

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

In the Matter of)
)
)

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

MB Docket No. 05-311

APPENDIX C TO REPLY COMMENTS OF AT&T INC.

**Experience Confirms the Urgent Need for Uniform Streamlined
Rules To Guide the Local Franchising Process**

March 28, 2006

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INTRODUCTION AND SUMMARY

The record in this proceeding is replete with evidence of the many ways in which the current local franchising process, undisciplined by uniform federal rules implementing the Act's prohibition on "unreasonable" franchising conditions, necessarily creates insurmountable barriers to entry that stand in the way of the broadband investment and widespread wireline video competition that recent advances in IP technology have enabled. Incumbent cable operators are doing everything they can to delay, block, or raise the costs of entry. Numerous consultants also are encouraging Local Franchising Authorities ("LFAs") to extract as much as possible from potential new wireline entrants, as these consultants stand to benefit from drawn-out negotiations. And cable industry-sponsored state and local laws often limit the ability of LFAs to respond appropriately to much-needed competitive wireline video entry that promises enormous benefits to consumers and communities throughout the nation.

This appendix collects numerous specific examples of the myriad unreasonable demands that the current local franchising regime has produced. These examples comprise just one symptom of a franchising process that, in both its basic structure and its implementation, is unsustainable in the face of rapid technological and competitive advancements. Section I addresses the recent experience of potential wireline video entrants. Section II addresses the earlier experience of wireline video entrants. And Section III addresses the experience of incumbent local operators that are now attempting a rosy portrayal of the local franchising process in order to head off regulatory reform, but in the past have expressly recognized many of the problems that justify that reform. As Gene Kimmelman of the Consumers Union aptly puts it: "I have heard more praise of local franchising [by the incumbent cable operators] than I have in 20 years." As the examples collected in this Appendix starkly confirm, if today's potential wireline video entrants are forced to negotiate separately with each of the nation's more than 30,000 individual LFAs, without uniform federal rules to streamline the process and cabin conditions to legitimate local interests appropriately tailored to competitive entry, crippling delay and entry foreclosure are assured.

Demands for Funding of Municipal Projects Unrelated to Cable Service

- Free fiber to traffic signals and municipal buildings (#s 1, 2, 59);
- Free telecommunications services (#s 1, 45, 151);
- Free cell phones, wireless service, and wireless broadband (#s 1, 8);
- Discounted broadband to public housing (#1);
- Funds for town to purchase street lights (#3);
- Free parking at telco facility for library patrons (#3);
- Free fiber to houses of worship (#3);
- Free use of manholes, conduits, and utility poles (#1);

- Provide video cameras to film a holiday visit from Santa (#6);
- Build a new fire station (#55);
- Build a new recreation center/pool (#56);
- Free regional telecom networks (#60);
- Duplicate incumbent's public access studio facility (#58);
- Set aside 10 percent of channel capacity for municipality (#57).
- Fund \$50,000 scholarship (#61);
- Install excess conduit for other potential competitors (#62).
- \$5,000 donation for an annual Halloween celebration (#151);
- Plant wildflowers on highway median, and put hanging flower baskets on street lights (#152);
- \$3 million donation for computer centers to train city residents (#153);
- Plant 20,000 trees (#156);
- Finance anti-drug abuse campaign (#157);
- Equity funds and loans to "disadvantaged" small businesses (#158).

Demands for Fees in Excess of 5-percent Franchise Fee

- Application fees up to \$50,000 to begin negotiations (#s 11, 12, 13, 14);
- Acceptance fees up to \$225,000 after franchise granted (#s 15, 19);
- Requirement to pay LFA's outside attorney and consulting fees (#s 16, 17);
- Fees up to 5 percent on telecom and Internet access services (#10);
- Up-front cash up to \$500,000, and recurring fees up to 3 percent for PEG support (#s 9, 18).
- Demands for franchise fees in excess of 5-percent (#s 63, 64, 164, 176);
- Demands for fees in excess of \$10 million per year (#65);
- Millions in capital grants for I-Net, PEG, and access studios (#s 67, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176).

Other Unreasonable Demands

- Local telephone company required to build to areas where it has no existing network (#s 25, 26);
- Submit to local jurisdiction of services normally subject only to federal jurisdiction (#s 22, 23).
- Unreasonable build-out requirements, sometimes in excess of incumbent (#s 71, 74, 79, 80, 82).

Unreasonable Delays

- After 17 months of negotiations, one LFA hired a new attorney who wanted to re-start negotiations from scratch (#32);
- Nearly 80% of Verizon's franchise negotiations pending 15 months ago are still not complete (#33);
- Only a small fraction of franchise negotiations take 6 months or less (#s 34, 35);
- LFA terminated negotiations for over a year when applicant did not agree to unreasonable build-out requirement (#25).
- The City of Indianapolis acknowledges that obtaining a franchise has been a "three-year process" (#38);
- One LFA took almost three years to negotiate with BellSouth (#86);
- Another LFA took two years to negotiate with Ameritech New Media (#87);
- For BellSouth, negotiations took nearly a year on average (#86);
- Some LFAs insisted on negotiating only as part of a consortium, which required Ameritech New Media to abandon entry plans (#89);
- Costly and lengthy feasibility studies before awarding franchise (#95);
- Delays of two-and-a-half years in negotiations (#s 94, 96);
- Entrants forced to abandon attempts to obtain franchise after years of delay (#s 94, 96).

Attempts by Incumbent Cable Operators To Raise Entry Costs

- Suits brought against town after award of franchise (#s 39, 98, 99);
- False and misleading flyers regarding new entrant's facilities (#40);

- Interference in franchise process to impose conditions and block approval, backed by litigation and threats of litigation (#s 41, 42, 43, 114, 115, 116, 117, 118, 119);
- Threats by incumbent cable operators to withhold access to cable-supplied public access studios if competitive franchise awarded (#97);
- Lobbying states to pass “level playing field” laws increase burdens on new entrants (#s 111, 113);
- Prevent competitors’ efforts to hire contractors (#120);
- Pressure landlords to exclude competitors (#s 123, 124, 127);
- Predatory win-back strategies where new competitors have entered (#s 130, 131, 132, 133, 134, 135, 136, 137, 138);
- Withhold cable-owned programming from competitors (#s 140, 141, 142, 143, 144, 145, 146, 147, 148).

Efforts by Outside Consultants To Raise Entry Costs

- “[A]dopt more stringent” rules than FCC (#46);
- “[D]efine where an operator must serve, and set the time for build-out of the system.” (#49);
- Franchise proceedings “can go on as long as desired.” (#50);
- Adopt ordinances that “can be unilaterally changed over time.” (#51).

I. RECENT EXPERIENCE OF COMPETITIVE WIRELINE ENTRANTS

A. Demands for Funding of Municipal Projects Unrelated to Cable Service

1. *Verizon*: “A Virginia county initially demanded that Verizon connect 220 traffic signals in the county with fiber; provide fiber services to ‘approximately 60’ organizations who ‘work with’ the [LFA’s] ‘Department of Human Services to provide medical, psychological, educational, nutritional, employment and housing assistance to at risk segments of the community’; provide high-speed cell phones for ‘approximately 1000 employees’; provide discounted broadband access in public housing; and allow the county free use of Verizon manholes, conduits and utility poles.”¹
2. *Verizon*: Another Virginia LFA “required Verizon to provide eight-strand dark fiber to all public buildings, even though all of these buildings already are wired with fiber.”²
3. *Verizon*: An LFA in Massachusetts “wants Verizon to fund the municipality’s purchase of street lights from the local power company. That same LFA also proposed that Verizon allow parking for the town library at a Verizon facility, build a mobile telephone repeater at city hall, and provide city employees with mobile telephone service.”³ This LFA also requested that Verizon provide free video services to all houses of worship within the municipality.⁴
4. *Verizon*: “One LFA . . . would like Verizon to construct an additional I-Net for the county, at a cost of over \$4.9 million.”⁵
5. Tampa, Fla. asked Verizon for video cameras to film a math-tutoring program for kids.⁶
6. Lynbrook, N.Y. has asked Verizon to provide cameras to film a holiday visit from Santa Claus. Deputy Mayor Thomas Miccio said, “They know if they don’t get this process done they’re going to be in big, big trouble, so we feel we’re in a very good position.”⁷

¹ Declaration of Marilyn O’Connell ¶ 43, *attached to Comments of Verizon on Video Franchising*, MB Docket No. 05-311 (FCC filed Feb. 13, 2006) (“*Verizon O’Connell Declaration*”).

² Comments of Verizon on Video Franchising at 73, MB Docket No. 05-311 (FCC filed Feb. 13, 2006) (“*Verizon Comments*”).

³ Comments of Verizon at 12, MB Docket No. 05-255 (FCC filed Sept. 19, 2005) (“*Verizon Comments in MB 05-255*”).

⁴ *Verizon O’Connell Declaration* ¶ 42.

⁵ *Verizon Comments in MB 05-255* at 13.

⁶ D. Searcey, *Spotty Reception – As Verizon Enters Cable Business, It Faces Local Static – Telecom Giant Gets Demands As It Negotiates TV Deals*, Wall St. J. at A1 (Oct. 28, 2005).

⁷ *Id.*

7. *Verizon*: “In a filing before the New York PSC, the towns of Larchmont and Mamaroneck asserted that once Verizon has a cable franchise in their communities, they will have regulatory authority to require Verizon to ‘entirely rebuild’ its system [*e.g.*, bury the entire fiber plant underground], ‘regardless of the impact on Verizon.’”⁸
8. *Verizon*: “One LFA in Pennsylvania demanded that Verizon provide free wireless broadband service (via EvDO) to local police, even though the incumbent faces no such requirement. Nor is wireless broadband provided by Verizon’s Pennsylvania subsidiary that is seeking the franchise. The LFA also demanded that Verizon provide free high-speed Internet access to the town’s two municipal buildings.”⁹

B. Demands for Fees in Excess of 5-Percent Franchise Fee

9. *Verizon*: “One California community initially demanded that Verizon match the cumulative PEG support that the incumbent had made over time. This included up-front charges of more than \$500,000 for PEG access equipment and facilities, and revolving charges that bring the total up to approximately \$1.7 million” over the course of the franchise.¹⁰
10. *Verizon*: “In Pennsylvania, numerous municipalities are claiming that they are entitled to 5 percent of Verizon’s future voice and data revenues from FiOS, in addition to a 5 percent cable franchise fee.”¹¹
11. *Verizon*: “Two other Virginia LFAs required application fees – which are paid at the time Verizon files the application – of \$10,000 and \$50,000, respectively.”¹²
12. *Verizon*: “Two LFAs in California required application fees of \$25,000 and \$20,000, respectively. Another community in that state has requested an upfront application fee of \$30,000 plus an agreement to pay additional expenses (*i.e.*, attorneys fees) of up to an additional \$20,000.”¹³
13. *Verizon*: “Two LFAs in Pennsylvania required \$30,000 and \$50,000 application fees, respectively.”¹⁴
14. *Verizon*: “A major Maryland LFA required a \$25,000 application fee to begin the negotiation process.”¹⁵

⁸ *Verizon O’Connell Declaration* ¶ 53; Verizon Comments at 80-81.

