December 7, 2006

VIA ELECTRONIC COMMENT FILING SYSTEM (ECFS)

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street SW
Washington, D.C. 20554

Re: 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

Dear Ms. Dortch:

This *ex parte* notice is filed on behalf of the National Association of Telecommunications Officers and Advisors ("NATOA"), the National League of Cities ("NLC"), the National Association of Counties ("NACo"), the United States Conference of Mayors ("USCM"), the Alliance for Community Media ("ACM"), and the Alliance for Communications Democracy ("ACD"). The associations were represented by Jeff Arnold, Tillman Lay, and Steve Traylor. On December 6, they met with Commissioner Jonathan S. Adelstein and his Legal Advisor (Media) Rudy Brioché, in order to discuss issues affecting local governments and the local franchising process. Discussions also addressed the proposed order in this docket and our continued belief that the Commission lacks the authority to act in this matter, as outlined in our attachment.

Also, during the course of the meeting, the participants presented a copy of the attached white paper on local franchising that was prepared on behalf of the International City/County Management Association ("ICMA").

Pursuant to Commission rules, please include a copy of this notice in the record for the proceeding noted above.

Sincerely,

Libby Beaty

Libby Beaty
Executive Director, NATOA

Attachment

cc: Alex Ponder, NLC
Jeff Arnold, NACo
Ron Thaniel, USCM
Commissioner Jonathan S. Adelstein
Rudy Brioché, Legal Advisor (Media) to Commissioner Adelstein

Local Governments' Responses to Proposed Rules in DN 05-311
Reportedly Under Consideration by FCC

GENERAL RESPONSE:

- The text of §§ 621(a)(1) and 635(a) gives exclusive jurisdiction over § 621(a)(1) "unreasonable refusal" matters to the courts, not the FCC.

- Because the courts already share concurrent jurisdiction over several provisions of Title VI not enumerated in § 635(a), any other reading would improperly write § 635(a), and § 621(a)(1)'s reference to § 635(a), out of the statute.

- Congress' decision to leave § 621(a)(1) matters to the courts was a wise one. The three Title VI provisions singled out for court jurisdiction in § 635(a) -- § 621(a)(1), § 625 (franchise modification), and § 626 (franchise renewal) -- all share the unique trait of involving fact-specific, LFA-specific issues -- matters that will inherently vary considerably from LFA-to-LFA and from cable provider-to-cable provider. Thus, the three Title VI provisions to which § 635(a) gives courts, rather than the FCC, jurisdiction are uniquely better suited to court, rather than FCC interpretation and enforcement, and peculiarly unsuited to any FCC "one size fits all" rules.

- PROPOSED RULE: LFA has 90 days to negotiate a franchise with entity, like an ILEC, that has preexisting access to local rights-of-way ("ROW"). LFAs would be given 180 days to negotiate with entities that do not have a pre-existing access to ROW. If LFA does not grant franchise within 90 (or, in the case of entities with no prior ROW access, 180) days, provider has the right to go ahead and provide cable service over local ROW while the LFA and the provider continue to negotiate a franchise agreement – the terms of which would then be retroactive to the date the provider began to provide service.

RESPONSE:

- By giving provider a federal right to construct and operate a cable system after 90 (or 180) days, the proposed rule would grant the provider a "franchise" within the meaning of § 602(9) of the Communications Act, and convert the FCC into the "franchising authority" within the meaning of § 602(10) of the Act. But the Act simply does not allow the FCC to grant "franchises" or make itself the "franchising authority." And if the federal authority to use local ROW to provide cable service given by the proposed rule were not construed to be a "franchise" improperly granted by the FCC, then that authority would

run afoul of § 621(b)(1), which prohibits the provision of cable service without a "franchise" granted by a "franchising authority."

- There is no plausible way to read a hard-and-fast deadline into § 621(a)(1)'s "unreasonable refusal" language. When Congress intended to set such a bright-line deadline on LFA action, it said so, *see* § 617 (120-day limit on LFA action on franchise transfers). Moreover, if Congress believed that 120 days was necessary for franchise transfers (where no franchise negotiation is required; only the identity of the franchiseholder changes), then there is no rational way Congress could have intended § 621(a)(1) to authorize a shorter (90) or only slightly longer (180) fixed deadline when, in the case of § 621(a)(1), the terms of the entire franchise agreement must be negotiated.

- The proposed rule encourages bad faith by providers. It guarantees them everything they want -- ROW access and the right to provide cable service (*i.e.*, a franchise) -- within 90 (or 180) days. It would be irrational for a provider to make any concessions at all to the LFA either before or after the deadline passes. The result: A franchise without obligations responsive to <u>local</u> community cable-related needs and interests (or with obligations unilaterally imposed by the provider or the FCC), directly contrary to the Cable Act.

- Alternatively, the rule would give LFAs that have not reached agreement within 90 (or 180) days no choice but to deny the application before the deadline expires to preserve their rights. The result: A large increase in § 621(a)(1) litigation which would not serve the provider's, the LFA's, or the FCC's interests in providing competition and deployment.

- By granting providers the right to use property – the local ROW – for a purpose (to provide cable service) that the owner/trustee of that property (the LFA) has not granted, the proposed rule would violate both the Takings Clause of the Fourth Amendment and the Tenth Amendment of the Constitution.

- <u>PROPOSED RULE</u>: LFA is limited to a total of 5% compensation in the franchise agreement. Any in-kind or monetary obligations for PEG support, government drops or I-Nets would be deducted from the 5% franchise fee.

RESPONSE:

- As the plain language of § 622(g)(1) makes clear, "tax, fee, or assessment" includes "only monetary payments" and "does not include … any franchise requirements for the provision of services, facilities or equipment." *1984 House Report* at 65 (emphasis added). Thus, in-kind requirements are not a "franchise fee."

- Section 622(g)(2)(C) specifically exempts payments devoted to PEG capital facilities or equipment, and capital facilities and equipment for I-Nets are PEG capital equipment and facilities, *see* §§ 611(b) and 624(b).

