up to applicable standards (including the FCC's). Each of the franchises outlined above contains some such methods of enforcement, though these may differ depending on what kinds of problems each community has faced and what legal powers are available to it (for example, to a charter county as opposed to a commissioner county[10]). An arrangement that deprived local communities of the power to enforce the applicable requirements would be a sham, since the requirements would be meaningless to a company that could violate them with impunity.

4. Public, Educational and Governmental Channel Capacity

The NPRM appears to assume at one point that local governments' interest in franchising is limited to right-of-way management and franchise fees.[11] The franchises outlined above make clear, however, that channel capacity and capital support for PEG channels are essential terms for a franchise.[12] A list of significant beneficiaries of the current PEG system would include local churches, civic groups, elder facilities, youth programs, and public safety organizations. But the number of PEG channels negotiated, and the kind of support, varies considerably, depending on the needs and interests of the individual community.

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[10] *See* Appendix A for an explanation of the legal categories of counties in Maryland.

[11] The Commission defines "the primary justification for a cable franchise" as a "locality's need to regulate and receive compensation for the use of public rights of way." NPRM at ¶ 22. While the Maryland Counties applaud the Commission's recognition of the importance of right-of-way management and compensation, there are also other important things involved in local cable franchising.

[12] As the Commission is no doubt aware, educational access channels are used by local educational institutions for the presentation of classes and educational information. Educational channels are also used for communications among schools, students, parents and the educational community. Government access channels present local, regional and state government information (typically produced by the local franchising authority) and include city/county council and committee meetings or hearings. Programs often highlight the governmental and public facilities, services or activities within a particular community. Public access channels provide a forum to give voice to the public within certain guidelines established by the access channel manager.

Congress specifically allocated to local franchising authorities the authority to require cable operators to provide PEG channel capacity and PEG capital support, including institutional networks. *See* 47 U.S.C. § 541(a)(2), (3) and (4).[13] The Commission has no authority to reverse this congressional mandate. Nor does the Commission have the capability to take over this function and achieve each local community's proper balance of PEG benefits.

5. Capital Grants for PEG

As the above examples show, individual communities may choose to receive greater or less PEG capital support (or none) for a variety of individual reasons: for example, because they prefer to negotiate other benefits from their contractual partners instead; because they believe that local consumers would bear the additional cost to the cable company; or because they prefer to find other sources of funding for PEG equipment and facilities. In these examples alone, PEG support amounts vary from Howard County's $0.20 per subscriber to Anne Arundel's $5 million lump-sum grant from Comcast – and even the comparison of the total amounts generated by these two approaches depends on how subscribership develops over the life of the franchise. Thus, no "one size fits all" approach is viable.

Moreover, those communities receiving capital support may obtain capital funding in different ways. Some, such as Charles County, receive payments over the life of the franchise.

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[13] As compensation for private use of the public rights-of-way, local governments negotiate financial and in-kind compensation from cable operators that is appropriate to the individual community, which may include PEG capacity, facilities and support. As part of these negotiations, cable companies and local governments determine who will provide PEG studios, equipment and staffing. Not all cable operators provide the same number of PEG channels or the same amount or kind of support, and not all communities need the same resources of each sort.

Congress affirmed this practice in the 1984 Cable Act when it stated that a franchising authority may "require adequate assurance that the cable operator will provide adequate public, educational, and governmental access channel capacity, facilities, or financial support." (47 U.S.C. § 541). Congress has twice amended § 541, first in 1992 and again in 1996, but did not alter or limit this right.

Others, particularly where PEG operations are just starting up, may prefer to negotiate an up-front lump sum payment to purchase the starting equipment required to make PEG programming possible (such as the specific initial grant in Charles County). Some (as in Anne Arundel County) are willing to take a lump-sum payment and deploy it over the life of a franchise. Again, no standardized approach fits all cases.

6. Upstream Transmission for PEG Programming

In addition to channel capacity and capital support, PEG programmers need a way to get their programming to the cable operator's headend so that it can be carried on the access channels. For this purpose high-capacity connections between a community's access studios or other PEG program origination sites, such as a county council or school board's chamber, and the cable operator's headend are vital to making PEG work. The variety of arrangements – dedicated lines versus use of a general-purpose I-Net, for example – and the variety of sites in the examples above makes clear that local franchise negotiations are necessary to meet local needs.

7. Cable Drops and Service

Another form of in-kind benefit obtained through the franchising process consists of connections (drops) and service to public, educational, and governmental facilities. Such cable connections can provide needed services to schools, police departments, and the like, and aid in the creation of an interconnected community.

8. Institutional Network (I-Net)

Local governments negotiate I-Nets as part of the compensation they receive from cable operators. Institutional networks are high-speed, typically fiber-optic, wide-area communications networks that connect government agencies, schools and similar entities. I-Nets can serve as secure and dedicated public safety networks, which are interconnected with but

operationally separate from commercial cable and telephone systems. They can thus play an invaluable role in homeland security. (For example, when both the telephone network and the public Internet became unusable on September 11, 2001 due to traffic overloads, I-Nets remained operational.)