⁹ *Verizon O’Connell Declaration* ¶ 45.

¹⁰ *Id.* ¶ 31.

¹¹ *Id.* ¶ 52.

¹² *Id.* ¶ 35.

¹³ *Id.* ¶ 36.

¹⁴ *Id.*

15. *Verizon*: “In Virginia, many LFAs require ‘acceptance fees’ at the time Verizon is awarded a franchise. One LFA required Verizon to pay \$225,000; another required \$50,000; a third also required \$50,000; and a fourth required \$100,000.”¹⁶
16. *Verizon*: “One Maryland LFA demands fees for attorneys at multiple layers of review, and has indicated that Verizon must match the estimated \$650,000 the incumbent paid.”¹⁷
17. *Verizon*: “One Virginia LFA demanded that Verizon pay its attorneys fees for its outside law firm, who advises and negotiates the franchise on behalf of the county.”¹⁸
18. *Verizon*: One LFA asked for a flat 3-percent “PEG support” fee on top of the 5-percent franchise fee.¹⁹
19. *Qwest*: “Qwest approached a city in Arizona about the possibility of obtaining a limited scope franchise agreement in order to gain a foothold in a growing, competitive market. Cox, the incumbent CATV operator in the city, had only recently completed its renewal. . . . When Qwest approached the city about a limited scope agreement, the city informed Qwest that it was not satisfied with the deal struck with Cox, and that Qwest’s application would not be approved unless Qwest agreed to pay the city \$225,000 for the same purpose. Qwest was unable to justify this payment in its business plan, and no longer has any plans to obtain a franchise in that city.”²⁰
20. A Cox spokesman in Hampton Roads, Va., noted that “[i]n certain instances, the cities would actually be making more” money to fund studios and equipment for public access channels with new entrants.²¹

C. Other Unreasonable Demands

21. *Verizon*: “One community in Virginia is refusing to give Verizon permits for fiber deployment, demanding that Verizon bury the fiber at a cost of \$3-4 million.”²²

¹⁵ *Id.*

¹⁶ *Id.* ¶ 35.

¹⁷ Ex Parte Letter from Dee May, Verizon, to Marlene H. Dortch, FCC, Attachment 1 at 2, MB Docket No. 05-311 (Feb. 24, 2006) (“*Verizon February 24 Letter*”).

¹⁸ *Verizon O’Connell Declaration* ¶ 38.

¹⁹ *Id.* ¶ 32.

²⁰ Comments of Qwest at 14, MB Docket No. 05-255 (FCC filed Sept. 19, 2005) (“*Qwest Comments in MB 05-255* at 14).

²¹ C. Flores, *Television, Internet Service in Hampton Roads: Cox, Verizon Duke It Out*, Daily Press at A1 (Feb. 18, 2006).

22. *Verizon*: “A Maryland LFA is demanding that Verizon obtain a franchise prior to issuing any permits for the company to begin FiOS construction.”²³
23. *Verizon*: “A major Maryland LFA is demanding, as a condition for securing a franchise, that Verizon allow the LFA to regulate non-cable services that are subject to exclusive FCC jurisdiction.”²⁴
24. *Verizon*: “Some LFAs in Maryland assert that they should be able to apply their local customer service standards to Verizon’s Internet access services offered over FTTP.”²⁵
25. *Verizon*: “In one town in Texas, the LFA demanded (prior to the Texas legislation) that Verizon serve the entire franchise territory. Although Verizon agreed to serve approximately 97-98 percent, the LFA rejected this offer and terminated negotiations with Verizon for over a year.”²⁶
26. *Verizon*: “[S]ome LFAs in California have taken the position that the State’s limited ‘level playing field’ statute, which contains a so-called ‘wire and serve’ requirement, mandates that Verizon build out to the incumbent’s entire franchise area, despite the fact that Verizon’s telephone service area does not cover much of the same area.”²⁷
27. *Verizon*: “[O]ne county seeks to require Verizon to carry 18 or more Public, Educational and Government (‘PEG’) channels in the franchise area – approximately 6 times the average.”²⁸
28. *AT&T*: “On June 7, 2005, AT&T’s predecessor sought a routine encroachment permit from Walnut Creek, California, to [begin conditioning work to remove ‘bridge taps’ that degrade network performance]. The standard permit form required only an agreement to comply with the City’s standard specifications, ordinances and traffic requirements, but the City issued the permit with a non-standard one-page rider that conditioned the permit on AT&T’s agreement that it would not provide any video service over the upgraded facilities without first obtaining a cable franchise from the City – without regard to whether the particular service provided would trigger a local franchise requirement under any

²² *Verizon O’Connell Declaration* ¶ 55.

²³ *Id.* ¶ 54.

²⁴ *Id.* ¶ 51.

²⁵ *Verizon February 24 Letter*, Attachment 1 at 1.

²⁶ *Verizon O’Connell Declaration* ¶ 26.

²⁷ *Id.* ¶ 27.

²⁸ *Verizon Comments in MB 05-255* at 13.

applicable law. After five months of unsuccessful administrative appeals and negotiations with the City, AT&T ultimately sued the City in federal court.”²⁹

- 29.** *AT&T:* AT&T has sought permits to deploy Project Lightspeed equipment in various communities in Illinois. Some municipalities have refused to grant such permits based on the fact that AT&T’s equipment eventually can be used to provide video service. They are therefore requiring AT&T to obtain a franchise before it begins using the public rights of way. The Village of Carpentersville informed AT&T that “[a] franchise agreement between AT&T and the Village must be in place prior to permission being granted for the use of the public right-of-way for the physical plant associated with Project Lightspeed.”³⁰
- 30.** *AT&T:* Several municipalities in Illinois have formed a consortium that is advocating that AT&T’s requests for permits to upgrade its network be rejected until AT&T obtains a cable franchise. The consortium wrote a letter to individual municipalities urging them to: “Refuse to issue ROW permits for Project Lightspeed unless a separate franchise agreement covering video services is in place;” “Adopt an ordinance which requires that all cable and multi-channel systems require a franchise agreement;” and “Adopt an ordinance which creates a temporary moratorium on the construction of any large ground mounted utility installations on public and private property.”³¹

D. Unreasonable Delays

- 31.** *Verizon:* “[T]he county staff for one county in Florida required Verizon to file several versions of its applications, demanding additional information each time before they would submit Verizon’s application to the County Board for approval to initiate negotiations.”³²
- 32.** *Verizon:* “Negotiations with one town in Virginia began in July 2004. By November 2004, Verizon thought it had negotiated a final franchise agreement with the town attorney, establishing a timeline for notice, commission and council review, with a final vote slated for February 2005. But then the town council referred the agreement to the town cable commission, which demanded significant changes to the negotiated agreement and hired an outside attorney to re-start negotiations. Verizon is now dealing with a third attorney who has said that the town is not sure it is ‘interested’ in having a second franchise.”³³

²⁹ Comments of AT&T Inc. at 26-27, MB Docket No. 05-311 (FCC filed Feb. 13, 2006) (“*AT&T Comments*”).

³⁰ Letter from Bob Cole, Public Works Director, Village of Carpentersville, Illinois, to Pam Summers, Project Manager – Project Lightspeed, AT&T Illinois (Mar. 23, 2006).

³¹ Memo from Robin Weaver, Administrator, Village of Roselle & Chair, Northwest Municipal Conference Utilities Regulation Committee, to Mayors/Presidents, Managers/Administrators (Mar. 24, 2006).

³² *Verizon Comments* at 32.

³³ *Verizon February 24 Letter*, Attachment 2 at 4.

33. *Verizon*: “With respect to the 28 negotiations (outside of Texas) that were ongoing as of 15 months ago – that is, as of December 1, 2004 – Verizon has received only 6 franchises to date, and three of those six took 15 months or more to complete. In other words, nearly 80 percent of those negotiations pending 15 months ago are still not complete, and of the few that are complete, half of them took 15 months or more.”³⁴
34. *Verizon*: “[O]f the 95 negotiations that were pending as of March 1, 2005, only 10 franchises have since been granted.”³⁵
35. *Verizon*: “With respect to the 238 negotiations that were ongoing as of six months ago – that is, as of September 1, 2005 – Verizon has received only 15 franchises to date.”³⁶
36. *Verizon*: “All tolled, of the 301 franchise negotiations that Verizon currently has underway, 22 have been dragging on for 15 months or more, while 85 have been ongoing for more than a year and 223 for more than six months.”³⁷
37. *Qwest*: “Qwest met with municipal officials in a different Arizona city during the spring of 2005 to discuss a franchise. . . . The city requested that Qwest provide a template agreement to the city using the incumbent license as a template. Qwest provided the city its revisions to the agreement in May, 2005. Despite repeated requests, and despite repeated contacts with the city, Qwest has yet to receive a single comment to its proposed contract. . . . Assuming the city opens a proceeding, a final franchise will lie many months – or possibly years – in the distance.”³⁸
38. The City of Indianapolis has acknowledged that obtaining a franchise has been a “three-year process.”³⁹

E. Attempts by Incumbent Cable Operators To Raise Entry Costs

39. *Verizon*: “On October 16, 2005, Cablevision – the incumbent cable provider in Massapequa Park – brought suit against the Village and Verizon alleging that, in approving Verizon’s franchise, the Village had violated the New York Open Meetings Law, N.Y. Public Officers Law §§ 100 *et seq.* In what appeared to be

³⁴ Ex Parte Letter from Leora Hochstein, Verizon, to Marlene H. Dortch, FCC, MB Docket No. 05-311 (Mar. 8, 2006) (“*Verizon March 8 Letter*”).

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Qwest Comments in MB 05-255* at 13-14.

