

affords some sense of what Congress recognized as the difficulty in reaching reasonable terms for the use of local communities' property when that property is as extensive and important as the public rights-of-way.

By way of comparison, Congress has established at least one deadline for the Commission's own action that is not associated with the development of a rulemaking following legislation. In 47 U.S.C. § 160, Congress established a regime by which carriers might petition the Commission for forbearance from a regulation. In subparagraph (c) of the statute, as in Section 617, Congress provides a timeframe in which the Commission must act or the requested government approval is deemed granted. Unlike Section 617, where an LFA is limited to 120 days, 47 U.S.C. § 160(c) provides: "Any such [forbearance] petition shall be deemed granted if the Commission does not deny the petition . . . within *one year* after the Commission receives it, unless the one-year period is extended by the Commission . . . by an *additional 90 days*..." (emphasis added).

A review of timeframes granted the Commission to act in its capacity as the federal government's franchising authority is also illuminating as to Congress's views regarding significant grants of rights by a governmental entity.

- In 47 U.S.C. § 307, the Congress empowers the Commission to grant, "if public convenience, interest, or necessity will be served thereby, a station license." No deadline for action is established the granting of such a license.
- In 47 U.S.C. § 332, Congress empowers the Commission to grant what are commonly known as cellular licenses, but other than establishing a deadline for a rulemaking (§ 332(c)(1)(D)), Congress imposes no time limit on Commission review to meet the burden of ensuring the public's interest is served.

It would appear that Congress understands the challenges that accompany a finding of what is in the public's interest in making such grants, and has not burdened the Commission with statutory deadlines for making such important decisions. The same sorts of considerations certainly apply to the use of the local community's property – analogous to the spectrum involved in the licenses mentioned above – in the franchising context.

G. State Legislative Actions Demonstrate That Franchising Is Not The Deterring Factor In The Bells' Entry.

The Commission requests comment on the impact of state-level legislative or regulatory activity on the franchising process. NPRM at ¶12. In this respect the Maryland Counties refer the Commission to the filing that is being made in this proceeding by the Texas Coalition of Texas Cities for Utility Issues (TCCFUI), a group of communities that are living with the results of 2005's Texas legislation.

H. The NPRM's Attitude Toward Incumbent Telephone Companies Reveals an Incomplete Understanding of Cable Franchising.

The Commission questions a local government's justification for franchising entities such as telephone companies that already have franchises that authorize their use of those rights of way, assuming that the reasons for franchising are that "the locality's need to regulate and receive compensation for the use of public rights of way." NPRM at ¶ 22. Given the points made above, it should be obvious that this statement reflects a lack of understanding regarding property law, state franchise rights, and local communities' goal of ensuring broad availability of advanced services – not merely the recovery of a fee. For example, the above information on Maryland law shows that at least in Maryland, the Commission would violate federal and state law were it to attempt to create a different franchise standard for entities already occupying the public rights-of-way.

In particular, the NPRM ignores the concerns of local government that all constituents have access to new services. As shown above, local franchises pay particular attention to ensuring that reasonable buildout schedules are agreed to and implemented. Rather than applauding such efforts at the local level, the Commission invites parties to provide a legal justification for characterizing such requirements as unreasonable. This internal inconsistency makes clear that the NPRM is based on faulty (and unsupported) assumptions about where the real problems lie.

The Commission has expressed some confusion over why a local franchising authority should require a cable franchise for entities that already have other franchises authorizing their use of public rights-of-way for telephone purposes. NPRM at ¶ 22. The answer is simple: someone who holds a limited right – a right to use someone’s property *for defined purposes* – cannot bootstrap that right into an expanded right to use someone else’s property for *all* purposes without the permission of the property owner. The owner of an office park who leases space to a vendor at a specified price specifically to put up a food stand would justifiably be surprised if the owner returned to find that the food stand had morphed into a three-ring circus, using the owner’s property for sword-swallowers, high-wire acts, and clowns in motorcars – without any adjustment to the price or other terms. (The property owner might be happy to have the circus in town, but might feel that the new uses of the property required additional conditions to address the new problems thus introduced, not to mention additional compensation to reflect the vastly greater profits derived from the owner’s property through these uses that had not previously been approved.) Similarly, a local community is not *obliged* to give new rights and powers automatically to an incumbent telco without considering the additional value gained or the additional obligations that normally accompany the additional rights.