A sizable part of a cable franchise negotiation involves determination by cable companies and local governments as to who will construct and manage an I-Net and whether any compensation to the cable operator is required. The range of possible solutions is considerable. Each deal is unique. Not all cable operators have agreed to construct I-Nets, and not all communities have requested them. The Cable Act, however, recognizes local authority to require construction of I-Nets. *See* 47 U.S.C.§ 544(b) (right to require cable-related facilities and equipment), and 47 U.S.C. § 531(b) (right to require dedication of capacity on I-Nets).[14]

9. Franchise Fees

Franchise fees represent part of the compensation a community receives in exchange for a cable operator's use and occupation of public property – the public rights-of-way. Thus, a franchise fee is in the nature of rent. A community's right to charge a franchise fee stems from its basic rights over its own property. These rights do not arise from federal law, but predate the Cable Act.

While franchise fees are often used as a source of funding for a community's cable-related activities or administration of a cable franchise, there is nothing that requires franchise fees to be used for these purposes. In fact, 47 U.S.C. § 542(h)(2)(i) makes clear that no federal agency can regulate how a community chooses to use these funds. Thus, franchise fees can be contributed to a local government's general revenues, dedicated to PEG support or cable

[14] In addition, 47 U.S.C. § 541 specifically exempts I-Net requirements from the general prohibition on requiring telecommunications services in cable franchises.

oversight, or used for any other function, depending on the needs of the community – just as with any other income from the community's assets.

While the five communities discussed above currently receive franchise fees at the five percent federal cap, there are some communities that choose to receive a lower franchise fee and to obtain other franchise benefits instead.[15] This is a local option based on local needs and interests.

10. Emergency Alert Systems

Local governments may use the federally mandated Emergency Alert System (EAS). They may also use a similar but separate system – what might be called a local alert system ("LAS") – to disseminate local emergency alerts over a cable system. In each case the ability to use the cable system to spread vital emergency information can be a significant benefit to the community. Both types of solutions can be required by local governments as part of a cable franchise. But the different situations facing individual communities mean that local communities must retain the flexibility here to negotiate what they need.

11. Diverse Needs and Interests Make A Federal Cookie-Cutter System Unworkable.

The above examples illustrate some of the variety in needs and interests among communities: differences in channel capacity, PEG capital grants, upstream connections, upgrade requirements. But these brief summaries in fact understate the variety of franchise deals. There are differences in the details of many provisions that have merely been mentioned above, such as construction standards and customer service rules. These different franchise agreements reflect some of the differences among the counties involved: differences in size, in topography, in demographics, in location, in the priorities they attach to their needs and interests.

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[15] Alexandria, Virginia, is one example.

C. Franchising Enables Competitive Entry.

In the history of cable to date, "overbuilds" (construction of a second cable system where an incumbent cable operator is already in place) have been relatively rare – not because local governments do not seek competition, but because few companies have ever been willing to enter a market without assurance of a local *de facto* monopoly. (One of the most frequent questions raised by local elected officials facing a cable monopolist is, "Can we somehow bring in competition?" – and the answer is, "You can invite them, but you can't make them come.") The participating Maryland counties, however, provide a useful laboratory showing that local franchising is not only compatible with, but favorable to, competitive entry.

Two of the five communities discussed above – Anne Arundel and Montgomery Counties – already have two cable operators with overlapping service areas. But their situations (and hence the ways in which competitive entry can best be encouraged) differ considerably. Anne Arundel has had competing cable operators for years; its principal problem has been to ensure that the two competitors do not collapse into one through a buyout (as has been proposed by the companies more than once in the last fifteen years). Montgomery County granted a second franchise to RCN, which promptly needed to retrench due to a nationwide shortage of venture capital. Each would be happy to grant Verizon the same franchise terms, but is willing to work with Verizon in an attempt to accommodate that company's unique demands. Howard County, occupied by a single cable company up to now, has already reached such a solution.

It is no accident that the other participating counties, Carroll and Charles, lie further from the area's metropolitan centers and thus are less desirable markets for an overbuilder to enter. The reason they do not have second franchises is that *no one has asked for one*. There is thus no magic bullet that would immediately bring competition to these communities. A federal attempt to manipulate the franchising process will do no good whatsoever until some company is willing

to build.[16] This is why the Commission's NPRM is looking in the wrong place. 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.

None of these communities has ever denied a cable franchise to an overbuilder. Each of the existing overbuilders was able to obtain a franchise through the normal negotiation process. There is no reason to suppose that Verizon is unable to do what RCN or Comcast succeeded in doing – if Verizon is willing to make a reasonable deal.

The Maryland counties thus provide hard evidence that the local franchising process does not delay competitive entry. On the contrary, competitive entry has occurred, and is occurring, precisely by way of the franchising process. Local franchising can continue to achieve the benefits described above, including deployment of advanced systems – benefits which will themselves continue to change in character as technology and the marketplace (and the makeup and priorities of the counties themselves) do so. The imperative for the Commission here truly is deregulatory: Let the Commission stay out of the way of the market – here, the negotiations between local franchising authorities and users of their public rights-of-way – if it wishes to obtain the best results.

III. ANY ATTEMPT TO UNDERMINE LOCAL CABLE FRANCHISING AUTHORITY IN MARYLAND WOULD CONFLICT WITH STATE LAW.

The NPRM asked commenters to address the breadth of the Commission's authority pursuant to federal law. However, it failed to raise the much more crucial issue of local property rights under state law and the constitutional protection of those rights. In this section, the

[16] As shown throughout these Comments, such a federal attempt would do no good in any case. Competitive entry will occur when competing companies decide it is profitable to enter the market, and not before.