³⁹ Comments of the City of Indianapolis at 8, MB Docket No. 05-311 (FCC filed Jan. 24, 2006).

an attempt to intimidate the Village officials, Cablevision also sought to depose the Mayor and the Village Trustees that had just granted the franchise.”⁴⁰

40. *Verizon*: “In Massapequa Park, cable-backed groups have distributed false and misleading flyers and advertisements to residents claiming that Verizon’s new network facilities are ‘eyesores’ that ‘can block your vision’ and will diminish ‘your property values and the beauty of your neighborhood.’ Cable companies have threatened town mayors that they would distribute these flyers unless public hearings on Verizon’s franchise application were postponed.”⁴¹
41. *Verizon*: “Charter made threats to LFAs in Keller, Texas, and Adelphia made threats in Leesburg, Virginia. Other cable operators have sent other municipalities threatening materials (often before Verizon even submits a franchise application) warning them of a battle ahead (*e.g.*, Cablevision in New York and Comcast in Texas). These actions already appear to be having a chilling effect on other local franchise authorities, whose representatives have expressed concern about commencing the franchise process out of fear of having to engage in costly litigation down the road.”⁴²
42. *Verizon*: “In Howard County, Maryland, where Verizon recently obtained a franchise, Comcast made an intense eleventh-hour push to delay the council from approving the franchise until Verizon agreed to a long list of additional conditions.”⁴³
43. *Qwest*: “In both Salt Lake City and the Denver greater metropolitan area Comcast has been very vocal in its demands to LFAs that Qwest be subject to build-out requirements. In other words, the build-out argument is the prime weapon of the entrenched cable industry in its fight to preserve the monopoly positions of existing cable franchisees.”⁴⁴
44. The Texas Cable & Telecommunications Association and various incumbent cable operators brought suits challenging the recently enacted Texas cable franchising law, SB5. The legislation enables new entrants to obtain a single, state-issued franchise for their service areas in Texas, without having to go through the burdensome and time-consuming local franchising process in each

⁴⁰ *Verizon O’Connell Declaration* ¶ 59.

⁴¹ *Id.* ¶ 61.

⁴² *Id.* ¶ 60.

⁴³ *Id.* ¶ 63.

⁴⁴ Comments of Qwest Communications International Inc. at 7, MB Docket No. 05-311 (FCC filed Feb. 13, 2006) (“*Qwest Comments*”).

municipality. The FCC has characterized the Texas franchising law as an “effort[] at the state level to facilitate entry by competitive cable providers.”⁴⁵

F. Efforts by Outside Consultants To Raise Entry Costs

45. *Qwest*: “In one Arizona town where Qwest applied for a franchise, municipal officials retained an outside consultant to negotiate Qwest’s franchise on the town’s behalf. . . . [T]he town’s consultant proceeded to take over three months to review the draft agreement. Six months ago, at the town’s final meeting, Qwest was finally informed that: (i) Qwest would be required to build its video network out to the entire town; and (ii) in order to receive an acceptable franchise, Qwest would be required to provide free telecommunications services to the town with a value totaling nearly \$50,000 annually. As a result, Qwest has ceased negotiations with the town and is looking elsewhere for an acceptable franchise.”⁴⁶
46. *LFA Consultant*: “[L]ocality can . . . adopt more stringent [customer service] standards” than the FCC requires.⁴⁷
47. *LFA Consultant*: Locality can “require the cable operator, through the franchising process, to build an institutional network, and to dedicate capacity on that network for educational and government use.”⁴⁸
48. *LFA Consultant*: Locality can “require an operator, through the franchising process, to provide channels, facilities, equipment and capital support for public, educational and government use of the cable system,” in excess of the 5-percent franchise fee.⁴⁹
49. *LFA Consultant*: “Through the franchising process a locality also can define where an operator must serve, and set the time for build-out of the system.”⁵⁰
50. *LFA Consultant*: “A local government has particular opportunities to enhance the local communications infrastructure and to advance the quality of life in the community through the cable television franchise renewal process.” Franchising proceedings “can go on as long as desired.”⁵¹

⁴⁵ *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, Notice of Proposed Rulemaking, 20 FCC Rcd 18581, ¶ 9 (2005).

⁴⁶ *Qwest Comments in MB 05-255* at 13.

⁴⁷ N. Miller & J. Van Eaton, Miller & Van Eaton, *Local Communities and Communications Networks: Key Issues 2006* at 3 (2006).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 5-6.

51. *LFA Consultant*: It is “wise for a community to adopt a general cable ordinance” because it “may establish rules that the locality is entitled to establish unilaterally.” “The advantage of such an ordinance is that, generally, it can be unilaterally changed over time, while a franchise, because it is a contract, generally cannot.”⁵²
52. *LFA Consultant*: Where local telephone companies install facilities used to provide telecommunications and high-speed Internet services, “[t]here is . . . a good argument that localities are entitled to require a franchise before construction begins,” even if the telephone company is not providing video service.⁵³
53. *LFA Consultant*: Localities can “charge rents for use of the rights-of-way (and not just recover costs) and to develop reasonable rules for use of the rights-of-way.”⁵⁴
54. *LFA Consultant*: “[I]ssues such as abandonment, consumer rebates/credits, transfers to other operators, construction and repair, radio frequency and repair, and stand-by power are not being properly addressed in local agreements.”⁵⁵

⁵² *Id.* at 4.

⁵³ *Id.* at 13.

⁵⁴ *Id.* at 19.

⁵⁵ *Local Officials Tackle Video Franchise Models*, TR Daily (Mar. 24, 2006) (citing Nicholas Miller, Miller & Van Eaton, PLLC).

II. EARLY EXPERIENCE OF COMPETITIVE WIRELINE ENTRANTS

A. Demands for Funding of Municipal Projects Unrelated to Cable Service

55. *Ameritech New Media*: Winfield, Ill. wanted ANM to build a new fire station.
56. *Ameritech New Media*: In Parma, Ohio, local officials wanted ANM to build the city a new recreation center/pool because the incumbent, Cox, had located its regional corporate headquarters and regional access studio in Parma.
57. *Ameritech New Media*: Chicago required a \$500,000 payment for local producers, a set-aside of 10% of channel capacity for the Chicago Access Corporation, and substantial annual payments to support the Access Corporation.
58. *Ameritech New Media*: In one instance, ANM was required to construct a local business office or public access studio facility, duplicating what already or existed or making up for what local officials felt was missing from the incumbent's franchise.
59. *Ameritech New Media*: In some cases, there was a coax I-Net built by the incumbent that the city wanted replaced with fiber, even if the existing one was underutilized or not used at all.
60. *Ameritech New Media*: Many of the I-Nets were being envisioned as regional networks, sought by consortiums of communities, not all of which were being targeted by ANM. Three groups that were particularly interested in regional I-Nets were the Cuyahoga County (Cleveland market) Mayors and Managers Association, the Regional Cable Group in suburban Chicago and the Northern DuPage County Television Agency (NORDCAT) in suburban Chicago.
61. *Grande Communications*: “[San Antonio] required that we fund a \$50,000 scholarship with an additional \$7,200 to be contributed each year.”⁵⁶
62. *UtiliCorp/Everest/Exop*: “Negotiating franchises with some municipalities has been a challenge. Some cities are hostile to competitive providers because they do not want their streets and rights of way disturbed. They require new providers to go underground, when incumbents have a grand fathered right to go overhead. . . . Some communities have sought to require Everest . . . to install excess conduit in the event that yet a third competitor would emerge.”⁵⁷

⁵⁶ Declaration of Andy Sarwal, Senior Vice President Business Development and Affairs, Grande Communications ¶ 9, attached to Comments of Fiber-to-the-Home Council, MB Docket No. 05-311 (FCC filed Feb. 13, 2006) (“FTTH Sarwal Declaration”).

⁵⁷ Comments of Utilicorp Communications Services, Everest Connections Corporation and ExOp of Missouri, Inc. at 5, CS Docket No. 01-129 (FCC filed Aug. 3, 2001) (“Utilicorp et al. 2001 Comments”).

B. Demands for Fees in Excess of 5-Percent Franchise Fee

- 63.** *Ameritech New Media:* A number of municipalities in Michigan – many of them served by Continental/Media One – believed that ANM, as an affiliate of Ameritech, had deep enough pockets to provide more than required of the incumbent if it wanted a franchise. Birmingham, for example, requested a 10-percent franchise fee, which exceeded that allowed by federal law, then required a 5-percent franchise fee plus the equivalent of 5 percent in other public benefits.
- 64.** *Ameritech New Media:* Chicago required an additional 2 percent of gross sales tax on top of the 5 percent franchise fee.
- 65.** The Memphis LFA sought from BellSouth fees in excess of \$10 million per year.⁵⁸
- 66.** *Ameritech New Media:* Cleveland Heights and University Heights wanted ANM to match in grants what the incumbent (Cablevision) spent on its I-Net. Cablevision claimed it had spent \$280,000 building an I-Net for the joint school system. ANM engineers, however, calculated that they could build the same network at that time (1999) for \$93,000. This dispute kept ANM from ever finalizing agreements in these communities.
- 67.** *Knology:* In the greater Nashville, Tennessee area (Davidson County), it took Knology eight months to obtain a franchise and “Knology had spent approximately \$500,000 in the process. . . . Knology . . . was required to obtain exorbitantly priced letters of credit and make excessive grants putatively for PEG activities including an initial PEG grant payment of \$266,000 at the time of the grant of the franchise. The total PEG grant requirement over the 15 year franchise term equated to an enormous \$1.9 million financial burden. Knology agreed to these requirements because it had no choice if it wanted to operate in Nashville.”⁵⁹
- 68.** *Grande Communications:* “Corpus Christi demanded an upfront \$200,000 payment for ‘PEG’ channels.”⁶⁰

C. Other Unreasonable Demands

- 69.** *Ameritech New Media:* In Cleveland Heights, the city had recently received payment and conduit space from MFS Networks in exchange for allowing it to lay conduit with fiber on a path along the main street through the town. Though this

⁵⁸ K. Miller, *City, BellSouth Feud Over Franchise Fee*, Memphis Bus. J. (Sept. 28, 2001), <http://www.bizjournals.com/memphis/stories/2001/10/01/story5.html?page=1>.

⁵⁹ Declaration of Felix Boccucci, Jr., Senior Vice President Business Development, Knology, Inc., ¶¶ 21-22, attached to Comments of the Fiber-to-the-Home Council, MB Docket No. 05-311 (FCC filed Feb. 13, 2006) (“*Knology Boccucci Declaration*”).

⁶⁰ *FTTH Sarwal Declaration* ¶ 9.

path was not consistent with the ANM system design to serve the entire community of Cleveland Heights, city officials wanted ANM to use that conduit and pay rent to the City.