This is even more true when the property in question is government property whose use is authorized by a franchise. The requirement for a separate cable franchise is consistent with the general rule that franchises are to be narrowly construed.⁴⁰ The Supreme Court has held that “whatever is not unequivocally granted is withheld; nothing passes by mere implication.” *Knoxville Water Co. v. Knoxville*, 200 U.S. 22, 34 (1906); accord, *Blair v. Chicago*, 201 U.S. 400, 471 (1906). For instance, a franchise for illuminating gas does not encompass the transmission of gas for heating, even though the same pipes are being used. *Hanford v. Hanford Gas & Pwr. Co.*, 169 Cal. 749, 147 Pac. 969 (1915); *Washtenaw Gas Co.*, 23 P.U.R.(N.S.) 226 (Mich. 1938). Closer to the matter at hand, the Supreme Court has also held that a long-distance telephone franchise does not automatically include the right to use the same property to provide local exchange service. *Mitchell v. Dakota Central Tel. Co.*, 246 U.S. 396 (1918). See also *Hawaiian Elec. Co.*, 87 P.U.R.4th 227, 232 (Hawaii 1987) (ducts in public rights-of-way can be used only for purposes specified in franchise).

As stated above in greater detail, Congress specifically recognized in local franchise authorities the authority (among other things) to ensure that all households are served, to obtain PEG channel capacity and recover PEG capital costs, and to require institutional networks. See 47 U.S.C. 541(a)(2), (3) and (4). These issues are unique to cable franchise negotiations. They would not be covered by any existing franchise granted for other purposes.

I. Level Playing Field

The Commission asks whether level playing field statutes create unreasonable regulatory barriers. NPRM at ¶12. Maryland does not have such a level playing field statute. In any case,

⁴⁰ See *Charles River Bridge v. Warren Bridge*, 11 Pet. (12 U.S.) 496, 546, 549 (1837); *Richmond v. C&P Telco*, 205 Va. 919, 923, 140 S.E.2d 683, 686 (1965). See generally 37 C.J.S., “Franchises,” § 21(b).

however, as noted above, the Commission has not been given authority to override state laws dealing with franchising.

J. The History of Section 541(a)(1) Litigation Shows Local Governments' Reasonableness In Franchising Decisions.

As of February 6, 2006, there appear to be thirteen published opinions, representing eleven different controversies, which cite Section 541(a)(1). (Two of the controversies resulted in both trial court and appellate court opinions.) Of the eleven controversies, only twice has an LFA been found to violate or potentially violate Section 541(a)(1). In one case the violation was a matter of semantics, while in the second the finding was procedural.

In *Qwest v. Boulder*, 151 F.Supp.2d 1236 (D. Colo. 2001), Qwest was providing cable programming in Boulder through a revocable permit granted by the city. In addition to Qwest, TCI was also providing cable in the city by means of a revocable permit, while Wide Open West, a third provider, was offering cable in the city by means of a franchise. Testimony was presented to explain that Qwest and TCI operated under "revocable permits" rather than franchises due to the fact that the city's charter required a vote of the populace for the issuance of a franchise. Wishing to avoid the expense of such an election, Qwest sued, arguing that the election provision was preempted by §541(a)(1). The court agreed. Thus, in the single proceeding in which a local community has been found to violate Section 541(a)(1), the community in question had issued *three* competitive franchises, and the controversy arose over the nature of the legal document held by the operator, not the right to serve or the terms of the franchise agreement. Thus, this case can hardly be used in arguing that local governments are standing in the way of competitive entry.

In *Classic Communications Inc. v. Rural Telephone Co*, 956 F. Supp. 896 (D. Kan., 1996), a telecommunications company and its telephone and cable television subsidiaries brought suit for refusal to grant a cable television franchise to the cable television subsidiary.

The Kansas District court denied the cities' motion to dismiss, stating that the reasonableness of the cities' refusal was not an issue at that stage of the litigation.

A summary of the other nine controversies reveals:

- Two proceedings were brought against the U.S. government acting in its capacity as an LFA on military bases. In *Americable International, Inc v. Dept of Navy*, 129 F.3d 1271 (D.C. Cir. 1998), the court found that the Navy's refusal to grant a SMATV contract does not rise to the level of a § 541(a)(1) violation. In *Cox Cable Comm., Inc. v. United States*, 992 F.2d 1178 (11th Cir.1993), the Eleventh Circuit found that Robins Air Force Base violated the Act when it granted an exclusive cable franchise to Centerville Telecable, the winner of a competitive bidding process. Obviously, these cases do not favor the suppression of local authority in favor of federal control.
- Four of the cases saw local governments citing the Act as a justification for their actions in *support* of competitive franchises. Twice local governments have unsuccessfully cited Section 541(a)(1) as a means to defeat rare instances of exclusive franchises that predated the Cable Act. See *James Cable Partners v. City of Jamestown*, 43 F. 3d 277 (6th Cir. 1995); *Service Electric Cablevision v. City of Hazleton*, 2005 WL 2020452 (M.D. Pa. 2005). Once the Cable Act was cited to defend against a claim that an LFA had favoring a competitor over an incumbent. *Cable TV Fund v. City of Naperville and Ameritech New Media, Inc.*, 1997 WL 280692 (N.D. Ill. 1997). In the final case, the Act was employed to demonstrate that the cable franchising process afforded due process standards. *Liberty Cable v. City of New York*, 893 F. Supp. 191 (S.D. New York, 1995).
- One case was brought against a private developer. *Comcast SCH Holdings, Inc v. The Villages of Lake Sumter, Inc*, 168 F.Supp.2d 1338 (M.D. Fla. 2001).