Maryland Counties supplement the general legal arguments provided by the NATOA Comments to provide, as an example, information on the fundamental legal underpinnings of local franchising authority in the Maryland constitution and statutory law. In Maryland, the right to franchise occupants of every 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. Any attempt by the Commission to manipulate the local franchising process for the benefit of the Bells would collide directly with this state law structure.

A. Legal Authority Over Public Rights-of-Way In Maryland

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.[17] The Maryland Public Service Commission, much like the FCC, has oversight over communications providers in the state, but is not empowered to grant a franchise, as the grant of a franchise is a legislative function which may be exercised only by the legislature or by a municipal corporation to which the power has been delegated. *See Charles County Sanitary District v. Charles Utilities, Inc.*, 267 Md. 590, 598, 298 A.2d 419, 425(1973); *cf. West v. Maryland Gas Xmission Corp.* 162 Md. 298, 303, 159 Atl. 758, 763 (1932); Md. Const. Act. XI-A, § 2; Md. Annot. Code, Art. 25A, § 5 (1957), as

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[17] Laws of Maryland 1910, ch. 180, Section 26, now Public Utility Companies, Section 5-201. This section has been recodified and amended to be Section 5-201 of the Public Utility Companies Article, by Chapter 8, section 2, Acts 1988 to read as follows:

Section 5-201. Franchises.

* * *

(b) Documents required. -- A public service company may not exercise a franchise unless it files with the Commission : (1) a certified copy of its charter; and (2) a statement by its president and secretary, signed under oath, that the appropriate local authorities have provided the required consent for the exercise of the franchise.

amended. *Cambridge v. Eastern Shore Pub. Svc. Co.*, 192 Md. 333, 339, 64 A.2d 151, 154 (1949).

Under Maryland law a franchise involves a grant of authority to an individual specially, and not to the public generally, to use public rights-of-way in a fashion different from the public's use. *See West v. Maryland Gas Transmission Corp.*, 162 Md. 298, 311, 159 Atl. 758, 763 (1932). As the *West* court explained, a member of the public may temporarily occupy a portion of public road while driving down it; only a franchisee may occupy a portion of the road more permanently.

In 1915, the Maryland Constitution was amended and ratified by the voters of the state to provide for home-rule counties. Article XI-A gave counties the option of adopting a charter form of local government. In 1918, the General Assembly enacted the Express Powers Act, which defined the scope of the legislative powers that charter counties were granted by the State. *See* Laws of Maryland 1918, ch. 456.

Once a Maryland county adopts a charter form of government it may exercise all the powers given it by the state legislature as set forth in the Express Powers Act, Article 25A, Section 5, of the Annotated Code of Maryland 1957, as amended. Section 5(B) of Article 25A of the Express Powers Act grants to a home rule county the *power to franchise* for the protection of the public rights-of-way *and to lease county property*, as follows:

> (B) County Property and Franchises
> To provide for the protection of the county property; ... to grant any franchise or right to use the same, or any right or franchise in relation to any highway, street, road, lanes, alley or bridge; ... to provide for the leasing as lessor ... or to any person, any property belonging to the county or any agency thereof, in furtherance of the public purposes of such county or agency, upon such terms and compensation as said county may deem proper. ...

State law in Maryland thus gives local communities – particularly home rule or charter counties – franchising authority independent of federal law.

B. Local Franchise Authority Predates the 1915 Constitution

Even before adopting a home-rule structure, many Maryland counties had responsibility for taking care of the public roads, as recognized in state legislation. Montgomery County and Prince George's County provide examples of the state's delegation of such authority.

The 1904 Laws of Maryland, Ch. 591, Article 17, Code of Public Local Laws, Section 279, provided that matters affecting Prince George's County public roads were under the control of the Board of County Road Commissioners. Section 285 further provided that the Board of County Road Commissioners was to be considered the agent of the Board of County Commissioners and *that title to all public roads vested in the County Commissioners of Prince George's County.*[18]

Montgomery County was empowered by the Maryland General Assembly in 1910 to exercise "general control and supervision" of "all matters pertaining to and affecting the public highways . . . of the [County]," and has specific authority to grant franchise rights "in relation to

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[18] Verizon's original charter provided that the company would obtain permission before moving onto any county property, consistent with this franchise principle. "That the said body corporate shall have the right, for the purpose of its business as aforesaid, to transmit or to provide for the purpose of its business as aforesaid, to transmit or to provide for the transmission of its electric currents or effects, either above or below ground, from Leonardtown to Charlotte Hall, in St. Mary's County, and through the State of Maryland and elsewhere, and for said purposes to erect poles and string wires and to construct and operate above ground telephone systems, with all the usual appurtenances, or without wires or by other improved means, with whatever form of equipment may be necessary or suitable; to cross navigable rivers or other streams by sunken cables or overhead construction provided that navigation is not thereby interfered with; and further, when necessary or desirable, the said corporation shall have the right to lay down and maintain an underground telephone system, with all the necessary conduits, ducts and mechanical and electrical devices, appliances and appurtenances pertaining thereunto and necessary, useful and proper for the carrying on and operation of the business of said corporation as aforesaid; provided, further, that before using the public or county roads the assent of such use by the Board of County Commissioners must be first had and obtained; and provided, further, *that before using any of the lanes, alleys and streets of any incorporated town or municipality the assent of the authorities of said town or municipality must be first had and obtained*" (emphasis added). Laws of Maryland, 1904 Ch. 591, Article 17, Section 285, Code of Public Local Laws.