70. *Ameritech New Media*: In Michigan communities such as Birmingham, Bloomfield Hills, Southfield, and the five Grosse Point communities, ANM was forced to withdraw from negotiations because the local officials were insisting upon benefits packages that made it economically unfeasible for a new company such as ANM to compete with the incumbent.
71. *Ameritech New Media*: Cox communities in the Cleveland market such as Rocky River and Lakewood wanted ANM to match in their respective communities all that Cox provided to the region as a whole. ANM never was able to finalize a agreement with any of these communities.
72. *Ameritech New Media*: In Cuyahoga County, Ohio, and DuPage County, Illinois, ANM was required to agree to comply with new model telecommunications ordinances that were still in the drafting stage.
73. *Ameritech New Media*: ANM was required to respond to voluminous Requests for Proposals. While this was typical in the big cities – both Columbus and Chicago required very detailed applications, including financial pro formas that are not appropriate for public disclosure in a competitive situation – ANM also encountered detailed RFPs in the Regional Cable Group in Illinois, Lakewood, OH, Cleveland Heights, OH and a number of other communities. ANM found such RFPs to be either non-starters in and of themselves or so cumbersome that few actually resulted in franchise agreements.
74. *Qwest*: “In 1998, Qwest negotiated nine license agreements in the Phoenix area. At the time, Qwest was forced to agree to city-wide build-out requirements in each of its agreements. In every case, Qwest was to complete its construction in five years.”⁶¹
75. *Qwest*: “It has taken Qwest nearly three years of intensive effort to renegotiate its seven franchises in the Phoenix area, where Qwest is already operating under franchise, and to obtain eight new agreements in the Phoenix, Denver and Salt Lake City metropolitan markets.”⁶²
76. *BellSouth*: “In 1996 BellSouth filed applications for authority to provide cable services in Shelby County, Tennessee (a suburb of Memphis) and in the two largest cities located within the Shelby County boundaries – Bartlett and Germantown. BellSouth was able to obtain a cable franchise to serve the City of Bartlett in only 3.5 months. However, after 5 months of negotiating with officials and the consultant firm representing Germantown, BellSouth reached an impasse

⁶¹ *Qwest Comments in MB 05-255* at 10-11.

⁶² *Id.* at 12.

with Germantown officials, who insisted that BellSouth agree to overbuild all of Germantown and the geographic area served by the incumbent operator in 5 years. Time Warner, the incumbent cable operator, persuaded Germantown officials that it would be a violation of Tennessee's 'level playing field' statute not to impose this build out requirement on BellSouth."⁶³

- 77.** *BellSouth*: "In the summer of 1996, BellSouth, acting through its cable affiliate BEI, filed an application for a cable franchise to serve the City of Coral Springs, Florida, a community located in southeastern Florida. The City hired a consultant to assist in the negotiations. . . . [T]he consultant proposed a number of unreasonable cable franchise requirements that it recommended be imposed on BEI that would result in placing 'more burdensome and less favorable' franchise requirements on BellSouth to which the incumbent cable operator is not subject. Given the relatively high cost and economic risk of entering the wireline video marketplace as a second or third entrant, BEI elected to withdraw its City of Coral Springs cable franchise application."⁶⁴
- 78.** *Grande Communications*: "From Grande's viewpoint, the franchising process in general was not a two-sided negotiation with the municipality. Rather, because there was most often an incumbent cable provider with a "competitive neutrality" or "most favored nation" provision in its franchise agreement, the process involved a one-way demand from the municipality: (1) sign an agreement that was virtually identical to the incumbent's and (2) agree to amend that agreement to include any new terms the incumbent agreed to it in its subsequent franchise renewal. If Grande had not accepted these demands, it would not have obtained a franchise."⁶⁵
- 79.** *Merton*: In Hanover, New Hampshire, "Merton was required to build out its network with 98 street miles of coverage, in contrast to 46 street miles of coverage required for Adelphia." This led Merton to withdraw its request for a franchise.⁶⁶
- 80.** "[R]equiring a new entrant to extend video service to specific neighborhoods by arbitrary deadlines often changes so dramatically the economics of providing service in the community as a whole that the company decides not to deploy video infrastructure *anywhere* in the community. Thus, SureWest decided not to deploy any video infrastructure in certain communities near Roseville, California due to neighborhood build-out requirements in those communities; Consolidated

⁶³ Comments of BellSouth Corporation and BellSouth Entertainment, LLC at 17, MB Docket No. 05-311 (FCC filed Feb. 13, 2006) ("*BellSouth Comments*").

⁶⁴ *Id.* at 18.

⁶⁵ *FTTH Sarwal Declaration* ¶ 6.

⁶⁶ Declaration of Terrence P. McGarty ¶¶ 42-43, *attached to* Comments of the Fiber-to-the-Home Council, MB Docket No. 05-311 (FCC filed Feb. 13, 2006) ("*FTTH McGarty Declaration*").

Telephone Co. delayed video infrastructure deployment in certain Texas communities for the same reason.”⁶⁷

- 81.** “In Dade County, Telesat got stopped dead in its tracks by a state law known as the ‘level playing field’ act. In theory, it was designed to ensure that the second cable franchise wouldn’t get more favorable treatment than the incumbent. But in the 10 states where such legislation has been enacted, many cable newcomers contend it has enabled incumbents to manipulate the franchising process. Often at the established cable company’s urging, local governments hold public hearings and conduct extensive studies on the impact of so-called overbuilders. In the end, communities frequently end up imposing more burdensome financial obligations and construction schedules on second cable systems. Dade County proved no exception.”⁶⁸
- 82.** “In his testimony before a Senate subcommittee in October 2005, US Telecom President & CEO Walter B. McCormick Jr. related the experience of Lakedale Communications in Otsego, Minnesota. Mr. McCormick described that after the City of Otsego conditioned a franchise for Lakedale Communications on a requirement that Lakedale build-out its network to match the incumbent’s cable service area, Lakedale had to abandon its plan. Consequently, even though Lakedale has infrastructure over which video services could be offered in Otsego at reasonable and competitive rates in those areas where Lakedale’s facilities existed or could be realistically expanded, Otsego residents have been deprived of that choice by the LFA’s insistence on buildout promises.”⁶⁹
- 83.** *RCN*: “It has been RCN’s experience that many local governments are determined to charge RCN as high a right-of-way fee as possible, and some are of the view that the adoption of broad ordinances or franchises are appropriate as well.”⁷⁰
- 84.** *Broadband Service Providers Association*: “BSPA members have faced: refusals by local governments to issue permits for the construction of telecommunications facilities, pending execution of a cable franchise agreement with the city; the imposition of additional ‘fair market fees’ on facilities in the public rights-of-way used for the provision of telecommunications or Internet access services, when those same facilities are used for the provision of cable service, and providers are already paying a percent of cable revenue in connection with the construction of the same network; the imposition of a plethora of additional administration,

⁶⁷ Comments of Ad Hoc Telecom Manufacturers Coalition at 5, MB Docket No. 05-311 (FCC filed Feb. 13, 2006).

⁶⁸ M. Robichaux, *Captive Audience: Cable Firms Say They Welcome Competition But Behave Otherwise – Some Established Systems Go to Great Lengths to Keep Rivals Out of the Game – A Nasty Battle in Niceville*, Wall St. J. at A1 (Sept. 24, 1992).

⁶⁹ *Qwest Comments* at 10-11.

⁷⁰ Comments of RCN Telecom Services, Inc. at 19, CS Docket No. 98-102 (FCC filed July 31, 1998) (“*RCN 1998 Comments*”).

review, and monitoring fees in addition to the percent of revenue franchise fee for the provision of cable service.”⁷¹

D. Unreasonable Delays

- 85.** *BellSouth*: “[I]t took BellSouth nearly one year, on average, to obtain a local cable franchise, and in some cases, such as in Gwinnett County and Cobb County, Georgia, the franchise negotiation process took almost three years to conclude.”⁷²
- 86.** *BellSouth*: “For the 20 cable franchises it has negotiated to date, the average length of time required to negotiate each franchise was approximately 10 months. In other words, it took BellSouth nearly one year, on average, to obtain a local cable franchise, and in one case, the franchise negotiation process took almost three years to conclude.”⁷³
- 87.** *Ameritech New Media*: In Troy and Warren in Michigan, Strongsville and Berea in Ohio, and Glen Ellyn and Mount Prospect in Illinois, ANM was eventually able to negotiate a workable franchise agreement, but the process that could have been accomplished in six months frequently took two years or more.
- 88.** *Ameritech New Media*: Chicago required a multi-stage application process with public hearings.
- 89.** *Ameritech New Media*: The Regional Cable Group (Hoffman Estates, Buffalo Grove, Elk Grove, Palatine, and Rolling Meadows) and NORDCAT (Itasca, Carol Stream, Bloomingdale, Roselle, and Wood Dale) in suburban Chicago, and Southwest Oakland Cable Commission (Farmington, Farmington Hills, and Novi) in Michigan, each insisted they would only negotiate as five-town consortiums to increase their leverage in getting a better deal from ANM. Several participating communities didn’t meet the criteria of the ANM business plan, however. ANM was never able to proceed in negotiating an agreement with any of these ten communities.
- 90.** *Grande Communications*: “In major cities, it took at least 9 months to obtain franchise agreements; in smaller cities, approximately 6 months was the average time required to obtain a franchise.”⁷⁴

⁷¹ Comments of Broadband Service Providers Association at 21, n.33, MB Docket No. 02-145 (FCC filed July 29, 2002).

⁷² Comments of BellSouth at 3, MB Docket No. 05-255 (FCC filed Sept. 19, 2005) (“*BellSouth Comments in MB 05-255*”).

⁷³ *BellSouth Comments* at 11.

⁷⁴ Comments of Fiber-to-the-Home Council at 26, MB Docket No. 05-311 (FCC filed Feb. 13, 2006) (“*FTTH Comments*”).

91. *Knology*: “It took Knology 10 months to get a franchise in Louisville, Kentucky (after which a lengthy appellate process occurred further delaying entry) and almost as long in Nashville, Tennessee.”⁷⁵
92. *Merton*: “[I]t takes approximately 3 years from the initial planning of a local broadband network to the commencement of service delivery to residences and businesses. A major reason for this lengthy timeframe is the time expended to obtain a video franchise agreement from local franchising authorities (LFAs).”⁷⁶
93. “A research report from an investment firm stated that the franchising process delays new entrants into the video services market between eight and 16 months.”⁷⁷
94. “[I]n its February, 2004 report, the GAO refers to what may be the ultimate horror story, ‘[a]nother BSP told us that it was unable to obtain a franchise after 2 and ½ years of working with a local franchising authority that was not receptive to competition, and the BSP did not succeed in entering the market.’”⁷⁸
95. “[A] six-month, \$100,000 study into the feasibility of competition led to one delay after another in the processing of Telesat’s application for a franchise . . . [as] incumbents prodded the county to ask for more data before taking any action.”⁷⁹
96. “Finally, after 2½ years of waiting, Telesat withdrew its application. . . . Later that year, the Dade County cable administrator who recommended doing a feasibility study was hired by Tele-Communications Inc., owner of Storer Communications Inc., one of the incumbent cable operators.”⁸⁰

E. Attempts by Incumbent Cable Operators To Raise Entry Costs

97. *Ameritech New Media*: In Rocky River and Lakewood (near Cleveland), Cox management threatened local officials, saying their residents would be denied access to Cox’s regional access studio in Parma if they issued a franchise to ANM. As a result, the Lakewood mayor blocked all efforts by ANM to negotiate a franchise. Rocky River also stonewalled ANM negotiating efforts.

⁷⁵ *Id.*

⁷⁶ *FTTH McGarty Declaration* ¶ 15.

⁷⁷ *FTTH Comments* at 26.