One case raises a cautionary point as to any attempt by the Commission to rule *in advance* on the reasonableness of local franchising. A party must ask for a franchise *before* a local franchising authority can be found to have unreasonably denied the grant of a competitive franchise. “A natural reading of § 541 requires that Houlton Cable apply for a second franchise before it can ask this Court to review whether it is reasonable to refuse one.” *NEPSK, Inc. v. Town of Houlton*, 167 F.Supp.2d 98, 102 (D. Me. 2001). *See also NEPSK, Inc. v. Town of Houlton*, 283 F. 3d 1 (1st Cir. 2002) (the requesting party must be asking for a new franchise and not a renewal).⁴¹

There is thus no basis in the case law for supposing that local communities have placed any barriers in the way of the franchising process. On the contrary, these cases typically see local governments *seeking* competition and industry players raising objections.

K. Local Government Franchising Decisions Are Entitled to Substantial Deference.

Courts have found that local governments are acting within their legislative capacity when granting franchises.⁴² Local governments are entitled to substantial deference when acting within their legislative capacity.⁴³

The seminal treatise on laws governing municipalities, McQuillin’s *Municipal Corporations*, explains the reasons as follows:

⁴¹ In *I-Star Communications Corp. v. City of East Cleveland*, 885 F.Supp. 1035 (N.D. Ohio 1995), the District Court for the Northern District of Ohio held that I-Star did not state a claim for relief pursuant to § 541(a)(1) because the case concerned the City’s efforts to revoke I-Star’s existing franchise, not a denial of an application for a “second competitive franchise.”

⁴² *See, e.g., Charter Communications. v. County of Santa Cruz*, 304 F. 3d 927 (9th Cir., 2002).

⁴³ *Id.* *See also Board of County Comm’rs v. Umbehr*, 518 U.S. 668, 678 (1996).

[N]o principle of law is better established than that courts will not sit in review of proceedings of municipal officers and departments involving legislative discretion . . . Thus, where a local legislative body has power to determine the expediency or necessity of measures relating to local government, its judgment upon the matters within the scope of its authority cannot be controlled by the courts.⁴⁴

The Supreme Court has held that a local government's "interest in being free from intensive judicial supervision of its daily management functions" implies that "[d]eference is therefore due to the government's reasonable assessments of its interests." *Board of County Comm'rs v. Umbehr*, 518 U.S. 668, 678 (1996). The same reasons apply to any such alleged supervision by the FCC. The Commission therefore must tread lightly if at all in questioning the "unreasonableness" of any refusal to grant a franchise.

L. The Commission's Contemplated Preemption of Local Governmental Powers Offends the U.S. Constitution As Well As the Maryland Constitution.

Any action by the Commission to mandate the granting of a franchise in favor of any party over the objection of the local franchising authority offends the Tenth Amendment of the U.S. Constitution. Under the Tenth Amendment, "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. As Justice Scalia has explained:

It is incontestable that the Constitution established a system of "dual sovereignty." *Gregory v. Ashcroft*, 501 U.S. 452, 457, 111 S.Ct. 2395, 2399, 115 L.Ed.2d 410 (1991); *Tafflin v. Levitt*, 493 U.S. 455, 458, 110 S.Ct. 792, 795, 107 L.Ed.2d 887 (1990). Although the States surrendered many of their powers to the new Federal Government, they retained "a residuary and inviolable sovereignty," The Federalist No. 39, at 245 (J. Madison). This is reflected throughout the Constitution's text, *Lane County v. Oregon*, 7 Wall. 71, 76, 19 L.Ed. 101 (1869); *Texas v. White*, 7 Wall. 700, 725, 19 L.Ed. 227 (1869), including (to mention only a few examples) *the prohibition on any involuntary reduction or combination of a State's territory*, Art. IV, § 3;.. and the Guarantee Clause, Art. IV, § 4, which "presupposes the continued existence of the states and . . . *those means and instrumentalities which are the creation of their sovereign and reserved rights*," *Helvering v. Gerhardt*, 304 U.S. 405, 414-415, 58 S.Ct. 969, 973, 82 L.Ed. 1427 (1938). . . .

