

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

COMMENTS OF *THE CITY OF LEAVENWORTH, KANSAS*

These Comments are filed by the *City of Leavenworth, Kansas* in support of the comments filed by the National Association of Telecommunications Officers and Advisors ("NATOA"). Like NATOA, the *City of Leavenworth* believes that local governments can issue an appropriate local franchise for new entrants into the video services field on a timely basis, just as they have for established cable services providers. In support of this belief, we wish to inform the Commission about the facts of video franchising in our community.

Our community has cable television regulations which operate in conjunction with the franchise agreement, the terms of which are negotiated with the cable company in conjunction with the franchise agreement. These documents are collectively referred to as the "franchise" below.

Cable Franchising in Our Community

Community Information

The *City of Leavenworth* is a city with a population of 35,290. Our franchised cable provider is *Kansas City Cable Partners, doing business as American Cablevision*. Our community has negotiated cable franchises since 1967.

Our Current Franchise

Our current franchise began on *February 3, 1997* and expires on *December 31, 2011*. Under the statutory timeline laid out in the Federal Cable Act, the cable operator has a 6-month window beginning 36 months before the expiration of the franchise in which to request a renewal under the Federal Act. As a result, at this time we *are not* currently negotiating a franchise renewal with the incumbent provider.

Our franchise requires the cable operator to pay a franchise fee to the *city* in the amount of 5% of the cable operator's revenues. The revenues for franchise fee purposes are calculated based on the gross revenues of the operator, in accordance with the Federal Cable Act.

We require the cable operator to provide the following capacity for public, educational, and/or governmental ("PEG") access channels on the cable system. *We currently have one (1) channel devoted to government access.*

Our franchise requires that our PEG channel be supported in the following ways by the cable operator: *The cable operator is required to provide the city with a character generator for operation of a billboard service and playback equipment. The cable operator is also required to provide up to 8 hours of technical assistance in installing such equipment and up to 25 hours per year of production training. The cable operator is additionally required to provide the required equipment to connect the city's existing cablecasting facilities to the system headend.*

Our franchise contains the following requirements regarding emergency alerts: *The cable provider is required to incorporate into its system the capability to permit the city, in times of emergency, to override the audio portion of all channels simultaneously, except where doing so would violate applicable law. The government channel shall be used for emergency broadcasts of both audio and video. These emergency alert requirements provide an important avenue of communication with our residents in the event of an emergency. An example of when this function has been helpful is the following: The city has used the emergency alert system to issue an amber alert about a missing child, to notify the public of an escape from the state prison located in our community and to announce the activation of the snow ordinance to inform people that they must move their cars off of the emergency snow routes or they will be towed.*

Our current emergency notification system is an analog system that does not work with digital televisions or the digital cable system. As more people buy digital televisions, the emergency notifications on the analog system reach fewer people. A digital emergency notification system will be needed in the future.

Our franchise contains the following customer service obligations, by which we are able to help ensure that the cable operator is treating our residents in accordance with federal standards and the terms it agreed to in its franchise. *The cable provider must furnish, render and sell cable service to its subscribers in a manner which conforms to the FCC Customer Service Standards, as amended from time to time.*

The provider is also required to credit to a subscriber a prorated portion of any prepaid service fee if the subscriber terminated monthly service prior to the end of a prepaid period.

The provider must maintain an office in the City of Leavenworth that is reasonably accessible to Leavenworth residents, open during normal business hours and maintain a telephone number that is toll-free for calls made from within the city limits. The portion of the office open to the public shall comply with the terms of the federal Americans with Disabilities Act.

The cable provider is also required to render efficient service, make repairs promptly and interrupt service only for good cause and for the shortest time possible.

The cable provider shall maintain a sufficient repair force of technicians that shall respond to customer complaints, loss of service or requests for repair.

Upon request, a subscriber's account shall be credited a prorated share of the charge for monthly service if the subscriber is without monthly service for a period exceeding 24 hours for any reason except subscriber inflicted damages to the cable provider's equipment.

Complaints and inquiries regarding the provider's service or performance directed to the city are promptly submitted to the cable provider. If the city concludes that the provider may not have attempted to resolve the dispute to the reasonable satisfaction of the person initiating the complaint and if the complaint remains unresolved, the city may conduct public hearings regarding the complaint.

Our franchise requires that the cable operator currently provide service to the following areas of our community: The cable provider is required to extend and make cable service available to every residential dwelling unit within the city when a minimum occupied density of 35 residential dwelling units per cable mile is realized, as measured from the existing system. The provider will also extend and make cable service available at the regular connection charge, regardless of the density requirement, to any isolated resident requesting connection if the connection to the isolated resident requires no more than a standard 200 foot drop line. Density per cable mile is computed by dividing the number of residential dwelling units in the area by the length, in miles or fractions of miles, of the total amount of aerial and/or underground cabling necessary to make service available to the residential dwelling units in the area in accordance with the design parameters of the cable communications system being constructed. The cable length is measured from the nearest point of access to the existing system, provided that such access is technically feasible and located within the street, other public property, private easements or rights-of-way. The total cable length excludes the drop cable necessary to serve individual subscriber premises.