⁷⁸ *Id.*

⁷⁹ M. Robichaux, *Captive Audience: Cable Firms Say They Welcome Competition But Behave Otherwise – Some Established Systems Go to Great Lengths to Keep Rivals Out of the Game – A Nasty Battle in Niceville*, *Wall St. J.* at A1 (Sept. 24, 1992).

⁸⁰ *Id.*

- 98.** *Ameritech New Media:* After the Village of Glendale Heights, Ill. awarded Ameritech New Media a cable television franchise, the Illinois Cable and Telecommunications Association filed a lawsuit to reverse the decision. The lawsuit was eventually dismissed.⁸¹
- 99.** *Ameritech New Media:* After the City of Naperville, Ill. awarded Ameritech New Media a cable television franchise, the incumbent – Jones Intercable – filed a lawsuit seeking to invalidate the franchise agreement.⁸²
- 100.** *Ameritech New Media:* It took fifteen months for ANM to negotiate a franchise with the City of Elgin, Ill. The incumbent operator, Jones Intercable, did everything in its power to ensure that the city did not grant ANM a franchise. In a letter-writing campaign, the management and attorneys for Jones raised numerous spurious issues, all designed to frighten city officials into delaying the grant of a franchise.⁸³
- 101.** *Ameritech New Media:* In the Sterling Heights, Mich. area, Comcast, the incumbent cable provider, developed a strategy where if there is not a valid exclusive agreement in effect with an MDU owner, Comcast tried to extract one.⁸⁴
- 102.** *Ameritech New Media:* Some incumbent cable operators offered up-front payments to secure exclusive MDU arrangements.⁸⁵
- 103.** *Ameritech New Media:* In the Columbus, Ohio area, Ameritech attempted to work out an arrangement with Time Warner for use of inside wiring in a handful of MDUs where the MDU does not want duplicate wiring and Time Warner claims to own the wiring but does not have an exclusive agreement. Despite the concerted efforts of the MDU owner and Ameritech, Ameritech was unable to garner any cooperation from Time Warner. Similar problems were experienced in other franchise areas.⁸⁶
- 104.** *Ameritech New Media:* In Plymouth, Mich., shortly after customers began switching from Continental Cablevision (Continental) to ANM, an employee of Continental intentionally cut several home cable television wires which served ANM's customers.⁸⁷

⁸¹ Comments of Ameritech New Media, Inc. at 4, CS Docket No. 96-133 (FCC filed July 19, 1996) (“*ANM 1996 Comments*”).

⁸² *Id.*

⁸³ Comments of Ameritech New Media, Inc. at 47, CS Docket No. 98-102 (FCC filed July 31, 1998) (“*ANM 1998 Comments*”).

⁸⁴ Comments of Ameritech New Media, Inc. at 30, CS Docket No. 97-141 (FCC filed July 23, 1997) (“*ANM 1997 Comments*”).

⁸⁵ *ANM 1996 Comments* at 6.

⁸⁶ *ANM 1997 Comments* at 31.

⁸⁷ *ANM 1996 Comments* at 4-5.

- 105.** *Ameritech New Media*: In the Village of Oak Lawn, Ill., the efforts of Multimedia Cablevision, Inc. resulted in the Village declining to negotiate a cable franchise with Ameritech until the merger between Ameritech Corp. and SBC was consummated.⁸⁸
- 106.** *BellSouth*: “In the summer of 1996, BEI filed an application for local franchise authority to provide cable services in the Miami-Dade County area. . . . Four of the incumbent cable operators filed extensive written objections to BEI’s franchise application.”⁸⁹
- 107.** *BellSouth*: In Miami-Dade County, Fla., “[t]he objections of the incumbent operators were too numerous to list here, but they centered primarily on claims that, (1) removal of the build out requirement violated Florida’s ‘level playing field’ statute; (2) without a mandatory build out requirement, BEI would engage in ‘cherry picking’ and ‘red-lining’ (notwithstanding BellSouth’s agreement not to engage in red-lining); and (3) the local franchising authority should not grant BEI’s franchise until it conducted a comprehensive study to determine whether having BellSouth construct video capable facilities in the public rights-of-way would be adverse to the public interest and endanger the public safety and convenience by placing too great of a burden on public rights-of-way and utility poles.”⁹⁰
- 108.** *BellSouth*: “On June 24, 1996, BEI filed an application for a local cable franchise to provide cable services in DeKalb County, Georgia. The two incumbent cable operators in DeKalb County – Scripps Howard and MediaOne – opposed BEI’s entry into the market: (1) requesting that the County impose a 5-year build out requirement for BEI’s entire service area; (2) raising concerns about ‘cherry picking’ by BEI; (3) seeking an investigation whether granting BEI a cable franchise would constitute a violation of the federal MMDS cross-ownership restriction set forth in 47 U.S.C. § 533 given that one of BEI’s affiliates (BellSouth Wireless Cable, Inc.) had an MMDS spectrum license covering the same area; and (4) arguing that the County ensure a level playing field and not grant a franchise more favorable or less burdensome than the incumbents’ franchises.”⁹¹
- 109.** *BellSouth*: In St. Johns County, Fla.: “Continental vigorously apposed BEI’s franchise application to compete in Continental’s service area. Attorneys representing Continental filed a number of written objections to BEI’s application. BEI’s application also was opposed by Time Warner, the incumbent cable operator serving the City of St. Augustine, Florida, which is also located within St. Johns County. Even though BEI was not seeking authority to provide

⁸⁸ *ANM 1998 Comments* at 47-48.

⁸⁹ *BellSouth Comments* at 12.

⁹⁰ *Id.* at 13.

⁹¹ *Id.* at 14.

service in Time Warner's franchise area, Time Warner claimed that granting the franchise would give BellSouth the right to 'cherry-pick' and that BEI should be required to meet the same five-year build out and line extension requirements contained in Time Warner's cable franchise."⁹²

- 110.** *RCN*: "In two prominent instances . . . excessively aggressive lobbying of the LFA by Comcast led to the failure of RCN's efforts to negotiate a viable franchise, with the consequence that consumers in those two markets still face a cable monopoly today." In Prince George's County, Md., after unanimous approval by the council of RCN's franchise agreement, "the County Executive, in an unexpected reversal, presumably at Comcast's urging, reopened negotiation of the franchise once more. After months of additional negotiation, during which the County continued to increase its demands, Starpower decided, in the summer of 2001, that it no longer could proceed with its plans to serve customers in Prince George's County. . . . Similarly, Comcast influenced the Philadelphia City Council to delay granting RCN a cable franchise for many months, while RCN was forced to respond to Comcast-scripted questions regarding its application. There, as in Prince George's County, after laboring for some three years to obtain a franchise, RCN ultimately determined that it was not feasible to proceed, and withdrew its franchise application."⁹³
- 111.** *RCN*: In Connecticut, Cablevision, other cable operators, and the New England Cable Television Association, urged the DPUC to impose heavy initial obligations on a new entrant to match those being undertaken by the existing cable company.⁹⁴
- 112.** *Knology*: In Louisville, Ky., Insight, which was required to "pay the city \$500,000 in five annual installments as part of a settlement arising out of the overcharging of cable customers in the 1980s," long before Knology entered the market, insisted that Knology be required to make the same payments so that Knology's franchise would not be "more beneficial" than Insight's.⁹⁵
- 113.** *WideOpenWest*: "[I]ncumbent operators . . . insisted under the guise of 'competitive neutrality' that local franchising authorities not permit competitive operators to contribute PEG capital and access funding fees which were proportionate to their relative market share; rather, they argued that the contributions must be identical in absolute dollar amounts."⁹⁶

⁹² *Id.* at 16-17.

⁹³ Petition of RCN Telecom Services, Inc., to Deny Applications or Condition Consent at 15, 16, MB Docket No. 02-70 (FCC filed Apr. 29, 2002) ("*RCN Petition*").

⁹⁴ *RCN 1998 Comments* at 16.

⁹⁵ *Knology Boccucci Declaration* ¶ 18.

⁹⁶ Reply Comments of WideOpenWest Holdings at 6, CS Docket No. 01-129 (FCC filed Oct. 11, 2001).

- 114.** *Utilicorp/Everest/Exop*: “The incumbent makes it known that they will sue the city if any franchise is granted that is more favorable or less burdensome than their own agreement with the city.”⁹⁷
- 115.** FiberVision, a competitive entrant, was prevented from entering four major Connecticut markets for a prolonged period due to litigation brought by incumbent cable operators. In 1997, after a four-year delay, FiberVision ended up not building the competitive systems, citing as the main reasons “the passage of time and the obvious changes in the cable industry since FiberVision originally applied for its franchises in 1993.” FiberVision also cited the fact that it “remained in a regulatory and legal morass” as leading to difficulty in raising the capital necessary to build out the systems.⁹⁸
- 116.** In 1999, Cablevision of Boston filed suit against RCN, Boston-Edison (who provided conduit to RCN), and the City’s Public Improvement Commission alleging violations of the Telecommunications Act of 1996 and various City statutes. The District Court denied Cablevision’s Motion for Preliminary Injunction stating that the motion had “little chance of succeeding” and that “[i]t would be contrary to the public interest to issue the preliminary injunction.”⁹⁹
- 117.** The City of Hazleton, Pennsylvania was sued in U.S. District Court by incumbent cable provider Service Electric Cablevision for offering a second franchise agreement to NuNet, which has plans to deploy a FTTH network. Service Electric claims that entry by NuNet violates their 17-year exclusive franchise with Hazleton, while city officials believe the 1992 Cable Act bans such exclusivity and applies retroactively.¹⁰⁰
- 118.** *RCN*: “One approach which has proven very popular is to seek sensitive competitive data on the proposed OVS system in the guise of potentially becoming a video program provider (‘VPP’) on RCN’s local system. . . . [An example of such an attempt] occurred in a formal complaint filed by Media General of Fairfax County, Inc., and Media General of Fredericksburg (collectively ‘Media General’). . . . Media General alleged that, although it was the franchised cable operator in Fairfax County, VA and as such operated well within the Washington, D.C. metropolitan OVS area certified by the Commission to Starpower, it was not a ‘competing in-region cable operator’ within the meaning of § 76.1503(c)(2)(v) of the rules and was accordingly entitled to review

⁹⁷ *Utilicorp et al. 2001 Comments* at 6.

⁹⁸ Thomas W. Hazlett & George S. Ford, *The Fallacy of Regulatory Symmetry: An Economic Analysis of the ‘Level Playing Field’ in Cable TV Franchising Statutes*, 3 J. of Bus. & Politics 21 at 32-34 (2001).

⁹⁹ *Cablevision of Boston, Inc. v. Public Improvement Comm’n of the City of Boston*, 38 F. Supp. 2d 46, 63 (D. Mass. Jan. 27, 1999), *affirmed*, 184 F.3d 88 (1st Cir. 1999).

¹⁰⁰ J. Bonner, *Cable Suit May Set Precedent*, Morning Call at AA1 (June 6, 2004).