- Non-capital PEG payments are also not a "franchise fee" with respect to any such payments that an "operator makes voluntarily relating to support of [PEG] access." *1984 House Report* at 65; *City of Bowie*, 14 FCC Rcd 9596, 9598 (1999).

- Section 622 (g)(2)(D) provides that "requirements or charges incidental to the awarding or enforcing of the franchise, including payments for bonds, security funds, letters of credit, insurance, indemnification, penalties, or liquidated damages" are not a "franchise fee." "Charges," of course, would clearly seem to be monetary, and in case there was any doubt, several of the examples are monetary in form. Moreover, many are far from incidental in amount. The only rational conclusion is that this exemption from the franchise fee definition applies to any in-kind or monetary requirement "or charge" that is incidental to the awarding or enforcing of a franchise fee, not just to such requirements or charges that are non-monetary, and not just to such charges that "incidental" in amount. Thus, reasonable application fees and cost reimbursement requirements in connection with the granting of a franchise application are "charges … incidental to the awarding or enforcing of the franchise."

- PROPOSED RULE: No buildout beyond that which is proposed by applicant and in no case beyond the applicant's existing telephone service area.

RESPONSE

- Section 621(a)(4)(A), which was enacted in 1992 at the same time as § 621(a)(1), provides that "[i]n awarding a franchise," an LFA "shall allow the applicant's cable system a reasonable period of time to become capable of providing cable service to all households in the franchise area."

- The only way to read §§ 621(a)(1) and 621(a)(4)(A) together is to conclude that it is <u>not</u> an "unreasonable refusal" for an LFA to require an applicant's system to provide cable service "to all households in the franchise area" as long as the LFA gives the applicant "a reasonable period of time to do so."

Forced Franchising

Why Telephone Industry Calls For "Shall Issue" Video Franchising Shouldn't Be Answered

ICMA *Leaders at the Core of Better Communities*

FORCED FRANCHISING

Why Telephone Industry Calls for "Shall Issue" Video Franchising Shouldn't Be Answered

ICMA

Leaders at the Core of Better Communities

[Franchising] was an area where we had to learn and see if this was going to be an issue for us. Right now we feel very, very confident that we have [our franchising] moving in the right direction, and this isn't holding us back in our deployment of video.

Virginia Ruesterholz
President, Verizon Telecom
September 27, 2006

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Scholarly journals: JON KREUCHER, FORCED FRANCHISING: WHY TELEPHONE INDUSTRY CALLS FOR "SHALL ISSUE" VIDEO FRANCHISING SHOULDN'T BE ANSWERED, Position Paper published by ICMA (October 2006).

Newspapers and other periodicals: Please refer to this position paper as "published by ICMA and authored by community-side cable attorney Jon Kreucher."

Bloggers: Please link to **icma.org** and **www.bloggingbroadband.com**. Complete .pdf copies of this position paper are available on those sites.

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ICMA

Leaders at the Core of Better Communities

ICMA is the premier local government leadership and management organization. Its mission is to create excellence in local governance by developing and advocating professional management of local government worldwide. ICMA provides member support; publications, data, and information; peer and results-oriented assistance; and training and professional development to more than 8,200 city, town, and county experts and other individuals throughout the world.

Few issues pose as much opportunity – and as much risk – to the safety and welfare of our residents as does the issue of competitive franchising of broadband video systems. Consequently, ICMA decided to investigate issues related to traditional video franchising and consider implications associated with changes to the existing system. ICMA's contact for this paper is Robert Carty, who may be reached at 202-962-3560 (rcarty@icma.org).

The Kreucher Law Firm PLC

KREUCHER Law Firm PLC

Integrity. Experience. Results.

Jon Kreucher was employed by ICMA to prepare this report. Mr. Kreucher helps local officials solve their cable and telecommunications issues. He regularly works with governments to identify and achieve appropriate goals in cable franchise renewals and franchise transfers, helps communities resolve issues related to competitive franchising, and assists governments in the development of legislative strategies related to communications issues.

For a decade of his legal career, Mr. Kreucher worked inside cable companies. While there, he and his teams secured over 500 video franchise renewals and nearly 1,000 franchise transfers. In the mid- to late 1990s, Mr. Kreucher's responsibilities included the development of competitive strategies in response to Ameritech's wireline video efforts. This experience makes him one of the country's most knowledgeable experts in the area of competitive franchising.

In 2005, Mr. Kreucher formed his own firm. He now applies his unique knowledge of the communications industry for the benefit of his local government clients. He has not represented any cable or telephone company in the current legislative processes. Mr. Kreucher's e-mail address is Jon@CableCounsel.com, or he may be reached on (877) 846-5963 ext. 105.

Contents

I. Executive Summary 5

II. Introduction: Déjà vu, All Over Again 20

III. A National System for Video Franchising Already Exists 25

IV. The Good, the Bad, and the Ugly: The Telephone Companies' Campaign 28

V. Don't Try This at Home: How Competitive Video Services Really Move from Idea to Market 33

VI. The Impact of Local Video Franchising on Broadband Deployment: Evidence to Date 43

VII. A Secret Obstacle to Broadband Deployment: The Phone Companies' Ever-Changing Business Plans 53

VIII. Why Local Franchising Works 61

IX. Competitive Franchising: The Changing Landscape of Negotiation 72

X. The Sky Isn't Falling: Responses to Specific Phone Company Claims 80

XI. Suggestions and Best Practices to Consider 101

XII. National and State Franchising: The Unintended Consequences 113

I. Executive Summary

Local governments have franchised video systems since cable television first sprouted in the late 1940s. Over the past six decades, local governments' role in video franchising has developed into one of the most deeply-rooted traditions in all of communications regulation. Some incremental improvements might be appropriate at this time -- but considerable caution and reluctance should be exercised before our adaptable and time-tested system of local video franchising is exposed to any significant change.

Curiously, history is repeating itself. The idea of "national franchising" for video systems first arose in 1972.[1] At that time, cable systems were relatively new and the industry was just beginning to boom. Despite its swift expansion, however, the cable industry groused that local franchising slowed the pace of cable system deployment.[2] Cable's franchising concerns were largely rejected, though, and local franchising remained a cornerstone of video regulation.[3] Ironically, very few would now argue that the cable industry – despite the concerns it voiced in 1972 -- has suffered as a result.