any highway, avenue, street, lane or alley, either on, above or below the surface of the same . . .," in return "for such money compensation as it shall upon inquiry determine proper...."[19] Pursuant to this authority, Montgomery County exercises control and supervision over all users of its rights-of-way under Chapter 49 of the Montgomery County Code (the "Right-of-Way Ordinance"). More specifically, the County's authority to require that users of its rights-of-way obtain a franchise and pay compensation to the County has been codified in sections 49-11 to 49-15 of the Right-of-Way Ordinance. Montgomery County Code, ch. 49, §§ 49-11 – 49-15.[20] The County's franchising authority, as set forth in Chapter 49, is not directed to telecommunications service providers specifically. Rather, it reaches all entities that seek to use the rights-of-way, including other utility companies. County Code § 49-11, 49-12.[21]

Attached as Appendix A to these Comments is a summary of the different forms taken by county government in Maryland and the status of each of the counties participating in this filing.

C. Maryland Counties are Entitled to Charge a Telephone Company Rent for a Company's Use of the Public Rights-of-Way.

It is frequently suggested by incumbent telephone companies that they are above such laws – that local franchising authorities have no power over them. On the contrary, Maryland law subjects incumbent telephone companies, like other right-of-way users, to the general franchising authority of Maryland counties.

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[19] Laws of Maryland 1910, ch. 484, sections 177H, 177V, 177W, approved April 11, 1910. Reflecting the County's subsequent charter, these sections have been codified in Chapter 49 of the County's Code.

[20] *See* Laws of Maryland 1910, *supra* note 3, at Section 177W, parts of which are now carried forward as Sections 49-11 and 49-12 of the County Code.

[21] The Maryland Court of Appeals has recognized that Montgomery County has "full and complete jurisdiction and control over its streets and roads." *County Council v. Lee*, 148 A.2d 568 (Md. 1959); *cf. Mayor of Baltimore v. C&P Telco*, 120 Atl. 229, 231 (Md. 1923) (to the same effect as to Baltimore).

To take Prince George's County as an example: the Southern Maryland Telephone Company was incorporated by the General Assembly of Maryland by 1904 Laws of Maryland, Ch. 353. Section 4 of the company's charter provides that the company must first obtain the consent of the Board of County Commissioners before using the "public or county roads" to provide its telephone services. Statutes antedating Verizon's franchise grant vest title to a county's roads in the County Commissioners as a corporate entity.[22] Courts have held where a county is the owner of the fee, the incumbent telephone company's rights under Maryland law "are . . . nugatory and inoperative" against the County and "subordinate to the property rights of the [county as] owner." *C&P Telco v. MacKenzie*, 74 Md. 36, 31 Atl. 690, 693, 28 Am. St. Rep. 219 (1891).

In particular, a county such as Montgomery or Prince George's can require compensation from a telephone company using its public rights-of-way. Maryland courts recognize and validate this conclusion: the right to compensation exists even where the grant of access to the public property is silent as to compensation. The Maryland Act of 1884, like the Federal Post Roads Act, does not immunize the telephone company from an obligation to compensate the property owner (here the County) for the Company's use of property.

Five decisions that make this point occurred in the Maryland Court of Appeals between 1894 and 1923.[23] These cases are best summarized by the following excerpt. In 1919 the Maryland Court of Appeals observed, "it seems to be well settled . . . that Acts 1868, c. 471,

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[22] *See, e.g.*, for Prince George's County, 1904 Laws of Maryland, Ch. 591, Article 17, Section 285, Code of Public Local Laws. *Cf. Kelly v. Consolidated Gas Co.*, 153 Md. 523, 528, 138 487, 492.

[23] *Postal Tel. Cable Co. v. Baltimore*, 79 Md. 502, 29 Atl. 819 (1894), *aff'd* 156 U.S. 210 (1895); *C&P Telco v. State Roads Comm'n*, 134 Md. 1, 2, 106 Atl. 257 (1919), *appeal dismissed*, 254 U.S. 662 (1920); *AT&T v. State Roads Com'n*, 134 Md. 11, 106 Atl. 260 (1919), *appeal dismissed*, 254 U.S. 662 (1920); *Postal Tel. Cable Co. v. State Roads Com'n*, 127 Md. 243, 96 Atl. 439 (1915); *Baltimore v. C&P Telco*, 142 Md. 79, 120 Atl. 229, 231 (1923).

§ 129, now section 359 of article 23 of the Code . . . did not confer upon or give the right to telephone or telegraph companies to make special use of the state's property without compensation or to give these companies the exclusive use of the highways of the state free of charge." *C&P Telco of Balto. v. State Roads Comm'n*, 134 Md. 1, 2, 106 Atl. 257, 258 (1919).

Thus, Maryland has long-settled laws governing how a county grants permission to a private party to use the public rights-of-way. Attempted interference by the Commission in this state law procedure would not speed the entry of incumbent telcos into their new lines of business. Rather, such interference would create grave conflicts with state law. The resulting uncertainties could delay competitive entry in Maryland communities for years. The Maryland Counties do not wish to see such delay visited upon their citizens.