Starpower's competitively sensitive system data for all of the proposed Starpower system other than the portion planned for its own franchised area."¹⁰¹

- 119.** *Knology*: “[A]n LPF suit was brought by Insight Communications against the City of Louisville and Knology. Litigation in this matter took more than three years. The City of Louisville and Knology eventually won the suit, but the case was settled with no damage award. More importantly, the extensive delay resulted in Knology pursuing other market investments and declining to enter the Louisville market. Thus the suit was an excellent competitive investment by Insight: Full wireline competition has still not emerged in Louisville because of the incumbent’s strategic use of litigation over an LPF provision.”¹⁰²
- 120.** *RCN*: “RCN is aware of no less than fifteen (15) contractors in the Philadelphia market – representing virtually all of the viable construction and installation contractors in the area – whom Comcast or, prior to its acquisition by Comcast, Suburban Cable, have prevented or tried to prevent from doing business with RCN.”¹⁰³
- 121.** *RCN*: “Upon RCN’s entry into the Philadelphia-area market, Suburban began requiring contractors, as a condition of receiving Suburban’s business, to sign ‘non-compete’ clauses in their contracts barring the contractor from working for any competing cable operator in the same jurisdiction.”¹⁰⁴
- 122.** *WideOpenWest*: “In [] discussions with two of the few manufacturers of video-on-demand servers, WideOpenWest was informed that the manufacturers’ products were unavailable in any market where WideOpenWest competes with a name incumbent MSO. . . . Where the incumbents do not have exclusive deals with vendors, they may still use their dominance in the marketplace to dissuade vendors from offering services to competitive providers. For example, it was recently alleged that [AT&T Broadband (now Comcast)] fired a local installations vendor in Utah that apparently agreed to perform services for a small competitive cable system owned by the City of Provo.”¹⁰⁵
- 123.** *Utilicorp/Everest/Exop*: Cable asked many landlords to sign “easement agreements” that while purporting to comply with FCC rules giving building owners the freedom to replace the incumbent with a wireline competitor, have the opposite effect; landlords that have signed these agreements now fear the threat of

¹⁰¹ Comments of RCN Telecom Services, Inc. at 11-12, CS Docket No. 99-230 (FCC filed Aug. 6, 1999).

¹⁰² Comments of Broadband Service Providers Association at 5-6, MB Docket No. 05-311 (FCC filed Feb. 13, 2006).

¹⁰³ *RCN Petition* at 17.

¹⁰⁴ *Id.* at 18.

¹⁰⁵ Reply Comments of WideOpenWest at 8-9, CS Docket No. 01-129 (FCC filed Oct. 11, 2001).

contract litigation “if they allow a competitor onto their property,” and are therefore not invoking the FCC’s rules.¹⁰⁶

- 124.** *Everest*: “Most owners of apartment complexes in the areas served by Everest have been induced by KCCP to enter into exclusive agreements in return for wiring their buildings. Some of these agreements are perpetual since they are for the life of the franchise and any renewals thereof. Others are 15-year agreements entered in the late 1990s when KCCP was completing the digital upgrade of its properties.”¹⁰⁷
- 125.** *Everest*: In Lenexa, Kan., Everest was unable to gain access to apartment complexes representing 18 percent of total passings (or 3,395 passings) in the City, since the owners of these apartment complexes had signed exclusive agreements with either Time Warner or DirecTV and indicated they were unable or unwilling to negotiate with Everest.¹⁰⁸
- 126.** *Everest*: “In the cases where Everest has been successful at negotiating an agreement with a property owner, Everest has found that the average length of time from an initial request for access to service customers who reside in multiple dwelling units until the successful conclusion of contract negotiations with the property owner is six months.”¹⁰⁹
- 127.** *RCN*: “RCN has also experienced difficulties gaining access to MDUs in various markets. Because some 30% of the public lives in such structures and this block is usually the critical early revenue-generating portion of any metropolitan area, the inability to efficiently provide service (or to provide such service at all) to such subscribers is frequently a serious problem. In many cases the incumbent cable operator has arranged exclusive rights to serve a particular building, often by making an up-front payment to the building owner.”¹¹⁰
- 128.** *RCN*: Over a period of many months, Cablevision denied RCN access to distribution wiring in certain Boston MDUs, in violation of the Commission’s inside wiring rules.¹¹¹
- 129.** Cable companies “have the incentive and ability to target pricing in an anticompetitive manner,” and AT&T Broadband (now Comcast) “may well have engaged in questionable marketing tactics and targeted discounts designed to

¹⁰⁶ *Utilicorp et al. 2001 Comments* at 7.

¹⁰⁷ Comments of Everest at 5, MB Docket No. 02-70 (FCC filed Apr. 29, 2002) (“*Everest 2002 Comments*”).

¹⁰⁸ Comments of Utilicorp Communications Services, Everest Connections Corporation, and Ex-Op of Missouri, Inc. at 4, MB Docket No. 02-145 (FCC filed July 29, 2002) (“*Utilicorp et al. 2002 Comments*”).

¹⁰⁹ Comments of Everest Connections at 2, WT Docket No. 99-217 (FCC filed Mar. 8, 2002).

¹¹⁰ Initial Comments of RCN Corp. at iv, CS Docket No. 01-129 (FCC filed Aug. 3, 2001) (“*RCN 2001 Comments*”).

¹¹¹ *RCN 1998 Comments* at 12.

eliminate MVPD competition.”¹¹² While the cable companies argued that the practice of targeting pricing decreases enhanced competition, the FCC found that such practices would instead “keep prices artificially high for consumers who do not have overbuilders operating in their areas because of the overbuilder’s inability to compete against an incumbent who uses such strategies.”¹¹³

- 130.** *Knology*: “Charter is offering severe discounts on service prices, cash payments, and other financial benefits to induce Knology’s customers to switch to Charter. These tactics are the same as those Charter is employing against the SEPB in Scottsboro, and to the same apparent end: to undermine Knology’s ability to compete, drive it from these markets, and restore Charter to its position as the sole cable provider there.”¹¹⁴
- 131.** *WideOpenWest*: WideOpenWest filed a complaint with the FCC alleging that Comcast is improperly targeting price reductions in the areas that WOW serves in Warren, Mich., negotiating private rates with select subscribers that are so low that “they wouldn’t be able to stay in business if everyone in the market got that deal.”¹¹⁵ “Throughout southeastern Michigan, in markets where WideOpenWest competes with Comcast, residents we sign up for service are being offered rate discounts of between 33 and 50 percent to switch back to Comcast. They are also being offered free digital service, free pay per view, and other giveaways. Existing Comcast customers that try to cancel their service to sign up with us are being offered similar benefits not to do so. Importantly, these offers are not publicized, nor are they made available to anyone other than our existing customers and those Comcast customers who have asked to be disconnected in order to switch over to us.”¹¹⁶
- 132.** *RCN*: “Comcast is offering RCN’s existing and potential customers in the Philadelphia market significant discounts on bundled digital cable and premium programming and cable modem service (this bundled is being offered at \$50/month) that is not being offered to customers outside of the RCN territories in the Philadelphia market. Given that the industry’s average monthly rate for digital cable service alone is \$53 to \$55, the anti-competitive impact of Comcast’s bundled rate of \$50 becomes self-evident.”¹¹⁷

¹¹² *Applications for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee*, Memorandum Opinion and Order, 17 FCC Rcd. 23246, ¶¶ 120-121 (2002) (“*AT&T/Comcast Order*”).

¹¹³ *Id.* ¶ 121.

¹¹⁴ Comments of Knology ¶ 9, CS Docket No. 01-129 (FCC filed Nov. 20, 2001).

¹¹⁵ B. McConnell, *Has Comcast Got a Deal For You; Overbuilders Eye WOW Complaint for Direction on Pricing Competition*, *Broadcasting & Cable* at 18 (Dec. 2, 2002).

¹¹⁶ Testimony of Mr. Mark Haverkate, President and CEO of WideOpenWest, On Behalf of the Broadband Service Providers Association, *Dominance on the Ground: Cable Competition and the AT&T-Comcast Merger*, before the Senate Judiciary Committee (Apr. 23, 2002) (“*Haverkate Testimony*”).

¹¹⁷ Comments of RCN Corp. at 12, MB Docket No. 03-172 (FCC filed Sept. 11, 2003).

- 133.** *RCN*: “In Folcroft, PA, just prior to RCN’s entry into the market, Comcast established a sales ‘Swat Team’ that was instructed to sign customers up for 18-month contracts, in exchange for receiving a lower price for their cable service.”¹¹⁸
- 134.** *Grande and ClearSource*: “In Austin, Corpus Christi, and other markets in Texas, both Grande and ClearSource are being subjected to deep discounting by [AT&T Broadband (now Comcast)], through its joint venture with AOL Time Warner, Texas Cable Partners. In Austin, for example, TCP is offering discounts of between \$16 to \$28 per month to customers of these competitors in order to lure them back to the incumbents’ own service.”¹¹⁹
- 135.** *Everest*: “In Kansas City, Everest is being subjected to comparable tactics by [AT&T Broadband (now Comcast)], through its joint venture with AOL Time Warner, Kansas City Cable Partners. In that market, however, KCCP has gone even further than its Texas affiliate – promising Everest customers additional payments of \$200 if they switch back to KCCP, and even more if they agree to write testimonials in favor of KCCP’s service. KCCP has also made so-called customer “loyalty test” offers to residents in areas where Everest is building out its system, through which customers in these neighborhoods are guaranteed discounts on service prices if they agree to stay with KCCP for 12 months. To fund these discounts, KCCP has raised the price of service for other neighborhoods served by its system.”¹²⁰
- 136.** *Everest*: In response to Everest’s market entry, Time Warner began offering packages for cable and high-speed Internet services at rates that are discounted up to 50 percent from their published rates. Time Warner offered customers who switch back from Everest to Time Warner three months of free service, as well as a “VIP package” of basic and digital service, three premium channels, and high-speed Internet service for \$59.95 – a product combination that usually retails for \$119.95.¹²¹
- 137.** *Knology*: “In Augusta, Georgia, Comcast is offering discounts in excess of 50 percent for basic and digital cable, high speed data, and other services – but only in areas where Knology offers competitive services. These offers are not made generally throughout Comcast’s service area, but are instead mailed directly to Knology customers and new residents in competitive neighborhoods.”¹²²
- 138.** *Ameritech New Media*: In some areas where Ameritech New Media secured a cable franchise, the incumbent cable operator began to offer discounts for long-

¹¹⁸ Comments of RCN Telecom Services at 16, MB Docket No. 05-192 (FCC filed July 21, 2005).

¹¹⁹ See *Haverkate Testimony*.

¹²⁰ See *Haverkate Testimony*.

¹²¹ *Utilicorp et al. 2002 Comments* at 4-5.

