments all powers not expressly delegated to the federal government, including all authority to manage use and control disruption of local public rights-of-way. National communications policy, while important, does not preempt the Constitution and must recognize the rights of local governments, which are preserved under the Communications Act.

Specifically, the Maryland Counties welcome this opportunity to:

- Share with the Commission some of the numerous benefits local cable franchising has achieved for citizens in Maryland counties, which have demonstrated a history of fostering choice by awarding competitive franchises.

- Inform the Commission about the powerful legal and proprietary rights Maryland communities have over their rights-of-way under state law.
- Respond to questions posed by the Commission in the NPRM.

Armed with a complete and accurate factual and legal record, the Commission will be able to conclude that there is neither legal basis nor factual need for Commission action in the cable franchising arena.

II. LOCAL CABLE FRANCHISING HAS PRODUCED GREAT BENEFITS IN MARYLAND.

A very brief account of key aspects of the cable franchising process in five Maryland counties illustrates essential points about local franchising that are not reflected in the NPRM. Local franchising produces benefits for local communities. Local needs and interests differ, and effectively addressing those needs and interests requires local franchising, not a cookie-cutter template imposed from above. And local franchising has not impeded, but has actually enabled, cable competition in Maryland.

A. The Participants' Experience Shows the Diversity of Benefits Achieved By Local Franchising, Including Competitive Entry.

1. Anne Arundel County

Anne Arundel, a Maryland charter county surrounding the city of Annapolis, Maryland, is one of the few locations in the United States with a long history of head-to-head cable competition. The first franchise in the County was for the system now owned by Millennium Digital Media ("Millennium"). The original franchise was granted in 1971; it was renewed in 1990 with then-owner North Arundel CATV, Inc. A set of five other franchises originally granted to several different entities in the mid-1980s were consolidated into one system by Jones Intercable in the 1990s; that system is now owned by Comcast. The result: approximately 65%

of the County's cable subscribers, located in the central part of the County, have actually had a choice of two wireline cable providers for the last fifteen to twenty years. In the northern and southern areas, there are also locations where only one cable operator, Comcast or Millennium, offers service.

The County's cable-related needs and interests have evolved over time. This was reflected, for example, in the 1990 Millennium agreement itself, which provided for a gradual increase in the franchise fee from three percent to five percent over three years (§ 3.2), and also for a gradual build-out over seven years to increasingly low-density areas of the County (§ 4.5). That agreement also provided (§§ 4.3, 5) for a system upgrade to ensure better service for County subscribers – what might today be called “accelerated deployment of advanced communications networks.” Among other things, the franchise requires emergency alert capability in aid of public safety (§ 5.5); two public, educational, and governmental (“PEG”) access channels, plus two more if the first two were fully utilized (§ 7.2); a capital grant of \$400,000 with potential additional grants of \$800,000 and \$400,000 for PEG and institutional network (“I-Net”) support (§§ 7.3-7.4); upstream transmission from at least six PEG origination sites (§ 7.8); cable service to specified public buildings (§ 7.1(d)); bonding and other enforcement mechanisms (§§ 3.5, 8).

One crucial benefit realized from the Millennium franchise negotiation was the founding of an institutional network. The County used part of the Millennium funding described above to build the first part of this network. The Comcast 2000 agreement, discussed below, allowed the County to extend and complete the I-Net by combining the assets it realized from the two providers. The results of this fruitful combination are described below.

The County's changing needs over time are also reflected in the differences between the 1990 Millennium franchise and the Comcast franchise, renewed in 2000, which built on the 1990

foundations to bring cable communications up to date in the County. The Comcast agreement matches the Millennium franchise fee, which had by this time reached five percent (§ 3(b)). It also required an upgrade, since by this time the system Comcast had taken over from Jones was quite old (§§ 4-5). Comcast's density requirement for extending service is the same 15 homes per mile at which Millennium had by 2000 arrived. The Comcast franchise also requires emergency alert capability (§ 5(d)). The PEG channel count is now four, plus one special channel shown only in a particular area within the County, Heritage Harbour, that had long used this channel under a prior franchise covering only that area (§ 7(b)(1)-(2)). By 2000 PEG upstream transmission was being handled by the I-Net and no longer required dedicated facilities, so there is no separate provision for such facilities in the Comcast agreement. Cable service to specified public buildings is provided (§ 7(a)(2)).