IV. CONGRESS HAS GIVEN THE COMMISSION NO AUTHORITY OVER LOCAL CABLE FRANCHISING.

In this section the Maryland Counties provide brief responses to specific questions raised by the Commission in the NPRM.

The Maryland Counties understand that the National Association of Telecommunications Officers and Advisors (NATOA), in a joint effort with the United States Conference of Mayors, the National League of Cities, and the National Association of Counties, will file comments demonstrating that Congress delegated no authority to the Commission to implement Section 621(a)(1), but reserved that authority to the courts ("NATOA Comments"). The Maryland Counties generally support the arguments expressed in the NATOA Comments, including the conclusion that a proper reading of federal communications law and application of the Supremacy Clause of the Constitution reveals no support for any putative Commission authority to preempt state or local government action in regard to cable franchising. The points made below supplement and support the NATOA Comments.

In general, the Commission solicits comment on how it "should implement Section 621(a)(l) of the Communications Act of 1934 . . . ." NPRM at ¶ 1. The Commission takes such actions having "tentatively conclude[d it] has authority to implement Section 621(a)(1)'s directive that LFAs [local franchising authorities] not unreasonably refuse to award competitive franchises." NPRM at ¶15.[24]

The Maryland Counties respectfully disagree with the Commission's tentative conclusion that it has any authority over the franchising process. For that reason, the Maryland Counties reject all additional conclusions the Commission builds on that original erroneous premise. As shown above, local franchising authority predates the Cable Act and the Commission. Congress preserved local governments' franchising authority over incumbent and competitive providers in § 621(a)(1). Further, Congress established the courts as the arbiters of any claims by an unsuccessful franchisee of unlawful franchising practices. As the Commission itself observes, Congress rejected the FCC's suggested text for amending Section 621(a)(1), and in so doing rejected any notion that the Commission was empowered to take the actions it contemplates in the NPRM.[25]

A. In Enacting The Cable Act, Congress Resolved the Franchise Debate In Favor Of Local Government.

In 1984, Congress adopted what has become known as the "Cable Act."[26] The Act was intended 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

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[24] The Commission's specific finding is that it may preempt and supersede any law or regulation based on its interpretation of authority "granted under Section 621(a) and 636(c) of the Act, and under the Supremacy Clause . . . ." NPRM at ¶ 15.

[25] See NPRM at n.20.

[26] Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779, codified as 47 U.S.C. § 521, *et seq.* ("Cable Act").

and interests of the local community." 47 U.S.C. § 521. The Cable Act was the culminating event in a multi-year debate as to:

- The appropriate scope of cable system authorization and regulation;
- The scope of Federal Communications Commission authority over cable systems;
- The level of government (federal, state or local) at which regulatory responsibilities should reside.[27]

Congress answered these three questions, for the most part, by placing primary responsibility for key elements of cable oversight at the local level. Local governments were recognized to have significant inherent authority over their public rights-of-way and to be in the best position to ensure cable systems best served their community interests.[28]

B. The Cable Act Explicitly Recognizes Local Governments' Authority To Meet Specific Community Needs In The Franchising Process.

In the NPRM at ¶ 10, the Commission states it seeks "to determine whether, in awarding franchises, LFAs are carrying out legitimate policy objectives allowed by the Act or are hindering the federal communications policy objectives of increased competition in the delivery of video programming and accelerated broadband deployment." While the Maryland Counties

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[27] It should be noted that the Commission, like many federal entities, tends to analyze governmental authority over cable in terms of "regulation." It must be kept in mind, however, that the property rights of local governments are also involved, as shown above, and that the exercise of property rights is not "regulation" as the term is normally used.

[28] The Commission, to its credit, recognizes in the NPRM this conclusion reached by Congress. *See* n.18, which provides some of the pertinent legislative history. "[This legislation] will preserve the critical role of municipal governments in the franchise process . . . . It is the Committee's intent that the franchise process take place at the local level where city officials have the best understanding of local communications needs and can require cable operators to tailor the cable system to meet those needs." H.R. REP. NO. 98-934. at 24 (emphasis added). Interestingly, the Commission makes much ado in n.23 regarding a defeated detailed version of §541(1)(a), but draws the wrong conclusion. When Congress rejected the proposed language, it empowered a local community to apply the same standard for the grant of a second franchise as the local community had imposed on the first. Congress found the local government could and would properly balance the needs of citizens with the claims of the competitive provider.

addresses this issue in greater detail below, Congress left no doubt that 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).

Further, the "growth and development of cable systems" is not the only objective that matters, and Congress recognized that the local franchising authority – not the FCC – was in the best position to achieve the proper mix of these objectives. For example, Congress specifically recognized that local communities could use the franchising process to require the cable operator to:

- *Pay a franchise fee* up to 5% of the gross revenues derived from the operation of the cable system to provide cable services.[29] 47 U.S.C. § 542.
- *Provide facilities, equipment and services* adequate to meet the cable-related needs and interests of the community.[30] 47 U.S.C. §§ 546, 541(a)(4), 544(b).
- *Build an institutional network (I-Net), and dedicate capacity on that network for educational and government use.*[31] As shown above, an institutional network can replace

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[29] Not all communities automatically seek the maximum 5% franchise fee permitted by law. For example, Anne Arundel County in its 1990 Millennium agreement (§ 3.2) provided for a gradual increase in the franchise fee from three percent to five percent over three years.