New schemes are again being proposed in many state legislatures and in Congress. These plans would severely restrict the traditional role that local governments have played in video franchising.[4] According to new plan advocates, local governments shouldn't be given the chance to negotiate the terms of a franchise with a video provider, and the oversight local

Core Knowledge

- While rarely mentioned by the telephone companies, it will still take years for wireline video competition to develop in most communities
- The pace of broadband network deployment is throttled by issues related to network construction and service provisioning, not by the traditional franchising process
- A reduction in the regulatory oversight provided by local officials should not be considered until wireline video competition becomes a widespread reality for residents
- If dramatic changes are made to our nation's traditional video franchising process, several unintended consequences could result: A deepening digital divide will likely be one such consequence, and increased taxes another

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[1] *In the Matter of Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to Federal-State or Local Relationships in the Community Antenna Television System Field; and/or Formulation of Legislative Proposals in this Respect*, 36 FCC2d 143 (Rel. Feb 3, 1972) (hereafter, "1972 Order").

[2] At the time, the cable industry was most vocal about regulation by state public utility commissions, which, according to the industry, created "unconscionable delay and confusion." 1972 Order at 206.

[3] *See infra*, at pages 25 - 27.

[4] In Congress, a bill which would create a federalized video franchising process has passed the House. The Senate's Commerce, Science and Technology Committee has reported out HR 5252 (formerly S. 2686), but no debate on the Bill has yet occurred on the Senate floor. Additionally, in the past two years or so, sixteen states have had new franchising proposals introduced. About half of those states have enacted new video franchising laws. Those states are Arizona, California, Indiana, Kansas, New Jersey, North Carolina, South Carolina, Texas, and Virginia. Other states have considered or are considering bills that have not yet passed. Those states include Iowa, Louisiana, Maine, Michigan, Minnesota, Missouri, Pennsylvania, and Tennessee.

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officials currently exercise over cable systems should be narrowed considerably. Put differently, critics of the traditional system argue that video franchising should amount to nothing more than an administrative task for local governments -- essentially, local officials should be forced to issue video franchises to most any company that makes a request. Because proposals to "nationalize" or "streamline" the franchising process have been made before, it is a particularly good time to review the track record of local franchising and explore the lessons that have been taught over the past several decades.

Critics of traditional video franchising essentially argue that local governments should be forced to issue video franchises on request

While current arguments are strikingly similar to those made by the cable industry in 1972, the most vocal critics of traditional video franchising are now large telephone companies like Verizon and AT&T.[5]

■ The Telephone Companies' Perspective in the New Debate

Verizon and AT&T now echo the comments made by the cable industry in 1972: Local video franchising, according to the telcos, creates intolerable delays in the deployment of their new full-service broadband networks.[6] According to phone company lobbyists, if

Phone companies have claimed that traditional video franchising creates delays in the deployment of broadband networks

[5] Verizon ranks number 18 on the Fortune 500 List for 2006, and AT&T is number 39. Combined, the companies have annual revenues of nearly $120 billion and annual net profits of over $12 billion. Fortune 500 list for 2006 (available at http://money.cnn.com/magazines/fortune). AT&T is in the process of buying BellSouth. When AT&T was broken up in 1984, eight major regional telcos were created. Following AT&T's purchase of BellSouth there will be just three: AT&T, Verizon, and the much smaller Qwest. Notably, the biggest wireless carriers are also owned by the two largest remaining regional Bells: Verizon is the majority owner of Verizon Wireless, and AT&T owns Cingular.

[6] *See, e.g.*, Comments of Verizon on Video Franchising, *In the Matter of Implementation of Section 621(a) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, FCC MB Docket No. 05-311 (Filed Feb. 13, 2006) (hereafter, "Verizon Comments") (local franchising creates an unreasonable barrier to entry that deters video competition and broadband deployment); *see also* Verizon Comments at iii, citing Hazlett Decl. attached to Verizon Comments (consumers could save "as much as $16 billion to $28 billion in net present value depending on future entry assumptions" (hereafter, "Hazlett Decl.")); *see also*, Comments of Edward E. Whitacre, Jr. before the Senate Commerce Committee (Feb. 15, 2006) (competitive video providers face "uncertainty, delay and prohibitive costs driven by the current cable franchising process"); Comments of BellSouth Corporation and BellSouth Entertainment, LLC, *In the Matter of Implementation of Section 621(a) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, FCC MB Docket No. 05-311 at 2 (Filed Feb. 13, 2006) ("The most significant barrier to increased video competition and accelerated broadband deployment is the local franchising process"); Comments of Qwest Communications International, Inc., *In the Matter of Implementation of Section 621(a) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, FCC MB Docket No. 05-

video franchises need to be negotiated on a community-by-community basis (as cable companies have done for six decades), new investments in broadband systems will be "held hostage"[7] and monopoly-like prices for cable services will continue.[8] Notably, however, early trepidation over traditional video franchising may have recently subsided, at least for one vocal telco. When speaking about the issue on September 27, 2006, Virginia Ruesterholz, president of Verizon Telecom, shared that company's latest perspective:

Verizon's early trepidation over traditional video franchising may now be subsiding

> [Franchising] was an area where we had to learn and see if this was going to be an issue for us. Right now we feel very, very confident that we have [our franchising] moving in the right direction, and this isn't holding us back in our deployment of video.[9]

For its part, the cable industry has generally supported the existing system; but cable lobbyists have also been known to abruptly alter their position. In Michigan, for example, the cable industry's trade association recently changed course and removed opposition to a bill that would abrogate most existing franchise commitments and institute a state-wide franchising system.[10] This shift raises some concern that the telephone and cable industries will not develop into real, full-service competitors, but will instead work cooperatively to

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311 at 2 (Filed Feb. 13, 2006) ("For a variety of reasons, actions by these LFAs . . . often have the impact of impeding or prohibiting competitive entry of new cable operators . . .").

[7] Declaration of Marilyn O'Connell at ¶11, attached to Verizon Comments (hereafter, "O'Connell Decl.") (during periods of franchise negotiation delays, "the large investments needed to prepare existing phone networks for high-bandwidth video services are held hostage.")