Given ten years' inflation and the different sizes of the systems, Comcast's franchise agreement included a one-time capital grant of \$5 million. As noted above, the Comcast agreement also provided for I-Net facilities to complete the County's fiber ring (§ 7(f)), although, based on ten years' additional experience with Millennium and with Comcast, the I-Net requirements were made more concrete and specific. The County paid Comcast for the I-Net fiber construction using part of the PEG capital grants. Enforcement mechanisms, too, had been improved over the preceding decade (§§ 3(g), 8).

Both Comcast and Millennium are subject to common rules regarding customer service, right-of-way management, and the like, embodied in the County Code.

These two franchises have provided County residents with PEG programming that includes extensive telecourses from Anne Arundel Community College, as well as programming from the elementary and secondary schools. The government access channel gives citizens a unique ability to see into the workings of County government and participate in the democratic

process. Public access affords a public “soapbox” for citizens in the County who wish to produce and air video programming.

Moreover, the all-fiber I-Net obtained as part of the County’s compensation for the cable operators’ profitable use of County property allows the County government to provide new services to its residents and to serve with greater efficiency. This system connects 125 locations in the County, including public middle schools, high schools, vocational schools, fire stations, police stations, court buildings, detention centers and County office buildings. The uses of the Anne Arundel I-Net include computer network connections, video court proceedings, distance learning, Internet access, computer learning, remote systems operations, PEG program distribution, traffic control, video traffic monitoring, and video surveillance monitoring.

Anne Arundel County is currently in negotiations with Verizon to establish a third cable franchise in the interest of increased competition and greater opportunities for County residents to use advanced communications systems.

From Anne Arundel’s experience it is evident that Maryland counties have for many years been prepared to entertain multiple franchisees, when multiple companies wish to enter. It is clear that the County’s needs change over time, as do the technologies that meet those needs. And it is clear that the resulting relationship has benefited both the County and the cable operators.

2. Carroll County

Carroll County lies in northern Maryland, north of Montgomery County and west of Baltimore. It is a more rural county than Anne Arundel, but contains many residents with advanced communications needs. Moreover, communication among the cities and towns in Carroll County represents a greater challenge precisely because of their geographic separation. To date Carroll County’s demographics have attracted only one cable operator.

In 2000 Carroll County renewed its franchise with what was then Prestige Communications, now a part of Adelphia (and soon to be part of Comcast). The 2000 franchise agreement provides for a five percent franchise fee (§ 7.1); use of the emergency alert system (§ 2.6); bonding and other enforcement measures (§§ 4, 12). Given the state of the system at renewal, an upgrade was not required, but the County reserved the right to require the system's capabilities to meet the state of the art during the latter half of the term (§ 9.3). The operator is required to serve to a density of twenty homes per mile (§ 5.9.2). The franchise agreement makes the operator subject to the Commission's customer service rules (§ 14.8).

Carroll County uses five access channels: two for educational purposes, one governmental, one public access, as in Anne Arundel – but because Carroll County includes a number of separately incorporated municipalities, a fifth channel is used for programming by these municipalities (§ 5.1). Up to three additional channels are available if needed (§ 5.1.2). Given the geographic dispersion of the County, the franchisee provides for a two-part I-Net: dark fiber connecting six key locations, and connectivity using cable modems to 86 other locations (§ 5.6). To support access programming and the I-Net, the cable operator provided an initial capital grant of \$500,000 and funding of \$300,000 to renovate PEG facilities, plus annual grants of \$75,000 (adjusted for inflation) to support continuing PEG needs (§ 5.2.1). Upstream transmission from PEG origination sites is available from each of seven town halls to the PEG access center, and from there to the cable headend (§ 5.3). Cable service is provided to public buildings such as schools, libraries, police and fire stations (§ 5.8).