In areas where the minimum occupied density is less than 35 residential dwelling units per cable mile, the cable provider may extend its system into such "low density" areas at its own discretion. The provider may negotiate a cost-sharing agreement with the area's developer or any of the area's residents.

In order to ensure that our residents have access to current telecommunications technologies, our franchise contains the following rebuild or upgrade requirements: The cable provider was required to complete a rebuild of its system within 24 months of passage of the franchise ordinance. The provider was required to use equipment used in high-quality, reliable, modern cable communications systems of similar design. Specific technical specifications were included in the franchise agreement.

The franchise agreement requires that upon the eighth (8th) anniversary of the effective date of the franchise, the cable provider make such improvements to the system as are necessary to maintain the system at the modern level of technical performance which has been implemented in a majority of cable television systems provided that such improvements can be instituted through technology which has been demonstrated to be feasible for its intended purpose, in an

operationally workable manner and in a manner which is profitable with respect to such improvements.

Our franchise contains a "most-favored-nations" provision which states the following: *The right to use and occupy the streets, city facilities and other public property shall not be exclusive. The city reserves the right to grant a similar use of its streets and other public property at any time during the term of the franchise. The city reserves any right under applicable law to construct, maintain and operate a cable communications system.*

If the city permits such similar use of its streets, city facilities and other public property upon terms and conditions which are less burdensome or more favorable to another operator of a cable communications system than the terms and conditions of this franchise, then the cable provider may elect to modify this franchise pursuant to the procedures set forth below.

In considering whether the terms and conditions of subsequent franchises are less burdensome or more favorable than the terms and conditions of this franchise, the reasonable value of the requirements of each franchise shall be taken as a whole.

If the terms and conditions of the subsequent franchise are less burdensome or more favorable, then the cable provider may propose modifications of the requirements in this franchise to the extent that modifications cure the disparity between the two franchises.

If any cable communications system is constructed and/or operated within the city, and the operator of such cable communications system is not required to obtain a franchise therefore, then the cable provider shall not be required to comply with any terms of this franchise that are more burdensome or less favorable than any requirements imposed on the operator of such other cable communication system governing the construction, operation or repair of such other cable communications system.

Our franchise contains the following insurance and bonding requirements: *The cable provider must maintain, throughout the term of the franchise, liability insurance from a company approved by the city insuring the cable provider and the city against damage to persons or property, violations of rights or interests and statutory violations in the minimum amounts of:*

- \$1,000,000 for property damage to any one person*
- \$1,000,000 for property damage in any one accident*
- \$1,000,000 for personal bodily injury or death to any one individual*
- \$1,000,000 for personal bodily injury or death in any one accident*

Should the Kansas Legislature or the courts of the State of Kansas modify the rule of sovereign immunity as it exists at the time the franchise is passed by the City Commission, by increasing the potential liability of the city beyond these amounts, the cable provider will provide liability insurance which will meet or exceed those new amounts.

The cable provider must submit a certificate of insurance to the city confirming that a satisfactory policy is in effect, which policy shall be renewed on its anniversary throughout the term of the franchise. The policy shall contain a separate endorsement requiring the insurance company to notify the city in writing of any change in, or cancellation of, the policy at least 10 days prior to any change or cancellation.

The cable provider, at its sole expense, must fully indemnify, defend and hold harmless the city, the members of the city commission and all other officials, employees and agents, boards or commissions, when acting in their capacity as municipal officials, employees or agents, boards or commissions, from and against any and all claims, suits and actions, liability and judgment for damages or otherwise.

The City shall not be so indemnified or reimbursed in relation to any matter, in any action, suit or proceeding (1) arising out of the operation, use or distribution of programming or services over the government channel or (2) in which the City is found to have engaged in willful misconduct or criminal acts.

The cable franchise grants the cable operator access to the public rights-of-way and compatible easements for the purpose of providing cable television service. *Apart from the franchise, the cable provider is required to obtain a permit from the appropriate municipal office before it may work in the public rights-of-way. The city does not charge a permit fee.*

The franchise agreement provides for the following enforcement mechanisms by which we are able to ensure that the cable operator is abiding by its agreement: *If the city finds that the cable provider has violated the terms of the franchise, written notice is given to the cable provider. The provider has 14 working days to inform the city in writing of either the action that it will take to correct the violation, that there is a dispute as to whether a violation has occurred, or that an extension of time is required to cure the violation. In either of the latter two items, a meeting is held to hear the dispute. Any violations remaining after the hearing must be addressed within 30 working days. The cable provider then has the option to pursue arbitration or appeal to a court.*

The city has the right to revoke the cable provider's franchise and all the rights, authority, power, privileges and permissions granted to the provider by its franchise for fiscal defects, bankruptcy, fraud, and/or failure to correct a material violation of the franchise agreement and cable ordinance. Revocation of the franchise is accomplished by passage of an ordinance. The city is required to give the cable provider 30 days written notice that an ordinance to revoke the franchise will be considered by the City Commission. The cable provider has the privilege to be heard by the City Commission regarding the proposed revocation ordinance.