[30] For example, Montgomery County, looking to a future in which PEG may come to be offered in ways other than traditionally channelized program streams, has negotiated with of its cable providers for analog PEG channels and also (if the system is digital) up to ten percent of the operator's downstream digital capacity for PEG use, subject to a limit of the bandwidth equivalent of twenty-five (25) channels.

[31] As noted above, an institutional network is a portion of the cable system designed primarily to serve customers other than residential customers. In many communities, operators have agreed to construct institutional networks that link schools, libraries, police and fire stations, and other government buildings. These links are then used for voice, video and data transmissions, and to provide connections to the Internet. *See* 47 U.S.C. §§ 531(b), (f), 541(b)(3)(D), 544(b)(1).

expensive communication lines that might otherwise be required, and can significantly enhance a local government's communications capabilities, to the benefit of its citizens and businesses.

- *Provide channels, facilities, equipment and capital support for public, educational and governmental ("PEG") use of the cable system.* Thus, for example, many franchises require the operator to provide channels, equipment and studios that schools, non-profit groups and others can use to produce video programming. Such PEG requirements can significantly enhance the ability of government, schools, non-profits and others to deliver information to the community cost-effectively.[32]

- *Define where an operator must serve*, while allowing a reasonable time for build-out of the system. 47 U.S.C. § 552(a). Some franchises require the operator to construct its system so that it can provide service to all residences in a community; some require that the system be constructed so that it can serve all businesses and residences; and some require operators to serve all areas with a certain population density. The point is that each community is in a position to ensure that service is available as broadly as is required by the needs of the individual community.[33]

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[32] As noted above, in Anne Arundel County every school is connected by the I-Net and has access to one of the four PEG channels that the County has negotiated with its operators. As a result of having access to such facilities, Anne Arundel Community College offers the largest tele-course program in the state.

[33] The best solution for a given community's needs and providers' situation varies. For example, Montgomery County's franchises with Comcast and RCN provide that "Franchisee shall make Cable Service available to all persons, including residences, businesses, and other legal entities, within the Franchise Area, including owners or occupants of multiple dwelling units that request Cable Service . . ." Anne Arundel County in its 1990 Millennium franchise agreement provided for a gradual build-out over seven years to increasingly low-density areas of the County (§ 4.5). *See* NPRM at n.20, which recounts congressional rejection of an FCC-suggested limitation on universal buildout for a competitive provider.

Even if the Commission had jurisdiction to address franchising issues, the Commission could not as a matter of law find that a local franchising authority was acting unreasonably in seeking community benefits such as those just described: I-Nets, PEG capital funding, facilities and channels, a build-out schedule, a bar on redlining, a franchise fee. As these benefits of the franchising process are explicitly recognized by Congress, they cannot be ruled out by lesser federal authorities (without limitation as to other benefits not specifically recognized, but not prohibited, by the Cable Act).

C. Congress Limited Local Authority In Some Respects, But It Did So Explicitly And Did Not Include Franchising As One Of Those Limitations.

The Maryland Counties do not mean to give the impression that local authority over cable is unlimited under the Cable Act. Congress did limit local authority in specific areas, but oversight of franchising is not one of those areas. For instance:

- *The Cable Act limits government authority to require cable operators to carry specific commercial programming.* 47 U.S.C. § 544.
- *The Cable Act limits, but does not eliminate, local authority to regulate rates.* 47 U.S.C. § 543.[34]

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[34] The rate regulation process has produced results that contradict the Commission's position in the NPRM. Cable operators claim that they are already subject to effective competition within the meaning of the Cable Act; and in the last several years, the Commission has found in favor of almost every operator that has petitioned for a finding of effective competition. If the Commission is correct in these findings, then effective competition for cable is already rampant throughout even the country's smaller and more rural communities. This undermines the Commission's tentative conclusion in the NPRM that local governments are preventing competition. Even if the Commission could show that that were the case – and it cannot – the most that could be proven is that *additional* competition would be desirable. In other words, having taken the position that existing multichannel video providers constitute a fully competitive marketplace, the Commission cannot consistently claim that the lack of competition is so dire as to justify the imposition of new federal regulations that meddle in areas of state and local authority.

- *The Cable Act states that no locality may "prohibit, condition, or restrict a cable system's use of any type of subscriber equipment or any transmission technology."* 47 U.S.C. § 544(e).[35]
- *The Cable Act states that a locality may not, as a condition of granting or renewing a cable franchise, "require a cable operator to provide any telecommunications service or facilities, other than institutional networks" except as provided in the Cable Act sections regarding PEG access and commercial leased access.* 47 U.S.C. § 541(b).

D. Congress Did Not Empower the FCC in Section 706 to Interfere with Cable Franchising.

The Commission asks: "given the relationship between the ability to offer video programming and the willingness to invest in broadband facilities," does Section 706 empower the Commission to act on a claim of unreasonableness behavior under Section 621(a)(1)? NPRM at ¶ 18. On the contrary, Section 706 has no role to play in the franchising process.