[8] Verizon Comments at iii, *citing* Hazlett Decl. at ¶52 (consumers could save "as much as $16 billion to $28 billion in net present value depending on future entry assumptions").

[9] Comment of Virginia Ruesterholz, President of Verizon Telecom, made during *Verizon Communications Inc. FiOS Briefing Session*, on September 27, 2006.

[10] Comcast and Charter Communications, the two dominant cable providers in the state, publicly opposed Michigan HB 6456 on September 13, 2006. *Minutes of the Standing Committee on Energy and Technology*, Wednesday, September 13, 2006 (available at http://www.house.michigan.gov). By September 19, however, the cable industry's state trade association had removed their opposition to HB 6456, a bill which would reportedly abrogate most existing video franchise obligations in the state, including many previous franchise commitments made by Comcast and Charter (while HB 6456 substitute H-2 was reported out of committee with recommendation on September 20, 2006, no printed version of the substitute bill was available to the public at the time).

reduce local oversight and later pursue control over all communications services within America's homes.

■ Local Governments' Perspective in the New Debate

Local governments are eager to see more competition in video services, just as phone companies are eager to provide that competition.[11] City managers and other local officials know that prices for cable services will likely drop when sustained, wireline video competition becomes a reality.[12] Local administrators also know that a robust communications infrastructure is necessary for economic development[13] and that competitive video systems create redundancy – an important consideration when local officials are called upon to respond to an emergency or a homeland security event.[14] Local governments' enthusiasm hasn't been kept a secret, either. As Verizon very recently noted, "[c]ities [are] eager to bring competition to [their] market[s]."[15]

Local governments are eager to see more competition in video services

■ Same Goals, Different Perspective: ICMA's Effort to Unravel the Claims

Local officials have the motivation to speed through the competitive franchising process and bring new video

[11] Nearly all ICMA survey respondents believe that their residents want more competition in video and other broadband services. Broad Survey (as defined at fn. 22, *infra*), Q. 8.

[12] U.S. General Accounting Office, *Telecommunications: Subscriber Rates and Competition in the Cable Television Industry*, GAO-04-262T at 6 (Rel. Mar. 25, 2004) (finding that cable prices are approximately 15% lower in communities where wireline cable competition exists). *See also*, Report on Cable Industry Prices, *Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992*, 20 FCC Rcd. 2718, 2721 (Rel. Feb. 4, 2005) (finding that cable rates were 15.7% lower in communities that have wireline competition).

[13] "The unprecedented growth in telecommunications capacity and in telecommunications applications has changed the way all businesses function. Every new company, and every company that is relocating or expanding, wants to be located where they can take advantage of the telecommunications explosion . . . [b]ecause most cities and counties do not have the resources to provide this costly infrastructure, the role of local government is to provide an environment that encourages the private development of this crucial infrastructure." Municipal Research and Services Center of Washington (available at www.nrsc.org/subjects/econ).

[14] Local emergency alert provisions have been included in traditional video franchises for decades. Initially, such clauses required the cable operator to make its facilities available to the local government during the duration of an emergency or disaster. More recently, video franchises require cable operators to provide a local emergency alert system in tandem with the federal emergency alert system so emergencies that only involve the local area can be distributed promptly. *See, e.g.*, 1970 City of Ann Arbor, Michigan Code, Chapter 32, Sections 2:119 and 2:120.

[15] *Verizon Communications Inc. FiOS Briefing Session*, Sept. 27, 2006, at slide 14.

alternatives to their residents -- but over the course of the last eighteen months, telephone companies have likened local franchising to a slow walk through a dark bog. These perspectives are so dramatically different that they almost seem irreconcilable. Even so, two possible explanations exist. First, it's possible that telephone companies' comfort with traditional franchising could increase, and fears subside, as telcos gather more experience with the process. Even if that were the case, however, a second possibility could also exist: It might be that traditional video franchising is neither intentionally abused by local officials nor as efficient as it could be. With that last possibility in mind, ICMA began to unravel competing claims about our nation's traditional video franchising system.

While the perspectives of telcos and local governments may appear at odds, two possible explanations exist

◘ ICMA's Unique View and Contribution

ICMA is a professional and educational organization for chief appointed officials who represent cities, towns, counties and regional entities. The organization is more than 90 years old, and the decisions of its 8,000-plus professional administrator members affect more than 100 million individuals in thousands of communities nationwide. ICMA's members are typically responsible for the day-to-day operation of local government. On policy-related matters, chief administrators regularly gather information, apply their professional experience and perspective to the topic, and then offer alternatives and recommendations to local elected officials so an informed decision can be made. Once the community's elected officials reach their conclusion, the administrator executes the resulting policy directive.[16]

Consequently, ICMA is not a lobbying organization. However, local franchising has such monumental importance to local governments that ICMA believed it should gather and develop new, relevant information to assist elected officials engaged in these vitally

[16] For example, pursuant to Tenet 5 of the ICMA Code of Ethics, ICMA members are to: "Submit policy proposals to elected officials; provide them with facts and advice on matters of policy as a basis for making decisions and setting community goals; and uphold and implement local government policies adopted by elected officials." ICMA Code of Ethics (available at http://www.icma.org).

important policy debates.[17] ICMA's ability to contribute to the current discussions is unique:

ICMA members have unique skills and a special ability to contribute to these discussions

» ICMA members are often engaged in large capital projects. Consequently, professional administrators have capital budgeting experience and project management skills much like those required to plan and build communications networks.

» ICMA members are responsible on a day-to-day basis for the supervision of work by utility service providers in the local rights-of-way.

» Chief appointed officials are typically responsible for the negotiation of local video franchises and have first-hand experience with the social benefits and administrative costs associated with the traditional franchising process.

» ICMA members are regularly asked for recommendations to make a process less time-consuming, less expensive, and more efficient – a skill particularly useful when policy alternatives are considered.