The 2000 franchise initiated the development of a healthy PEG program under the aegis of the County's Community Media Center, which has opened a studio for public use and programs the access channels. While it has proven difficult to ensure that the operator fully meets its I-Net obligations, at times bringing into play the enforcement mechanisms referred to

above, the institutional network promises to improve communications among the County and Towns at a favorable cost.

3. Charles County

Charles County is a community in southern Maryland, just south of the District on the east side of the Potomac River. While the County has long been relatively rural in character, it has recently undergone considerable development, particularly in the northern part of the County.

Until relatively recently, the County did not see a need to franchise the cable operator (currently Comcast) that had been providing cable service in the County for a number of years. In light of the potential for improving service, advancing economic development, and increasing revenue, however, the County decided to require a franchise. The County's initial franchise agreement with Comcast was completed in 2002.

An upgrade was already under way at the time the Comcast franchise was granted; thus, the franchise agreement did not need to contain an upgrade requirement. However, the Charles County agreement incorporates system performance requirements including bandwidth and node size (§ 3(a)), and the potential to require an upgrade of system capabilities after the tenth year of the fifteen-year term (§ 3(c)). Comcast must extend its system to reach a density of twenty homes per mile (§ 3(b)). Four PEG channels are required (§ 4(a)(1)), plus two digital access channels for training purposes (§ 4(b)). Charles County also obtained a dark fiber I-Net connecting educational and governmental facilities throughout the County, together with data-over-cable services to other locations through Comcast's business-oriented cable modem service (§ 4(g)). PEG and the I-Net are supported by capital grants amounting to one percent of Comcast's gross revenues (§ 4(c)); in addition, Comcast provided a one-time capital grant of \$250,000 toward the cost of an access studio (§ 4(d)). As in Anne Arundel's Comcast

agreement, upstream carriage for PEG is handled over the I-Net. Cable service is provided to schools, libraries, County offices and agencies (§ 4(e)). Franchise fees (at five percent, § 5(a)) and PEG grants were phased in during 2003 to avoid “rate shock.” Enforcement measures are provided to protect the County and its citizens against potential misbehavior by the operator (§ 6). The County Code provides for use of the Emergency Alert System, along with customer service rules, right-of-way management tools, reporting requirements, and related provisions.

Charles County’s institutional network and PEG facilities have become extremely important to the County even in their relatively short life-span to date. Because of the I-Net, the County is able to dispense with slow, costly leased T-1 lines, and yet improve its communications capabilities (including VoIP and video over IP technology, remote help desk operations, HVAC management). The County can also achieve greater uniformity of instruction for its schools, since all schools can now access all services using the I-Net: every classroom has the same capability as every other, benefiting the students at every level.. The centralization of servers that the I-Net makes possible allows for easier maintenance and deployment of upgrades. Additional remote sites not on the I-Net can be managed by extending the I-Net through the County’s wireless data network and tower microwave network. The I-Net allowed the County to become the first Southern Maryland community to install a point of presence for the statewide Net.Work.Maryland. A host of public entities, especially public safety and emergency operations agencies, can now communicate better and faster. Specifically, the I-Net enhances the County’s continuity planning and disaster recovery, since the ubiquitous network makes it possible to have government services anywhere on the I-Net when necessary.

With respect to PEG applications, existing production facilities can be leveraged to produce new programming, since material that was previously available only for internal school use can now be given wider distribution via the PEG channels. With the portable studio and the

I-Net available, video programming can be originated from any I-Net site, without need for dedicated upstream connections. The digital training channels allow closed-circuit, in-service training that efficiently uses minimal bandwidth. Government access channel telecasts and emergency overrides provide the capability for faster and more informative communication with the general public regarding public safety messages and alerts, government programs, and issues addressed at public meetings.

One particularly significant lesson of Charles County's experience is that the absence of a franchise requirement until 2002 did not attract a single overbuilder. This indicates that the development of cable competition results from the perceived attractiveness of a given market or other motivations for company decisions, and not from the franchising process. Verizon, for example, has been free since 1996 to enter the market in Charles County, but has chosen not to do so.