A franchise is the principal means by which local governments grant private entities the right to use public property. Originally, local and state governments primarily managed the public rights-of-way to serve the needs of pedestrians and vehicular traffic. As utilities began to emplace permanent facilities in those rights-of-way, communities required each utility to obtain a specific authorization to use that real estate. This authorization was classified as a franchise, because it represented a special, limited and personal privilege to use public property not enjoyed by transient right-of-way users. This special grant is necessary because a private person cannot

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[35] Curiously, although local franchising has been a major factor in driving the deployment of advanced cable systems throughout the history of cable, the Commission has chosen to interpret the 1996 Act as *preventing* a community from requiring a cable operator to use advanced technology such as fiber-optics. *See Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, FCC 99-57, 14 FCC Rcd 5296 at ¶¶ 136-143 (1999).

take another's property, even for a public use, except by approval from the entity with authority over the property.

Rather than address this issue at length, the Maryland Counties refer the Commission to local governments' filing in the 4th Section 706 Review proceeding and incorporates those comments here by reference.[36] The Maryland Counties reproduce here the summary from these local governments' comments to demonstrate that rights-of-way management tools and requirements are outside of the Commission's "barriers to entry" sphere:

> Fair and reasonable compensation requirements, like right-of-way management, lie outside the FCC's sphere of "barriers to entry." The Commission's own spectrum auction policies and those of federal right-of-way managers outlined in NTIA's Roadmap are directly analogous: spectrum and federal rights-of-way, like state and local rights-of-way, are a scarce resource that is most efficiently allocated through a market price mechanism such as an auction or recovery of fair market value.
>
> Local property cannot be given away by the federal government to telecommunications companies without just compensation. As NATOA and NLC have noted in other comments, such a giveaway would implicate Constitutional issues, including Fifth Amendment takings as well as the "anti-commandeering doctrine" of *New York v. United States*, 505 U.S. 144 (1992). These constitutional considerations, as well as § 253 itself, require that local communities be free to take appropriate measures, including revenue-based measures, to establish such compensation.
>
> The federal courts, led by the Supreme Court in *City of St. Louis v. Western Union Tel.*, and ratified by the Fifth Circuit in *City of Dallas v. FCC*, recognize that local governments have the normal rights of all property owners in controlling all elements and benefits of right-of-way property. Thus, telecommunications providers placing their facilities in public rights-of-way must pay fair and reasonable compensation no less than the cable company hanging its cables in *Loretto v. TelePrompter Manhattan* or providers placing their switching equipment in telephone central offices in *Bell Atlantic v. FCC*.
>
> As compelling as the federal government's interest in encouraging competition in telecommunications may be, there is no basis in law or logic for requiring local governments to subsidize competitors by turning over a valuable asset without charging

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[36] *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonably Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, GN Docket No. 04-54 Comments of the United States Conference of Mayors, National Association of Counties, American Public Works Association, Texas Coalition of Cities for Utility Issues, Montgomery County, Maryland, and the Mount Hood Cable Regulatory Commission, filed May 10, 2004.

> an economically efficient price. On the contrary, as noted above, thousands of miles of networks have already been put in place through market negotiations.[37]

The Maryland Counties also remind the Commission that any claims of preemption by implication are precluded by Section 601(c) of the Telecommunications Act of 1996, which states in subpart (c):

> NO IMPLIED EFFECT. –This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments.

Thus the Commission may not create new rules governing local right-of-way management or compensation, nor create adjudicatory procedures affecting these local rights.

E. The Commission Unreasonably Constricts the Scope of Local Franchising Authorities' Reasonable Authority.

The Commission tentatively concludes that local communities act reasonably when they seek to:

- "assure that access to cable service is not denied to any group of potential residential cable subscribers because of the income of the residents of the local area in which such group resides";
- "allow [a] cable system a reasonable period of time to become capable of providing cable service to all households in the franchise area"; and
- "require adequate assurance that the cable operator will provide adequate public, educational and governmental access channel capacity, facilities, or financial support." NPRM at ¶ 20.

As noted above, the Maryland Counties agree that each of these acts is within a community's reasonable authority. The Commission's tentative conclusions are incorrect, however, if they are intended to suggest that *only* such acts are reasonable. Such an opinion

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[37] *Id.* at 33 (footnotes omitted)

would ignore other areas defined by Congress as being reasonable franchise terms. In the Cable Act Congress recognized that it is not unreasonable for an LFA to require each of the items listed in ¶ 20 of the NPRM – for example, to require a competitive franchisee to:

- *Pay a franchise fee equal to 5% of the gross revenues* derived from the operation of the cable system to provide cable services. 47 U.S.C. § 542.
- *Build an institutional network, and to dedicate capacity on that network for educational and government use.* 47 U.S.C. § 531.
- *Define a buildout area, not just assure against redlining, so long as the community allows a reasonable the time for build-out of the system.* 47 U.S.C. § 552(a).[38]

If the Commission believes it has authority to issue an order in this proceeding at all, it is important for the Commission to keep in mind that both incumbent cable and telephone companies will argue that anything not included on a Commission list of reasonable requests must by definition be unreasonable. Hence any such list must be clearly marked as not exhaustive, "without limitation." But in fact, as noted above and in the NATOA Comments, the Commission has not been given authority to determine what sorts of franchise conditions are reasonable.