» ICMA's members adhere to a strict Code of Ethics, originally developed in 1924. Each ICMA member agrees to submit to a peer review of his or her conduct under established enforcement procedures. Among the notable tenets in ICMA's Code of Ethics: "[T]he chief function of local government at all times is to serve the best interests of all of the people."[18]

The skills, experience and perspective of ICMA's members are particularly well-matched to the issues raised in current video franchising debates. Consequently, ICMA chose to investigate questions related to the traditional system of video franchising and consider possible implications of a change in

[17] *See* fn. 4, *supra*.
[18] ICMA Code of Ethics at Tenet 4 (available at http://www.icma.org).

policy. We hope this broad perspective can benefit all policymakers engaged in these vitally important discussions.

◘ ICMA's Goals

Local government managers, like thoughtful policymakers, exhibit great care and reluctance before they recommend disrupting a policy that has been in place for a significant period of time. Even so, Verizon and AT&T have raised serious concerns about the current video franchising process. ICMA shares the vision of a more competitive video marketplace, and we believe that the telephone companies' objections deserve serious consideration. Therefore, ICMA set out to answer these five important questions:

ICMA answered five important questions

» What lessons might be learned from past debates over traditional video franchising?

» Does recent, firsthand experience indicate that traditional video franchising has slowed the deployment of broadband systems, as telephone companies claim?

» Have abuses of the local franchising process appeared with regularity, or are such problems the exception rather than the rule?

» Do the "shall issue" franchising proposals advocated by the telephone companies threaten the interests of local governments or their residents?

» If the traditional video franchising process is not working as well as it should, are dramatic changes necessary, or can modest incremental changes be implemented to make the process more efficient?

ICMA conducted three surveys over a five-month period

In an effort to answer these questions, ICMA conducted three surveys of its members over a five-month period.

The first survey[19] targeted those communities that have *recently issued* a local video franchise[20] to a telephone company. The second survey[21] directed questions to those communities that are *now considering* a telephone company request for a video franchise. The third survey[22] was directed to all ICMA members currently serving in local governments. Over 650 individuals nationwide responded to these surveys, making ICMA's effort the largest and most comprehensive survey of community leader perspectives.[23] As part of this multi-month investigation, ICMA also analyzed an extensive amount of information that is publicly available but rarely referenced. Such information included FCC filings, transcripts of reports on quarterly earnings, company press releases and news archives, transcripts of testimony before federal agencies and legislative committees, and comments made by financial analysts about the telcos' broadband plans and deployment.

More than 650 community leaders responded to the ICMA surveys, making this the most comprehensive project of its kind to date

◘ Conclusions

A large amount of new information was gathered or synthesized as a result of this research. Among the most notable conclusions:

Conclusion: While not perfect, traditional video franchising has worked well for 60 years.

Traditional video franchising has worked well for six decades

» While subject to traditional video franchising, the cable industry built service to 105 million homes

[19] This survey was directed to ICMA members in 50 identified communities, and non-members in 18 identified communities. Twenty-six communities returned the survey, for a response rate of 38% (hereafter, "Very Narrow Survey").

[20] AT&T does not believe that it needs a "franchise" from any level of government to provide "Internet Protocol" video service (*i.e.*, "IPTV"). AT&T has instead offered to enter into "competitive video service agreements" with some local governments. It is beyond the scope of this paper to address AT&T's legal interpretation of Title VI of the Cable Act, and, in particular, 47 U.S.C. §651. It does appear, however, that AT&T's interpretation of relevant Cable Act provisions conflicts with a plain reading of §651, which generally requires compliance with all Title VI requirements (including the need to obtain a video franchise) when a telephone company offers "video programming."

[21] This survey was directed to ICMA members in 109 identified communities. Fifty communities returned the survey, for a response rate of 46% (hereafter, "Narrow Survey").

[22] This survey was directed to ICMA members "in service" (*i.e.*, for which ICMA has email addresses) – 5,243 members. Nearly 600 communities returned the survey, for a response rate of 12% (hereafter, "Broad Survey").

[23] ICMA's surveying led to many notable conclusions which are presented throughout this paper. A request for copies of the surveys and related results can be directed to Robert Carty, 202-962-3560 (rcarty@icma.org).

nationwide,[24] invested $100 billion in network improvements over the past decade,[25] achieved the highest level of broadband availability,[26] and is already providing competitive phone service to 49 million homes.[27] Local governments have supervised the placement of more than one million miles of cable in local rights-of-way,[28] and hundreds of thousands of cable customer issues are resolved by local governments each year.[29] The traditional video franchising system has successfully accommodated telephone company requests for video franchises in the past,[30] and has proved its adaptability over the course of more than 50,000 cable franchise renewals completed during the past twenty years.[31] These notable accomplishments should not be overlooked when calls for a new video franchising system are considered.

The cable industry has become tremendously successful while subject to traditional video franchising

Conclusion: Local franchising hasn't slowed broadband deployment.

» The cable industry – while subject to traditional video franchising – has invested more than $100 billion in the development of broadband networks, and has the highest level of broadband service availability in the communications industry.[32]

» AT&T has itself acknowledged the point: Even while subject to traditional video franchising,

No objective evidence supports the telcos' claim that traditional video franchising slows broadband network deployment

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[24] *See, e.g.*, Ted Hearn, *Telcos Push Franchise Revamp Up Hill*, MULTICHANNEL NEWS, February 20, 2006, at 3.

[25] Id.

[26] According to the FCC, 91% of homes passed by cable have access to cable modem service, while 76% of homes served by incumbent phone companies had access to Digital Subscriber Line ("DSL") service. FCC Press Release, *Federal Communications Commission Releases Data on High Speed Services for Internet Access*, April 3, 2006, at 2.

[27] Hazlett Decl. at ¶26, *citing* Research Notes, LEICHTMAN RESEARCH GROUP, INC., Q4 2005, at p. 6.

[28] Id. at ¶16, fn. 14, *citing* National Cable & Telecommunications Association, *Cable & Telecommunications Industry Overview 2003: Mid-Year* (2003).

[29] National Association of Telecommunications Officers and Advisors Press Release, *Survey Indicates Local Governments Resolve Large Number of Customer Service Complaints Each Year*, April 26, 2006.