¹²² See *Haverkate Testimony*.

term commitments (typically one year), some of which contain penalties for early termination which exceed the savings offered, *e.g.*, \$3 per month discount but a \$5 per month penalty for terminating service in cases other than a physical move of residence.¹²³

- 139.** *RCN*: “Over a period of months, [Cablevision] actively obstruct[ed] RCN’s efforts in New York to return the Cablevision set-top boxes of RCN’s newly-acquired subscribers to get refunds for such customers.”¹²⁴
- 140.** *Everest*: “KCCP has refused to allow Everest to carry Metro Sports, a local sports network established by KCCP even though KCCP permits Comcast to carry MetroSports in the nearby communities that Comcast serves. Denying Everest with access to MetroSports harms the company since MetroSports has exclusive rights to certain popular sports programming.”¹²⁵
- 141.** *RCN*: “In prior years RCN has provided the Commission with details on its inability to secure local sports programming in the New York City and in the Philadelphia markets. Both of these problems persist. In New York City RCN has been deprived by Cablevision of access to overflow sports programming. . . . In the Philadelphia suburban communities in which RCN is actively building out its system, the overwhelmingly dominant incumbent, Comcast, acquired the great bulk of the local sports programming, as well as their venues, and threatened to deny RCN long term access. The threat was mitigated only when Comcast faced Justice Department review of its plan to acquire Home Team Sports in the Washington area.”¹²⁶
- 142.** *Ameritech New Media*: HBO refused to grant Ameritech New Media access to HBO programming distributed by Continental, the incumbent operator in several Ameritech New Media franchise areas.¹²⁷
- 143.** *Seren Innovations*: Seren Innovations had been denied access to the MidWest Sportschannel, the Game Show Network, and MSNBC in the Minneapolis market due to exclusive contract arrangements between AT&T Broadband (now Comcast) and programmers.¹²⁸

¹²³ *ANM 1996 Comments* at 6.

¹²⁴ *RCN 1998 Comments* at 10.

¹²⁵ *Everest 2002 Comments* at 5-6.

¹²⁶ *RCN 2001 Comments* at 9, 11.

¹²⁷ *ANM 1996 Comments* at 5.

¹²⁸ Reply Comments of Seren Innovations, Inc. at 11, CS Docket No. 99-251 (FCC filed Sept. 17, 1999).

- 144.** In 2001, Paul Bunyan, an OVS operator competing with Charter in numerous Minnesota markets, alleged that it was denied access to the Disney Channel because Charter has an exclusive contract with Disney.¹²⁹
- 145.** In Florida, Telesat “found it couldn’t get access to popular cable program networks, many of which are at least partly owned by the largest cable operators in the country. For instance, Telesat can’t get the Sunshine Sports Network, which carries Orlando Magic basketball games and Florida State University sports. The Sunshine network is 51% owned by a group of cable operators and 49% owned by a partnership between cable entrepreneur Bill Daniels and Liberty Media Corp.”¹³⁰
- 146.** *Broadband Service Providers Association:* “As part of its retransmission requirement, Altrio, a BSPA member in Greater Los Angeles, was initially asked to carry Soap Network in the last round of retransmission consent negotiations. Altrio was then told it could not carry Soap Network in certain areas of the Los Angeles market because of an exclusive carriage agreement with an unnamed incumbent cable operator. A list of the zip codes in which carriage was prohibited corresponded to those in Pasadena where Charter has a franchise. This market-wide prohibition would also apply to zip codes in Los Angeles County and Temple City where Charter operates.”¹³¹
- 147.** *Broadband Service Providers Association:* “Denying access to content has also extended into rural areas. RFD-TV is a channel positioned to meet the unique needs and interests of a more rural population. During its development process RFD-TV accepted the assistance of MediaCom Communications (“MediaCom”), which serves 23 states. In return, MediaCom obtained an exclusive broadcast right to RFD-TV in all of the territories it serves. BSPA understands that RFD-TV has now agreed to make its programming available to competitors as of December 2003.”¹³²
- 148.** *Broadband Service Providers Association:* “In the Boston market, Comcast has exclusive rights to carry the local news programming of New England Cable News. Comcast has refused to waive those exclusive rights and provide this critical programming to RCN, thereby denying RCN’s existing and potential subscribers with access to this important local programming.”¹³³

¹²⁹ Comments of the Competitive Broadband Coalition at 14 n.23, CS Docket No. 01-290 (FCC filed Dec. 3, 2001).

¹³⁰ M. Robichaux, *Captive Audience: Cable Firms Say They Welcome Competition But Behave Otherwise – Some Established Systems Go to Great Lengths to Keep Rivals Out of the Game – A Nasty Battle in Niceville*, Wall St. J. at A1 (Sept. 24, 1992).

¹³¹ Comments of Broadband Service Providers Association at 15, MB Docket No. 03-172 (FCC filed Sept. 11, 2003).

¹³² *Id.*

¹³³ *Id.* at 17.

149. “In New York, an incumbent cable operator threatened apartment co-op boards with a halt in its service if the co-ops let a competitor in.”¹³⁴
150. “In Cape Coral, Fla., a city famed for its Arbor Day celebrations, a cable provider charged that a would-be competitor planned to destroy 600 to 700 trees to string cable (it didn’t actually plan to cut any).”¹³⁵

III. EXPERIENCE OF INCUMBENT CABLE OPERATORS

A. Demands for Funding of Municipal Projects Unrelated to Cable Service

151. In the Village of Sloatsburg, N.Y., Cablevision agreed to donate \$5,000 to the Village to offset the cost of its annual Halloween celebration, in addition to an unrestricted gift of \$20,000 to the Village, and agreed to waive all monthly service charges for service at the Village Hall, including the Fire Department, for the life of the franchise agreement. Cablevision also agreed to keep the payment center at Village Hall open for the life of the agreement.¹³⁶
152. The *Wall Street Journal* reported that in Massapequa Park, N.Y., Verizon “complied with the village’s request for a \$27,000 grant – *the same amount the current cable company [Cablevision] had paid* – to be used to plant wildflowers on the median of a four-lane highway that cuts through town and hanging flower baskets to decorate old-fashioned street lights in the village center.”¹³⁷
153. In 2000, in order to receive approval to acquire Cablevision’s Cleveland, Ohio franchise, Adelphia agreed to “donate \$3 million to the Cleveland Foundation, mostly to start computer centers that would train city residents,” and a portion of which could possibly go to “theater groups seeking to broadcast their productions on cable.”¹³⁸ This was in addition to the \$1 million Adelphia would contribute for the city’s cable-related expenses, and \$1.5 million for the city’s privately run minority-affairs station.¹³⁹
154. A 1983 *Business Week* article cites then-NCTA President Thomas E. Wheeler as stating that some municipally mandated conditions border on the outrageous – “in

¹³⁴ M. Robichaux, *Captive Audience: Cable Firms Say They Welcome Competition But Behave Otherwise – Some Established Systems Go to Great Lengths to Keep Rivals Out of the Game – A Nasty Battle in Niceville*, Wall St. J. at A1 (Sept. 24, 1992).

¹³⁵ *Id.*

¹³⁶ See Sloatsburg Village Board, *Minutes of Regular Meeting – January 25, 2005*, Resolution #05-002, <http://www.sloatsburgny.com/01-25-05minutes.pdf>.

¹³⁷ D. Searcey, *Spotty Reception – As Verizon Enters Cable Business, It Faces Local Static – Telecom Giant Gets Demands As It Negotiates TV Deals*, Wall St. J. at A1 (Oct. 28, 2005) (emphasis added).

¹³⁸ C. Quinn, *Cable Firms To Give*, Plain Dealer at 1A (Oct. 3, 2000).

¹³⁹ *Id.*

Sacramento, for example, it took a promise to plant 20,000 trees to win franchise approval.”¹⁴⁰

- 155.** *Mackinac Center for Public Policy*: “Local governments may also mandate nonmonetary, or ‘politically correct,’ concessions from operators for franchise rights. In Sacramento, California, a cable operator had to plant 20,000 trees to secure his franchise. Another in Miami had to provide \$200,000 in annual funds to the local police department for an anti-drug abuse campaign.”¹⁴¹
- 156.** “[T]he 1982 Sacramento franchise, awarded to United Tribune Cable Company, included, among other things, a promise that UTC would plant 20,000 trees and spend ‘\$90 million in construction projects, local studios, and job training programs.’ When the franchise proved economically unfeasible, residents of Sacramento went without cable for several more years.”¹⁴²
- 157.** “Miami deputy attorney A. Quinn Jones . . . said that Miami Cablevision was committed to giving the city at least \$600,000 a year for public access and \$200,000 per year for a city drug enforcement program – until the FCC said that neither was allowed.”¹⁴³
- 158.** The 1982 franchise agreement between the City of Denver and Mile Hi Cablevision required the cable company to provide \$500,000 in equity funds and loans to “disadvantaged” small businesses, and \$1 million in loans to “develop[] two minority entrepreneurial channels.”¹⁴⁴
- 159.** *Pacific Research Institute*: “Some municipalities have perversely used the franchise bidding process to strong-arm unfair agreements from cable providers, such as requiring corporate funds to help cover local budget shortfalls, or the procurement of unrelated goods and services for public use by cable operators. Although federal laws have since tightened what can be demanded, city officials still find creative ways to push the legal envelope.”¹⁴⁵
- 160.** *The Telmarc Group*: “The strategy was to respond to city RFPs with detailed proposals and then to show how cheaply the cable company would provide basis service and also to show what other ‘gifts’ could be made to the city. Thus pricing such as \$1.95 per month for basis and the gift of hundreds of trees to line

¹⁴⁰ *Cutting Through the Delays in Cable Franchising*, Business Week (May 16, 1983).

¹⁴¹ D. Alexander, *Laying Cable and Competition*, Mackinac Center for Public Policy (May 15, 1999).

¹⁴² T. Hazlett, *Wiring the Constitution for Cable*, The Cato Review of Business & Government, <http://www.cato.org/pubs/regulation/regv12n1/reg12n1-hazlett.html>.

¹⁴³ M. Greene, *Cable TV Promises Prove Elusive*, Washington Post (Sept. 20, 1984).

¹⁴⁴ M. Brown, *Cable TV Industry Says Local Demands Stifling*, Washington Post (Jan. 3, 1982).