⁴⁴ 2A McQuillin *Municipal Corporations* § 10.33 (3d ed. 1996) (footnotes omitted).

Printz v. United States, 521 U.S. 898, 918-19 (1997) (emphasis added).

As part of that system, the Supreme Court recognized that "[t]he Federal Government may not compel the States to enact or administer a federal regulatory program." *Printz* at 933 (quoting *New York v. United States*, 505 U.S. 144, 188 (1992)). Moreover, the Supreme Court stressed the importance of political accountability in this system of dual sovereignty, recognizing that the Constitution "contemplates that a State's government will represent and remain accountable to its own citizens." *Printz* at 920.

Local officials are held accountable by their citizens/constituents. They serve as trustees duty-bound to maximize the value of local property for the greater good of the public they serve. See *Erie Telecommunications, Inc. v. City of Erie*, 659 F. Supp. 580 (W.D. Pa. 1987) ("[A]s a city holds the streets in trust for the public, it would be a dereliction of a city's fiduciary duty to grant franchise rights . . . without receiving the fair market value for the property"). The Commission, on the other hand, is held accountable by no one. An unelected agency is not in a position to override the decision of a community, expressed through its elected government, as to the proper balance of priorities in the best interests of that community.

The NPRM seems to suggest that this basic duty of an elected government can be overridden by a federal regulatory scheme.⁴⁵ Aside from its other defects, such an exercise of federal power would constitute a classic unfunded mandate. The NPRM appears to favor the idea of emulating the kind of arrangement for the Commission that the Supreme Court objected to in *Printz* for members of Congress, in which they could "take credit for 'solving' problems without having to ask their constituents to pay for the solutions with higher federal taxes." *Printz* at 930. Meanwhile, as the federal government takes credit for what it hopes will be a

⁴⁵See, e.g., NPRM at ¶ 15 *et seq.*

solution, local government is “forc[ed] ... to absorb the financial burden of implementing a federal regulatory program,” *id.* at 930, by giving up its rights-of-way without the full compensation desired by the local community.

As the Supreme Court recognized, “It is an essential attribute of the States’ retained sovereignty that they remain independent and autonomous within their proper sphere of authority.” *Id.* at 928. It is difficult to think of a more “proper sphere of authority” than the management of a municipality’s own property. Yet the Commission seems eager to undermine this authority in the interest of federal regulation.

The above considerations regarding the trustees’ role of the local government makes clear that the Commission’s tentative approach is not only improper, but unnecessary. There is no doubt that citizens will let local officials know if they believe the local government is delaying competition.

The Commission is the latecomer to this party. Both local governments and their citizens have been trying to encourage competitive video providers to enter local communities for years. The lack of response (in most cases) to these invitations reflects the reluctance of competitive cable and telco providers to enter the market, not any reluctance by the local community to receive them.

M. The Commission Lacks the Capacity to Arbitrate Cable Franchise Negotiations.

The Commission lacks the legal authority, the experience, and the professional staff to assume the task of arbitrating cable franchise negotiations. 47 U.S.C. § 253(c) reflects Congress’s recognition that local government is the only level of government capable of managing right-of-way access. There is no one set of optimal construction, maintenance, make-ready, undergrounding, space allocation, restoration or insurance requirements fitting all communities. Moreover, these are areas in which the Commission has no experience and no

expertise. For example, the Commission has no knowledge of local conditions in a given community and no expertise in gauging, for example, the difficulty of build-out conditions in a specific geographic area.

Indeed, if industry representatives were successful in burdening the Commission with the job of policing local rights-of-way nationwide, the result would undoubtedly be slower resolution of these detailed issues than now occurs at the local level. By way of example, it has been noted that the average processing time for cable rate regulation matters at the Commission is approximately five years.⁴⁶ Commission action on industry appeals of local rate orders have been known to take almost nine years. *See, e.g., Falcon First Communications, L.P.: Appeal of Local Rate Order of the City of Dalton, GA, DA 05-1270, 20 FCC Rcd 8567 (Media Bur. 2005) (remanding a rate order dated May 7, 1996, for further proceedings by the local franchising authority).* And these discouraging examples involved applying a set of uniform Commission regulations, not local right-of-way matters in which the Commission has no experience.