[30] *See, e.g.*, table, *infra* at page 83: Telephone companies gathered nearly 200 traditional video franchises through their own effort following enactment of the 1996 Telecommunications Act.

[31] *See infra*, fn. 308 and related text.

[32] *See* fn. 26, *supra*.

"Cable companies remain far and away the market leaders in video and other broadband services."[33]

» In nearly all cases, the telephone companies install new broadband components in their networks *before* they even request a local video franchise. *See footnote 139 and accompanying text.*

Telcos are already building wireline broadband systems at a blistering pace – often without first obtaining a video franchise

» Telcos set a record pace for fiber-to-the-premises deployments in 2005 and the first quarter of 2006. *See charts, pages 47 – 48.*

Conclusion: The telephone companies' ever-changing plans have slowed broadband deployment, and uncertainties remain with respect to the telcos' most recent video efforts.

» In the decade following the 1996 Telecommunications Act, telephone companies quickly entered and then abruptly abandoned the wireline video business. As recently as year-end 2001, telephone companies held traditional video franchises covering 63 million homes in the country. *See chart, page 56.*

Less than five years ago, telcos held traditional video franchises authorizing service to more than 63 million homes—but then they abruptly abandoned the wireline video business

» Telephone companies pulled the plug on their wireline video businesses between 1998 and 2001 because of changing business plans, not because of local video franchising.[34] *See pages 53 – 57.*

» In the last two years, telephone companies have applied for traditional video franchises in far fewer than 2 percent of all communities nationwide. Before radical changes to our traditional franchising system are considered, the telcos' limited experience should be weighed against a video franchising process that has already adapted to six decades of changes in the industry. *See page 123 - 127.*

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[33] Comments of AT&T Inc., *In the Matter of Implementation of Section 621(a) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, FCC MB Docket No. 05-311, at 15 (Filed Feb. 13, 2006).

[34] *See infra*, at pages 80 – 85.

» Technological uncertainty and the need to establish a profitable business model still exist, and doubts remain about the telcos' long-term commitment to full-service, wireline broadband video networks. *See telco analyst and executive quotes, pages 58 – 59.*

Doubts remain about the telcos' latest wireline video deployment plans

Conclusion: The traditional system of local video franchising will keep pace with the telcos' broadband deployment plans.

» When speaking to financial analysts, telephone company executives say that traditional video franchising has not slowed their deployment of broadband systems. *See telco executive quotes, pages 2 and 44 - 46.*

» Before telephone companies can offer competitive video services, telcos first have to build "Network Ready" systems; then the phone companies have to put back-office systems in place to make their new services "Market Ready." These two "Super Steps" throttle the pace of broadband deployment – not traditional video franchising. *See pages 33 - 42.*

Two "Super Steps" are the gating factors in the pace of broadband deployment –not traditional video franchising

» The telcos' momentum is already building, as communities are issuing competitive video franchises at a rapid pace. In fact, traditional franchises covering more than 2 million homes were issued in the middle two quarters of 2006 alone. *See chart, page 47.*

Telcos are obtaining traditional video franchises at a record pace

» By even its own estimates, Verizon has already obtained video franchises covering three times as many households as the company is currently prepared to serve. As of September 27, 2006, Verizon held video franchises covering 3.3 million homes – but it was only "open for business" in 1 million of those homes. Verizon expects the difference to grow even larger by the end of 2006. By then, the telco expects to hold franchises covering over 6 million homes, even though the

Verizon already holds video franchises covering three times as many homes as it can currently serve

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company will be "open for business" in just 1.8 million of those households.[35] *See chart, page 51.*

» AT&T appears to be in a similar position, as company executives say they can't move any faster in their broadband deployments. *See executive quote, page 45.*

» Telephone companies still have several years of construction ahead – time enough for the phone companies to obtain video franchises in the traditional manner.[36]

Conclusion: The speed at which competitive franchises are issued will continue to improve.

Competitive video franchising is already picking up speed and momentum

» The average amount of time taken to issue a competitive video franchise will continue to decline. Telephone companies, for example, are now willing to negotiate with large consortia of communities to develop a common franchise.[37]

» Traditional video franchising is already keeping pace with the telephone companies' own broadband network construction goals.[38]

» There is no reason to believe that the record success recently achieved by telcos in local franchising[39] will not continue -- provided, of course, that telephone companies continue to actively pursue such franchises.[40]

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[35] *Verizon Communications Inc. FiOS Briefing Session*, on September 27, 2006.
[36] *See infra*, at pages 45 - 46.
[37] Verizon, for example, negotiated a common franchise with 30 Montgomery County, PA communities, which represent nearly 225,000 potential viewers. Verizon Press Release, *Hatfield Borough First Community in Montgomery County Consortium to Grant Verizon Cable Franchise*, June 29, 2006. Additionally, Verizon negotiated a common franchise agreement with the West Chester Area Council of Governments which is comprised of six Pennsylvania communities. Verizon Press Release, *West Goshen Township Consumers One Step Closer to Real Choice for Cable*, June 26, 2006.
[38] *See* chart, *infra* at page 51.
[39] Chart, *infra* at page 47.
[40] The telephone companies' local franchising efforts may be designed to support lobbying efforts rather than to gather local video franchises. *See infra*, at pages 89-90.

Conclusion: Reduced government oversight of cable systems should not be considered until the telephone companies' promise to create widespread wireline video competition becomes a reality for residents.

» Traditional video franchising includes local government oversight, which ensures that service providers honor both social and financial obligations. *See pages 62 - 65*.

» Just 100 or so of the 33,000 communities nationwide currently receive competitive wireline video services from a telephone company.[41] While both the telephone and cable industries have voiced their preference for reduced government oversight of their business, local supervision of cable systems shouldn't be compromised until the promise of a more competitive video market becomes a widespread reality for communities and their residents.