4. Howard County

Like Carroll County, Howard County is a partly rural northern-tier Maryland community; but its needs and interests differ from those of its neighbor to the west. The general outline of franchise requirements in Howard County can be seen in the franchise agreement recently concluded with Verizon; the benefits bargained for by the County are similar to those of incumbent cable operator Comcast.

The Howard County-Verizon agreement contains a build-out requirement to make service available to an Initial Service Area within two years after the "Service Date" (the date on which Verizon first provides service, as distinct from the effective date of the agreement, and thus a less determinate date than one would normally expect to find in a franchise agreement), and in the remainder of the County within seven years, to a density of thirty homes per mile, with various

exceptions (§ 3.1).³ Cable service is provided to public buildings such as fire stations, schools, police stations and libraries (§ 3.3). The cable system has bandwidth requirements similar to those of contemporary incumbent systems (§ 5.1). The Emergency Alert System is made available for use by the County (§ 5.4). Like Anne Arundel, Howard County requires four PEG channels (§ 6.1). The PEG/I-Net grant, however, is merely twenty cents per month per subscriber (§ 6.2.2). Verizon expects to acquire the PEG signals by interconnection with the existing operator, so there is no requirement for upstream PEG transmission (§ 6.1.3) The franchise fee is set at five percent (§ 7). Certain customer service requirements are included in the franchise agreement (§ 8). Bonding and enforcement provisions are also included (§ 13).

Howard County has chosen to establish relatively lower requirements for cable operators than some other Maryland counties, particularly in the area of PEG support.⁴ This difference reflects the variability in local needs and interests, across communities as well as over time. Howard's case also shows that Maryland counties are ready to welcome *bona fide* competitive entrants even where multiple cable providers are not already present (as they are in Anne Arundel).

5. Montgomery County

Montgomery County, a technologically sophisticated suburban community bordering the District on the northwest, was served by a series of cable providers for many years without any

³ As a general matter, Verizon's insistence on specific ways of handling build-out, and its reluctance to make firm commitments similar to those of most cable franchises, is one of the factors that has made negotiations with Verizon slower than they otherwise would have been. See p. 41 below.

⁴ In case one might be tempted to suppose that these lesser requirements caused Verizon to sign an agreement more quickly in Howard County than in other communities, it must be kept in mind that Verizon's Fairfax County agreement, with its three percent PEG grants and eighteen PEG channels, was signed before Howard's; and that, as noted above, Verizon did not seek to provide cable service in Charles County despite that jurisdiction's lack of *any* franchise requirements prior to 2002.

application for competitive entry. The most recent renewal of its franchise (currently held by Comcast) occurred in 1998. Shortly afterwards, in 1999, the County concluded a franchise agreement with a second cable company, Starpower Communications, L.L.C. (now RCN). These agreements are essentially identical, except as to build-out requirements, where the County found it necessary to take into account the limitations of RCN's available capital after the collapse of the dot-com boom around the turn of the millennium.⁵ Thus, the brief summary below will refer to the Comcast franchise.

The Montgomery County-Comcast agreement provided for a four-year rebuild of the then-existing system to modern standards (§ 6(d)-(k)) and the potential for further improvement if the performance and capabilities of the system fall behind the state of the art (§ 6(v)). It provides the County with access to the Emergency Alert System for public safety purposes (§ 6(q)); addresses right-of-way management issues and construction standards in detail (§ 5); generates a five percent franchise fee (§ 8(a)); and sets a density requirement of 15 homes per mile (§ 4(b)(1)). The franchise also contains requirements for non-discrimination in employment, training for employees, and procurement from minority, female, and disabled-owned businesses (§ 10). The County Code also covers customer service standards, along with right-of-way management provisions, enforcement mechanisms, and more.