The city may require the cable provider to continue operating its system after revocation until the system can be transferred to a new owner or the city requires the cable provider to remove, at its own expense, any above-ground portion of the system from all streets and public property. If the cable provider fails to begin removal of the system within 90 days after written notice of the city's demand for removal or the cable provider has failed to complete such removal within one year after written notice, the city has the right to operate the system or transfer it to another

entity for operation or the city can declare the system abandoned and cause the system to be removed, the cost of which shall be recoverable from the insurance and indemnity provisions in the franchise or from the cable provider directly as liquidated damages.

The Franchising Process

Under the law, a cable franchise functions as a contract between the local government (operating as the local franchising authority) and the cable operator. Like other contracts, its terms are negotiated. Under the Federal Cable Act it is the statutory obligation of the local government to determine the community's cable-related needs and interests and to ensure that these are addressed in the franchising process – to the extent that is economically feasible. However derived (whether requested by the local government or offered by the cable operator), once the franchise is approved by both parties the provisions in the franchise agreement function as contractual obligations upon both parties.

Our current franchise provides that changes in law which affect the rights or responsibilities of either party under this franchise agreement will be treated as follows: *In the event that any court, agency commission, or other authority of competent jurisdiction: (1) declares the general cable ordinance or the franchise ordinance invalid, in whole or in part, or (2) requires the cable provider either to: (a) perform any act which is inconsistent with any provision of the general cable ordinance or the franchise ordinance, or (b) cease performing any act required by any provision of the general cable ordinance or the franchise ordinance, then the cable provider shall not be required to comply with any term declared invalid and shall comply with any such requirement.*

If any provision of the general cable ordinance or the franchise ordinance is held by a court or by any federal or state agency to be invalid as conflicting with any federal or state law, rule or regulation now or hereafter in effect, or is held by such court or agency to be modified in any way in order to conform to the requirements of any such law, rule or regulation, the conflicting provision shall be considered to be a separate, distinct and independent part of the general cable ordinance or the franchise ordinance, and such holding shall not affect the validity and enforceability of any other provision of the general cable ordinance or the franchise ordinance.

While a franchise is negotiated by the local government as a contract, the process provides the cable operator additional due process rights, and consequent additional obligations on the local government. For instance: *The franchise is established by ordinance. At a minimum, ordinances require consideration at two public meetings of the city commission before adoption and publication in the newspaper.*

All subscribers and residents may direct complaints and inquiries regarding the cable provider's service or performance to the city. Such complaints and inquiries will be promptly submitted to the cable provider. If, in the sole discretion of the city, it is concluded that the cable provider may not have attempted to resolve a dispute to the reasonable satisfaction of the person initiating a complaint, and if the complaint remains unresolved, the city may conduct public hearings regarding the complaint. If a hearing is conducted, all parties to the dispute shall be invited to participate. A record shall be maintained of the hearing.

Any controversy or change arising from the operation of the cable provider under the franchise can be appealed to a court of competent jurisdiction or to arbitration. Arbitration involves a public hearing and a written decision of a panel of three arbitrators, one appointed by the city, one by the cable provider and one by the other two arbitrators.

Competitive Cable Systems

Our community

- has never been approached by a competitive provider to provide service,
- has actively sought out competitive providers, but has not been successful, and
- does have mechanisms in place to offer the same or a comparable franchise to a competitor upon request.

Leavenworth's previous city manager contacted a cable company that was operating in a neighboring county and requested that they consider providing services in Leavenworth. The company sent representatives to Leavenworth to study the area and they decided not to pursue services in Leavenworth due to the population density and the entrenchment of the existing cable provider.

Conclusions

The local cable franchising process functions well in the *City of Leavenworth*. As the above information indicates, we are experienced at working with cable providers to both see that the needs of the local community are met and to ensure that the practical business needs of cable providers are taken into account.

Local cable franchising ensures that local cable operators are allowed access to the rights-of-way in a fair and evenhanded manner, that other users of the rights-of-way are not unduly inconvenienced, and that uses of the rights-of-way, including maintenance and upgrade of facilities, are undertaken in a manner which is in accordance with local requirements. Local cable franchising also ensures that our local community's specific needs are met and that local customers are protected.

Local franchises thus provide a means for local government to appropriately oversee the operations of cable service providers in the public interest, and to ensure compliance with applicable laws. There is no need to create a new Federal bureaucracy in Washington to handle matters of specifically local interest.

Finally, local franchises allow each community, including ours, to have a voice in how local cable systems will be implemented and what features (such as PEG access, institutional networks or local emergency alerts, etc.) will be available to meet local needs. These factors are equally present for new entrants as for existing users.

The *City of Leavenworth* therefore respectfully requests that the Commission do nothing to interfere with local government authority over franchising or to otherwise impair the operation

of the local franchising process as set forth under existing Federal law with regard to either existing cable service providers or new entrants.

Respectfully submitted,

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