Even though the telephone and cable industries both prefer reduced oversight by local officials, local oversight is even more critical as competitive markets begin to develop

» Local oversight is even more critical as competitive markets begin to develop. A wireline video market moving from one dominant provider to two or more competitive providers experiences a number of growing pains during the transition. Coordination of construction, accusations of anti-competitive conduct, promotional disputes, interconnection of PEG programming, and a variety of other matters regularly arise. Local regulators are often in the best position to intervene and resolve such disputes quickly. *See pages 77 – 79.*

» Competitive neutrality between providers should be achieved through the equal application of traditional franchising principles, not through the elimination of traditional video franchising and

[41] Verizon provides FiOS video service to residents in approximately 80 communities. Verizon News Release, *Verizon Celebrates FiOS TV's First Anniversary*, Sept. 21, 2006. BellSouth provides video service to 14 franchise areas. *See, e.g., Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, FCC 06-11 at ¶124 (Rel. March 3, 2006). AT&T offers U-Verse video service in portions of San Antonio, and Qwest is believed to offer vDSL service to a few communities in the southwest.

local government oversight, as telephone and cable lobbyists prefer. *See pages 105 - 108.*[42]

Conclusion: Modest, incremental suggestions related to traditional local video franchising should be explored, and best practices should be encouraged.

» State "level playing field" statutes can be misused by cable company incumbents to discourage competitive entry. It may be appropriate to repeal such laws. *See 111 – 112.*

» Ongoing policy debates related to the franchising process create uncertainties and delay, as potential competitors and incumbents both wait to see how issues develop at the state and federal levels. It would benefit all involved to quickly bring current discussions to a close. *See comments of ICMA survey participants, pages 130 - 131.*

» All parties in interest, including telephone companies, cable operators, and local governments, should consider the facilitation of model franchise language that could be applied on a widespread basis. *See pages 101 – 102.*

Several modest suggestions can be pursued immediately to speed competitive video franchising – dramatic changes to the traditional system aren't required

Conclusion: Dramatic changes to traditional video franchising are risky, as many significant, unintended consequences could result.

» Every resident in a community counts. However, many forced franchising proposals do not require competitive providers to offer service to every home in a community. Without community-wide buildout requirements, the digital divide will probably grow wider. *See pages 118 – 121.*

[42] Importantly, the telephone and cable industries have made similar claims before. In lobbying the 1996 Telecommunications Act, for example, telephone companies promised that wireline video competition would develop if telcos were permitted into the video business. Congress listened to those promises, and provided four different ways for the phone companies to offer competitive video services. Ten years later, a competitive wireline video business remains a promise, not a reality. *See* pages 53 - 60, *infra*.

» Forced franchising proposals will likely result in hidden increases in taxes and assessments, as many such proposals require new or expanded agencies at the state or federal level and/or reduce the franchise fee revenue currently collected from video providers by local officials. *See pages 121 – 123.*

» A significant amount of litigation will probably result from any dramatic change made to our traditional video franchising system. Uncertainty will result, and threaten the current record pace of broadband network deployment. *See pages 129 - 130.*

Any dramatic change to traditional video franchising could result in a number of unintended consequences

Nearly everyone shares the goals of lower cable prices, broader access to high-speed Internet services, and the technological innovation that is encouraged by a competitive market. However, those considering forced franchising proposals should exercise great caution and reluctance before a policy six decades in the making is dramatically changed. Significant modifications to traditional video franchising do not appear warranted at this time, and much more harm could occur from such changes than good.

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II. Introduction: Déjà vu, All Over Again

Core Knowledge

"National franchising" was first debated in 1972 when cable systems were considered a "communications revolution." Back then, the cable industry complained that local video franchising slowed the deployment of cable's new networks – much like telephone companies do today. Despite cable's concerns, however, local video franchising remained in place and cable companies have prospered in the three decades since. Like their cable competitors, telephone companies can also prosper within the traditional video franchising system.

History has a curious way of repeating itself.

By 1970, local cable franchising had already existed for more than 20 years, and the cable business was gathering real momentum. The Federal Communications Commission took note, and called cable an "emerging technology that promises a communications revolution."[43]

"The only thing new in this world is the history that you don't know."

Harry S. Truman

In 1972, the FCC launched an inquiry to explore "how best to obtain, consistent with the public interest standard of the Communications Act, the full benefits of developing communications technology for the public, with particular immediate reference to CATV services and potential uses."[44] According to the Commission, there had been no "overall plan as to the federal-local relationship,"[45] and coordination of regulatory responsibilities had to be established.[46] In an effort to remedy the situation, the FCC considered three alternatives. The first of these alternatives is again being debated today, namely "federal licensing of all" video systems.[47]

Cable is "an emerging technology that promises a communications revolution."

***Federal Communications Commission**, 1972*

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[43] 1972 Order at 210. The FCC's prescience in 1972 is noteworthy: "We did not attempt an all-inclusive listing of cable's potential uses [in our notice of proposed rulemaking], but took note of many, including facsimile reproduction of newspapers, magazines, documents, etc.; electronic mail delivery; merchandising; business concern links to branch offices, primary customers or suppliers; access to computers . . ." 1972 Order at 144, fn 10 (emphasis supplied).

[44] 1972 Order at 144, *citing* Notice of Proposed Rule Making and Notice of Inquiry in Docket 18397.

[45] Id. at 204.

[46] Id.

[47] Id.

Cable operators were quick to weigh into the 1972 debate. Even though their business was expanding at a rapid pace, the industry viewed its enviable position with qualified enthusiasm. According to the cable industry in 1972, local governments lacked the expertise to oversee the industry's development.[48] Delays and confusion were created, cable claimed, by the state-local regulatory system.[49] NCTA,[50] the cable industry's trade group then and now, seized upon the FCC's interest and "urged that the Commission entirely pre-empt this field and limit local involvement . . ."[51]

The cable industry voiced concern over local video franchising in 1972, much like the telcos do today

■ The Newest "Communications Revolution": Broadband Services

The debate over traditional video franchising has resurfaced -- but this time, the principal detractors have not been cable companies. Instead, a remarkable volume of criticism has come from large telephone companies like Verizon and AT&T. Just as the *cable* industry had asserted in 1972, the *telephone* industry now claims that traditional video franchising slows the deployment of the telcos' new broadband systems,[52] and that local governments lack the expertise to regulate in an "Internet Protocol" world.[53] According to phone company lobbyists, if discretion related to video franchising is not removed from local governments and administered at the state or federal levels, the telcos' ability to construct broadband systems will be "held hostage" and monopoly-like prices for cable services will continue.[54]

Just a couple of real differences exist between the old and new federal franchising debates: the identity of the critic and the nature of the "communications revolution"

■ Students of History, Take Note

When boiled down to the basics, just a couple of differences exist between the "nationalized franchising" debate in 1972 and the one being considered today.