¹⁴⁵ Comments of the Pacific Research Institute at 3-4, MB Docket No. 05-311 (FCC filed Feb. 10, 2006).

municipal roads were common. All parties knew that the bids were unrealistic but it was a land grab process amongst the larger cable operators.”¹⁴⁶

- 161.** *Charter*: “Accordingly, some of the concessions LFAs seek to extract from cable operators during the transfer process include commitments to modify cable system capabilities, to provide I-Net or fiber-optic set asides, to provide additional grants to support Public Educational and Government programming, to provide cash payments in settlement of ongoing disputes, or to impose various other requirements such as heightened service standards. Thus, in many instances during the transfer process, Charter faced the same demands the ILECs now identify.”¹⁴⁷
- 162.** *Cablevision*: Concessions involving rights-of-way management, indemnity, scope/timeframe, and damage to municipal property “are hardly ‘outrageous demands’ by local governments that unreasonably and unnecessarily burden franchise negotiations. To the contrary, they are basic cable franchise obligations well within the right and responsibility of local governments to demand and that Cablevision and other incumbent cable operators have fulfilled for decades.”¹⁴⁸
- 163.** Cablevision’s Franchise Agreement in Hempstead requires Cablevision to indemnify the town against any claims against it relating to the construction, operation, service and repair of the cable system, including any such claims where the town is partially negligent.¹⁴⁹

B. Demands for Fees in Excess of 5-Percent Franchise Fee

- 164.** An LFA consultant recommended that if Comcast Corp. and Millennium Digital Media want to keep their cable franchises in Anne Arundel County, they should be willing to bring at least \$28 million to the bargaining table – nearly five times the terms of the current contract terms. In 1999, the last time negotiations took place, consultant Mary Cordona – using input from various county agencies, nonprofit and business groups – suggested \$24 million. Most of the money – about \$16 million – would go toward video production equipment for the school system, however services wouldn’t be limited to area agencies. The BWI Business Partnership, for example, has requested cable broadband service to be

¹⁴⁶ T. McGarty, The Telmarc Group, *The Hidden Costs of Broadband: Franchises, Internet Access, Litigation and Industry Change* at 17 (2005), attached to Comments of the Fiber-to-the-Home Council, MB Docket No. 05-311 (FCC filed Feb. 13, 2006).

¹⁴⁷ Comments of Charter Communications, Inc. at 5-6, MB Docket No. 05-311 (FCC filed Feb. 13, 2006).

¹⁴⁸ Comments of Cablevision Systems Corporation at 17, MB Docket No. 05-311 (FCC filed Feb. 13, 2006).

¹⁴⁹ Franchise Renewal Agreement between Town of Hempstead, New York and Cablevision Systems Long Island Corp., Section 18.2 (Feb. 17, 2003).

extended to the airport area. The County's Economic Development Corp. seeks \$20,000 for a video conference room.¹⁵⁰

- 165.** Time Warner Cable's Franchise agreement in Tampa requires, among other things, an initial capital grant of \$1,000,000 to be used by the Franchising Authority for the expansion of the existing I-Net; an initial capital grant of \$500,000 for equipment and renovation of access facilities; payment of \$1,750,000 at the time of acceptance of the agreement for operational support of the PEG access channels, and, upon the fifth and tenth anniversaries of the effective date of the agreement, a payment of \$1,250,000; and \$250,000 in community grants for cable-related activities at the time of acceptance of the agreement and upon the tenth anniversary of the effective date of the agreement.¹⁵¹
- 166.** "Time Warner's Charlotte division president, David Auger, said the dispute [with the Charlotte LFA] is 'a classic example of a local government agency run amok,' and accused the county of 'holding our right to do business hostage until we come up with the ransom they are seeking.'"¹⁵²
- 167.** "Comcast said it hasn't agreed to a franchise because in the guise of an institutional network, the city [of Walnut Creek] wants improper concessions, such as building a separate, advanced telecom network for municipal use. . . . The city also wants support for public, educational and governmental access channels in excess of the 5% franchise fee cap, Comcast has alleged."¹⁵³
- 168.** "In St. Paul, Minnesota, for example, the operator pays a 5% franchise fee and in addition provides more than \$1.50 per subscriber per month for PEG and institutional network uses. In Larchmont, New York, the operator provides more than \$1.00 per subscriber per month in PEG support."¹⁵⁴
- 169.** Comcast's 2002 franchise renewal for Santa Maria and Lompoc, Cal. called for Comcast to provide I-Net to link public buildings for voice, video, and data. The I-Net would link the cities' media centers to each other. Comcast committed to an initial grant of \$828,000, and annual grants of \$355,000 per year for the 12-year franchise term (adjusted each year for the local CPI).¹⁵⁵

¹⁵⁰ D. Leiva, *Negotiations To Begin For New County Cable Contracts*, Annapolis Capital (May 29, 2005), available at http://www.pulp.tc/html/negotiations_to_begin_for_new_.html.

¹⁵¹ Time Warner Cable Franchise Agreement with City of Tampa, App. C (Mar. 23, 2000), http://www.tampagov.net/dept_Cable_communications/franchise_agreement/index.asp.

¹⁵² C. Levine, *Time Warner Cable Countersues County; Response Expands Fight On Data-Network Deal*, Charlotte Observer (July 22, 2005).

¹⁵³ L. Haugsted, *Comcast Sues Calif. City Over Impasse*, Multichannel News (Mar. 7, 2005).

¹⁵⁴ N. Miller & J. Van Eaton, Miller & Van Eaton, *Local Communities and Communications Networks: Key Issues 2006* at 3 (2006).

¹⁵⁵ The Buske Group, *Outcomes of Recent Cable Franchise Renewals*.

- 170.** Cox’s 2002 franchise renewal for Oceanside, Cal. committed Cox to “Telecom./Technology Grants” of \$1.4 million initially, then \$1.35 million after 12 months, and \$1.35 million after 24 months.¹⁵⁶
- 171.** Adelphia’s 2001 franchise renewal for Brunswick and Brunswick Hills Township, Ohio, committed Adelphia to \$400,000 to fund PEG access equipment and facilities in the first year, and \$100,000 in the fourth year. Adelphia committed to renovating and providing the PEG Access facility rent-free for the life of the franchise.¹⁵⁷
- 172.** Charter’s 2000 franchise renewal for Gilroy, Hollister, and San Juan Bautista, Cal. committed Charter to an initial grant of \$700,000 to fund PEG efforts, and \$209,782 or 3% of gross revenues per year, whichever is less, thereafter.¹⁵⁸
- 173.** Adelphia and Avenue’s 1999 franchise renewal for Ventura, Cal. committed the franchisees to fund PEG efforts with an initial grant of \$500,000, then \$400,000 in the second year, and \$140,000 in the third year. Adelphia committed to a contribution of \$1.04 per subscriber per month on an ongoing basis, and Avenue committed to a contribution of \$1.20 per subscriber per month.¹⁵⁹
- 174.** Prime Cable’s (now Comcast) 1998 franchise renewal for Montgomery County, Md. committed the franchisee to 13 analog channels, and up to 10% of digital spectrum for PEG access. In addition, the franchisee committed to a \$2 million contribution in the first year, \$1.2 million in the second year, and \$200,000 per year thereafter, adjusted for CPI.¹⁶⁰
- 175.** InterMedia’s (now Comcast) 1996 franchise renewal for Mountain View, Cal. committed the franchisee to contribute \$2.6 million over 10 years (including funds for I-Net equipment and PEG access services).¹⁶¹
- 176.** Comcast recently renewed its franchise agreement in San Francisco. “As part of the deal, [San Francisco] will receive a one-time settlement fee of \$3.5 million along with about \$4.4 million in public access, education and government funding over four years. This would be in addition to the \$517,000 in franchise fees the city receives annually from Comcast.”¹⁶² “Other public benefits contained in the

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² R. Kim, *S.F. Considers Cable TV Deal*, San Francisco Chronicle (June 30, 2005).

contract include funding for a public access television production studio as well as a mobile production van.”¹⁶³

C. Lawsuits Against Municipalities To Prevent “Illegal Conditions”

- 177.** Time Warner Cable filed suit in U.S. District Court for the Southern District of Texas, Houston division, against the city of West University Place, its mayor, and city manager, challenging the fee requirements of SB 5 in Texas. Time Warner’s franchise expired at the end of January 2006, and city officials asked for one percent of Time Warner’s gross revenues beginning that month, in addition to the five percent franchise fee. Time Warner has asked the district court to declare that state law is pre-empted by national cable policy, and seeks an injunction against the city to prevent it from collecting the fee associated with section 66.006(b) of SB 5.¹⁶⁴
- 178.** *Comcast*: “If, in fact, the ILECs are encountering difficulties in the franchising process, they can readily pursue remedies in the courts. That is what the statute provides. That is how Comcast and other cable operators have dealt with the comparatively small number of unreasonable demands presented by LFAs in franchise proceedings over the course of several decades.”¹⁶⁵
- 179.** “‘Comcast will continue to object to San Jose’s attempt to impose illegal conditions on our right to serve our customers in the city, in whatever forum or forums necessary,’ said Western region vice president of communications Andrew Johnson.” “Comcast said in its complaint that pending access and institutional-network demands have had a ‘chilling effect’ on the company’s programming plans, and therefore violate Comcast’s First Amendment rights.”¹⁶⁶

D. Other

- 180.** *Gene Kimmelman, Consumers Union, Senate Commerce hearing, Feb. 15, 2006*: “I have heard more praise of local franchising [by the cable companies] than I have in 20 years.”
- 181.** *Robert Sachs, National Cable and Telecommunications Association*: “As we discovered from 1992 to 1996, government regulation can have a stifling effect.”¹⁶⁷
- 182.** *Comcast*: “The ILECs’ claims that LFAs are slowing the approval process with unreasonable demands simply ring hollow. To be sure, having secured over 4,600

¹⁶³ C. Goodyear, *Board Panel OKs Comcast Deal*, San Francisco Chronicle (Aug. 4, 2005).

¹⁶⁴ Original Complaint, *Texas and Kansas City Cable Partners L.P., d/b/a Time Warner Cable v. City of West University Place et al.*, Case 4:05-cv-04177 (S.D. Tex. filed Dec. 12, 2005).

¹⁶⁵ Comments of Comcast Corporation at 3, MB Docket No. 05-311 (FCC filed Feb. 13, 2006).

¹⁶⁶ L. Haugsted, *Judge Voids San Jose Complaint*, Multichannel News (Aug. 30, 2004).

¹⁶⁷ A. Parker, *CEOs Call for No Federal Role in Cable-TV Pricing, Content*, Philadelphia Inquirer (May 4, 2004).

franchises around the country, Comcast has encountered its share of difficult franchise negotiations with LFAs, and some problems continue to arise in the context of franchise renewals and transfers. But experience has taught that negotiation and compromise – not threats and intimidation – almost always enable Comcast and LFAs to reach an accord.”¹⁶⁸

- 183.** *New Jersey BPU*: “New Jersey is . . . familiar with the delay that can be caused by the renewal process, as guided and set by the Commission. Renewals of existing franchises take in excess of 36 months, and the Board would support Commission action to streamline this process.”¹⁶⁹

¹⁶⁸ Comments of Comcast Corporation at 15, MB Docket No. 05-311 (FCC filed Feb. 13, 2006).

¹⁶⁹ Comments of the New Jersey Board of Public Utilities at 6, MB Docket No. 05-311 (FCC filed Feb. 13, 2006).