Consumer protection is a major focus of cable oversight in the County. The County's cable office conducts weekly scheduled conference calls with the cable operators to discuss recurring issues and trends. The County Council also holds quarterly meetings with the cable operators to discuss customer service, construction, and other cable-related issues. In addition, the cable office frequently receives calls asking for clarification of particular issues after the

⁵ The County accordingly amended the 1999 Starpower franchise in 2002 to adjust the build-out requirements.

subscriber has spoken with a cable company customer service representative. Such issues include, but are not limited to, the buy-through provisions of the Cable Act for premium channels. Many subscribers that contact the County's office are under the impression that a higher tier of service is needed in order to have access to premium channels. The County is in a position to explain the rules, describe what is and is not regulated, and advise the customer on what can be done, all in response to a citizen's specific question. (Obviously, no centralized office such as the Commission could take over this function nationwide.)

Customer service provisions are set forth in the franchise agreement (§ 9), as are bonding and enforcement measures (§ 14); but these specific provisions comprise only a small part of the County's program for resolving cable complaints. The cable office has one position dedicated to handling all complaints regarding the two cable providers in Montgomery County. In 2005, the County received over 2254 complaints, and filed 2161 formal complaints with the two cable operators. The County's cable office directly secured \$93,871.65 in credits and refunds to current and former subscribers for complaints filed in 2005. The County believes that much of this money would not have been credited or refunded without this assistance.

The County's cable office sends out monthly surveys to complainants who have received closure letters from their cable companies. These surveys average a 33% return rate with a 96% positive feedback ratio. This serves as a check and balance for complaint issues. On average, 10% of returned surveys report that the issue has not been resolved. Those unresolved cases are then reported back to the cable provider. 98% of all returned surveys indicate the subscriber would use the County's service again should the need arise.

Montgomery County has put in place an additional procedure for complaints that remain unresolved for 30 days. These complainants may request their issue be heard before the Cable Compliance Commission. The Commission is composed of appointed County residents who

volunteer their time to listen to both the complainant's issue and the cable provider's defense. The Commission has authority to award damages up to \$1,000. In many cases, the cable provider will reach an agreement with the complainant prior to the day of a hearing before the Commission.

The franchise agreement provides the County with thirteen PEG channels (§ 7(a)(1)), plus a digital set-aside for PEG purposes (§ 7(a)(3)). The franchisee provides capital grants of \$2 million in the first year, \$1.2 million in the second year, and \$200,000 per year, adjusted for inflation, thereafter (§ 7(b)(1)). Upstream transmission links to bring PEG programming to the headend are required in twelve County locations (§ 7(c), Exhibit E). The franchisee provides cable service to sites including educational institutions, nonprofit health care institutions, community centers and other municipal buildings (§ 7(g)).

Montgomery County has made extensive use of its institutional network for many years. The County government depends upon this network for crucial functions. Today's FiberNet has been built up out of assets from a number of sources, including the current Comcast franchise, a monetary settlement with a previous cable operator, and the County's own funding. The current Comcast franchise agreement provides an annual capital grant of \$1.2 million for I-Net purposes, plus a grant of \$1.25 million in each of the first two years to help fund I-Net electronics, plus dark fiber installed during the company's system upgrade (§ 7(h), (k)).

These networks allow the County flexibility in dealing with emergency situations, such as September 11 and the sniper incident a few years ago, as well as more mundane traffic and weather-related emergencies. The County's police and fire forces use the FiberNet for daily business and training. The courts use it for arraignments. The County's PEG channels provide coverage of local events, staff training, Council sessions, Town Hall meetings, and press conferences. They allow quick and accessible dissemination of information concerning

government programs and services, Board of Education meetings, classroom support, and instructional programming. Moreover, they provide a venue in which citizens can train to produce and air their own programs. The County's thirteen PEG channels produce award-winning programs. They make possible local programming and media opportunities that are not available through other television venues.