⁴⁶ *See Average Time Taken to Resolve Cable Regulation Proceedings in 2000, Exhibit I of the Further Comments of the Real Access Alliance, In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets, CC Docket No. 96-98, Wireless Communications Association International, Inc. Petition for Rulemaking to Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed to Provide Fixed Wireless Services, CC Docket No. 88-57, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 Review of Section 68.104 and 68.213 of the Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network, WT Docket No. 99-217 (filed Jan. 22, 2001).*

V. CONCLUSION

For the reasons indicated above, the Bureau should decline to intrude into local cable franchising.

Respectfully submitted,



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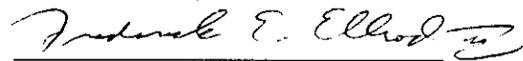
CERTIFICATION PURSUANT TO 47 C.F.R. § 76.6(a)(4)

The below-signed signatory has read the foregoing Comments of Anne Arundel County, Carroll County, Charles County, Howard County, and Montgomery County, and, to the best of my knowledge, information and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law; and it is not interposed for any improper purpose.

Respectfully submitted,

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APPENDIX A

DESCRIPTION OF MARYLAND COUNTY GOVERNMENTS

“Twenty-three counties and Baltimore City make up the twenty-four main local jurisdictions found in Maryland. Baltimore City, although a municipality, has been considered on a par with county jurisdictions since the adoption of the Maryland Constitution of 1851.”⁴⁷ The twenty-three counties have three different forms of government, each with differing authority to govern under Maryland law.

- **Charter Counties:** There are ten charter entities in Maryland: nine charter counties and Baltimore City.⁴⁸ A charter county is a home rule governmental entity created pursuant to Article XI-A of the Constitution of Maryland. In a charter county, the traditional commissioner form of government need not be employed so long as voters approve a formal charter outlining the structure of the county government.
- **Code Counties –** There are six counties that operate as code counties.⁴⁹ A code county has greater local autonomy than a commissioner county, but not as great as in a charter county. Commissioners can enact, amend, or repeal local laws on a wide array of matters. The General Assembly may enact public local laws covering an entire class of code counties, but not for a single code county individually.
- **Commissioner Counties:** There are eight “commissioner” counties in Maryland.⁵⁰ A commissioner county does not have constitutional home rule power (*i.e.*, it may not legislate on local matters without the prior specific consent of the General Assembly).

⁴⁷ See Maryland State Archives, www.mdarchives.state.md.us/msa/mdmanual/01glance/html/county.html (viewed Feb. 12, 2006).

⁴⁸ The charter counties are Anne Arundel, Baltimore City, Baltimore County, Dorchester, Harford, Howard, Montgomery, Prince George's, Talbot and Wicomico.

⁴⁹ The code counties are Allegany, Caroline, Charles, Kent, Queen Anne's and Worcester.

⁵⁰ The commissioner counties are Calvert, Carroll, Cecil, Frederick, Garrett, St. Mary's, Somerset and Washington.

ANNE ARUNDEL COUNTY: Anne Arundel County is located between Baltimore and Washington. The county is named after the wife of Cecil Calvert, the second Lord Baltimore. Its population is projected to grow from 485,800 in 2000 to 563,000 in 2030. The population of the County tripled in the decades between 1940 and 1960 from 68,375 to 206,634. The county was formed as a charter government in 1964.

CARROLL COUNTY: Carroll County, with a population of 150,897, was formed in 1836 from the western part of Baltimore County and the eastern part of Frederick. Carroll County has a land area of 456 square miles and it measures about 27 miles in both width and length. Carroll County is governed by three county commissioners, the traditional form of county government in Maryland. (Carroll County voters have rejected charter amendments that would call for a government consisting of a County Executive and a County Council.)

CHARLES COUNTY: Charles County is a county in the south central portion of the state of Maryland. As of 2006, the population is about 135,000. Its county seat is La Plata. Charles County is a code county.

HOWARD COUNTY: Howard County is located in the north central part of the state of Maryland between Baltimore and Washington, DC. As of 2000, the population of the county was 247,842 and growing. The "Howard District" was formed in 1838 by the splitting of Anne Arundel County and in 1851 became an official county. Howard County was granted a charter form of government in 1968.

MONTGOMERY COUNTY: Montgomery County is a suburban county located in the state of Maryland northwest of Washington, D.C. As of 2000, the population of the county was 873,341. Montgomery County was formed in 1776 by the splitting of Frederick County. In 1791, portions of Montgomery and Prince George's County were ceded to form the new District of Columbia. Montgomery County was granted a charter form of government in 1948.