F. Congress Addressed Many Time Frames in the Cable Act, But Did Not Impose a Timeline on Franchising.

Relying upon an unfounded conclusion (as shown above) as to its authority under Section 621(a)(1), the Commission asks whether it should establish maximum time periods for LFAs to

[38] The Maryland Counties find it troubling that in light of congressional approval of buildout schedules in 47 U.S.C. § 552, the Commission in ¶ 23 asks parties for a legal theory of how such actions might be characterized as unreasonable. It appears here that the Commission is looking for ways to *slow down* the deployment of advanced communications systems, rather than to promote such deployment.

consider a competitive franchise, and if so, how should it go about enforcing such a time frame. *See* NPRM at ¶21.

The Maryland Counties remind the Commission that Congress did not delegate any authority to the Commission to interfere with the franchising process. Moreover, the Congress did not see fit to impose any timeframes or deadlines for the granting of a franchise. Since Congress in 1996 did amend the nation's cable and communications laws to impose any number of deadlines on the FCC, states, local governments and providers, but created no such deadlines on franchising, one must conclude that Congress intentionally chose not to impose a deadline for franchising – perhaps recognizing that such a deadline would be open to abuse given the ability of prospective franchisees to delay negotiations indefinitely by persisting in unreasonable demands.

As the Commission notes at n.80, in 1996 Congress did amend Section 617 of the Act to impose a time limit for a community's review of a transfer of a franchise. Section 617 provides that a local franchising authority must act on a transfer or sale request within 120 days or the request is deemed granted. Section 617 is instructive, but not for the lesson the Commission seeks to draw. Congress chose to create a deadline for transfers, but chose not to create any such deadline for the grant of an initial or competitive franchise. The Commission must therefore tread very lightly in this area, as Congress has chosen to leave this matter to negotiations between local franchising authorities and cable providers.

If the Commission nonetheless believes (incorrectly) that it has authority to invent a deadline for franchise negotiations, the Commission would do well to differentiate between the grant of an initial franchise and the transfer of same. In a transfer, the heavy work of developing a franchise to meet the unique needs of the community has already been done; the issues in a transfer have to do with conveying that franchise to someone else. In a franchise grant, on the

other hand, a new franchise agreement must be established for a new provider. This is a far more complex process – particularly in cases where the new provider considers itself radically different from the incumbents and makes novel and unprecedented demands of the local franchising authority.

If a competitive franchisee presented a local community with a proposal simply to accept the terms of the existing cable franchise, the deal might well be done in less than 120 days. The Maryland Counties are not, however, aware of any instances in which any of the current Bell companies has made such a proposal. A specially tailored franchise agreement addressing novel demands by the prospective franchisee, on the other hand, may take longer to develop. The Maryland Counties would not necessarily be hostile to a proposal that a new franchisee be granted *a clone of the existing franchise* within 120 days. But applying a similar timeframe to an entirely new negotiation runs the risk of merely encouraging the applicant to make unreasonable demands and "run out the clock" in order to coerce the local franchising authority into agreeing to such demands.

It must similarly be kept in mind that cable applicants' own internal bureaucratic machinery creates substantial delay, and imputing the resulting slowness to local franchising authorities would ignore the facts so as to upset the equities. For example, Verizon employs a "two-tier" negotiating process, in which the Verizon representatives actually discussing franchise terms with local governments must clear even the smallest changes from the company's cookie-cutter Model Franchise Agreement with a mysterious "committee" that never actually appears at the negotiating table. This bureaucratic approach introduces extensive delays into the process. Because it never actually deals with franchising authorities or participates in the give-and-take of negotiation, the Verizon "committee" is an ivory-tower body that is insulated from real-world issues. It is thus encouraged to persist in unreasonable expectations and to make non-negotiable

demands that bear little resemblance to the terms of any existing franchise agreements. Any Commission attempt to analyze the causes of what the Commission perceives as slowness in the negotiating process will be fundamentally incomplete and inaccurate unless it includes a full account of the way the Bells, *in practice*, approach negotiations.

Specifically, in a recent Commission hearing, Verizon suggested that it was unhappy with the progress of negotiations in Montgomery County.[39] The County informed Verizon in August 2005 that the County would quickly grant Verizon a franchise on terms comparable to the existing franchises held by RCN and Comcast. Verizon has not accepted that suggestion. Instead, the company has met about once a month with the County over the last eight months "to identify differences" between the County's franchises and Verizon's preferred approach. Central issues appear to be Verizon's unwillingness to accept the County's existing cable consumer protection law and the County's authority to ensure that the normal signal quality and maintenance practices for a cable system apply. Most recently, in mid-December, Verizon told the County that the company was not interested in meeting further because (according to Verizon) the two parties were too far apart.

The franchise renewal process established by Congress in 1984 does provide insights into a reasonable timeframe for franchise negotiations, although it does not include a hard-and-fast deadline. In 47 U.S.C. § 546, Congress created a three-year program for identifying community needs and crafting a franchise agreement with an incumbent to meet those needs. Certainly the Maryland Counties do not wish to take three years to grant a competitive franchise. On the contrary – *and this fact cannot be overstressed here* – local communities wish to bring in competitors as soon as reasonable terms can be arrived at. But the three-year renewal window

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[39] *See* Lynn Stanton, *Franchising Issues Dominate FCC Video Competition Hearing*, TR DAILY (February 10, 2006).