In Montgomery County, then, the Commission may see a community that has paid close attention to the development of cable and taken steps to encourage that development. This active role has not discouraged competition. On the contrary, the County is currently served by two cable operators, and would readily agree at once to have Verizon also provide service under similar terms and conditions; dealing with Verizon's special demands and the company's institutional rigidity, however, may render such an agreement more difficult than it would be with a more flexible and reasonable provider.⁶

B. The Franchise Benefits Needed In Each Community Depend On That Community's Individual Characteristics.

The above sampling of franchise experience from a selection of Maryland counties establishes two facts about local franchising. First, it is of vital importance to local communities. Any attempt to eliminate local cable franchising would cause these communities great harm. Merely reviewing some of the general categories of franchise terms, as in the brief comments below – and this is not an exhaustive list – makes clear the range of benefits that flow to cities and counties from the franchise process. But, second, it also shows that in many of these areas, communities want different things. When they are permitted to bargain for them case by case (as a free market requires), they end up with different results. The diversity of the resulting franchises shows why it would be improper (and inefficient) to impose the iron hand of federal

⁶ See p. 41 below.

uniformity on the franchising process. The local franchise examples above are similar in their importance; but part of their importance lies in their differences.

1. Accelerated Deployment of Advanced Networks

Opponents of local franchising like to portray themselves as fearless⁷ builders of advanced networks, and local communities as clueless Luddites standing in the way of progress. For this reason the Maryland Counties must underline a crucial fact: *Local franchising has always driven the expansion of advanced cable networks.* Local communities have not impeded the deployment of broadband. Rather, they have always pushed cable operators to commit to faster, broader deployment through franchise agreements. Most of the franchises outlined above include upgrade provisions, either as specific requirements at the start, or in the form of a right to demand state-of-the-art systems later if the operators fall behind. This shows the communities' commitment to *advanced* networks. And every franchise contains requirements that cable operators extend service to as low a density as possible. This shows the communities' commitment to extending the *deployment* of such networks. In recent years, as the services offered by cable operators have become more attractive to business customers, local franchises have also sought to ensure that business customers are served.⁸ Moreover, the actual results of this local franchising initiative show that it has worked: cable networks have developed far further in the last twenty-five years than the public switched telephone network (largely

⁷ The imaginary nature of this self-portrayal is evident both from the current Bells' ten-year wait (since the 1996 Act) to take any steps at all to provide broadband video, and from the remarkable array of bailout provisions and escape clauses in the typical Verizon franchise agreement. (The one Bell company that did move aggressively into cable, Ameritech, was acquired by SBC (now AT&T) – which immediately stopped the grand experiment and sold off the telco cable systems.) Indeed, the Bells' most marked characteristic in this venture appears to be fear – which is one reason that relying on these companies alone to lead the nation to the promised land of competition would be unwise.

⁸ See, e.g., § 4(a) of the Montgomery County-Comcast franchise agreement.

unaffected by local franchising) did in the past century. If the Commission is serious about wishing to promote the deployment of advanced networks, it should welcome the involvement of local governments.

2. Customer Service

Largely ignored in the discussion of fees, PEG, I-Nets and rights-of-way has been the critical role local governments have played in providing consumer protection. While the Commission has adopted minimum customer service standards (which have not been revisited since 1992), Congress preserved the ability of a local government to set more stringent customer service standards, where necessary, and to enforce those standards along with the Commission's. 47 U.S.C. § 552.⁹ Moreover, the contractual relationship of a franchise agreement, together with any ordinance-based mechanisms available in a given community, have provided the indispensable mechanisms that allow enforcement of these standards. The franchises outlined above approach these issues in different ways, depending on the problems that have arisen in each community; but each reflects the principle (well-grounded in experience) that cable operators will take advantage of customers unless they are aware of adverse consequences from doing so.

The Commission is not going to take over the job of dealing with customer complaints nationwide. It must not stand in the way of those who can.

3. Enforcement Methods

As noted specifically with respect to customer service, it is essential for local communities to have ways to ensure that cable operators honor their commitments and perform

⁹ 47 U.S.C. § 552 (a) provides: "A franchising authority may establish and enforce— (1) customer service requirements of the cable operator; and (2) construction schedules and other construction-related requirements, including construction-related performance requirements, of the cable operator."