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[48] Id. at 205.
[49] Id. at 206.
[50] Once the National Cable Television Association, now the National Cable Telecommunications Association.
[51] 1972 Order at 205.
[52] *Supra*, fn. 6.
[53] According to Ivan Seidenberg, President and CEO of Verizon, getting permission from each community before offering video service is "out of date with technology, [and] out of touch with consumer demands." Testimony of Ivan Seidenberg before the Senate Commerce Committee, Feb. 15, 2006.
[54] *See, e.g.*, Verizon Comments at iii, *citing* Hazlett Decl. at ¶¶50-52.

Those differences are the identity of the critic, and the nature of the "communications revolution." In 1972, the detractor of local video franchising was the *cable* industry; now it's the *telephone* industry. In 1972, the "communications revolution" was cable's new technology; now, it's the advent of interactive broadband services. So what lessons have the intervening thirty years taught?

"Local governments are inescapably involved in the [video franchising] process…[and] bring a special expertness to such matters…local officials are also in a better position to follow-up on service complaints."

FCC, 1972

◘ Lesson 1: The FCC's Conclusion in 1972 Still Rings True Today

After sorting through comments from cable operators, local governments, broadcasters and others, the Federal Communications Commission determined that a federalized franchising policy was not appropriate. The FCC's conclusion seems as relevant now as it did in 1972:

> The comments advance persuasive arguments against federal licensing. [Such] licensing would place an unmanageable burden on the Commission. **Moreover, local governments are inescapably involved in the process because cable makes use of streets and ways and because local authorities are able to bring a special expertness to such matters** … [L]ocal authorities are also in better position to follow-up on service complaints. Under the circumstances, a deliberately structured dualism is indicated . . .[55]

Eventually, Congress adopted "a national policy concerning cable communications."[56] The Cable Communications Policy Act of 1984[57] embraced the "structured dualism" promoted 12 years earlier by the FCC, and regulatory authority over video issues was

Congress adopted a national policy on cable communications in 1984

[55] 1972 Order at 207 (emphasis supplied).

[56] According to 47 U.S.C. §521, "the purposes of this title are to – (1) establish a national policy concerning cable communications; (2) establish franchise procedures and standards which encourage the growth and development of cable systems and which assure that cable systems are responsive to the needs and interests of the local community; (3) establish guidelines for the exercise of Federal, State, and local authority with respect to the regulation of cable systems; (4) assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public."

[57] P.L. 98-549, 98 Stat. 2779 (1984).

officially split between the federal and local[58] levels of government. Since that time, the division of authority between the local and federal levels of government has remained largely unchanged.[59]

Local governments have remained at the center of video franchising for six decades because the system is time-tested and it works

Why has the local franchising process remained substantially unchanged over such a lengthy period of time? The answer is simple: local franchising has been time-tested and it works.

◘ Lesson 2: Local Video Franchising Didn't Hinder the First "Communications Revolution"

In 1972, cable companies complained that local franchising would slow the deployment of cable systems – the "communications revolution" of the time. Did the cable industry's 1972 fears materialize? With the benefit of hindsight, very few would seriously make such a claim. While subject to local video franchising, the cable industry has built systems that reach 105 million homes in the country.[60] The cable industry has also invested more than $100 billion since the 1996 Telecommunications Act was passed in order to build state-of-the-art broadband systems.[61] Notably, cable's investment has paid off, as the industry enjoys a higher level of broadband service availability than its telephone company rivals.[62] Cable also offers competitive telephony service to about 49 million homes nationwide.[63] All of this has been accomplished despite the fears that cable voiced about local video franchising in 1972.

The cable industry has become enormously successful while subject to local video franchising—the telcos could be, too

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[58] In fact, the authority is split between the federal and state levels of government, but in most states that authority is delegated or reserved to the local level of government.

[59] *See*, Cable Television Consumer Protection and Competition Act of 1992, Pub. L. 102-385, 106 Stat. 1460 (1992) (affected the relationship between cable operators and programmers; also implemented rate regulation); 1996 Telecommunications Act, Pub. L. 104-104, 110 Stat. 118 (1996) (designed to encourage competition between phone and cable companies).

[60] *See, e.g.,* Ted Hearn, *Telcos Push Franchise Revamp Up Hill*, MULTICHANNEL NEWS, Feb. 20, 2006, at 3.

[61] Id.

[62] According to the FCC, 91% of homes passed by cable have access to cable modem service, while 76% of homes served by incumbent phone companies had access to Digital Subscriber Line ("DSL") service. FCC Press Release, *Federal Communications Commission Releases Data on High Speed Services for Internet Access*, April 3, 2006, at 2.

[63] Hazlett Decl. at ¶26, *citing* Research Notes, LEICHTMAN RESEARCH GROUP, INC., Q4 2005, at p. 6.

◘ Lesson 3: Local Video Franchising Won't Slow the Latest "Communications Revolution," Either

If the cable industry brought us the first communications revolution -- which has included an investment of over $100 billion in network improvements over the past 10 years -- why can't telephone companies work within the traditional video franchising process and start a communications revolution of their own?

Even after criticizing the local franchising process in 1972, cable operators forged on. Since that time, the cable industry built broadband networks that reach most every home in the country. There is no reason to believe that telephone companies will take a different approach – in fact, the evidence is to the contrary. Despite their current criticism of local video franchising, telephone companies are already building full-service, wireline broadband systems at a blistering pace[64] and they are negotiating traditional local video franchises at a record rate.[65]

History does, indeed, have a curious way of repeating itself. Local video franchising did nothing to impede the cable industry's "communications revolution." With the benefit of hindsight, there is no reason to believe that traditional video franchising will impede the next revolution, either.

Despite its current criticism of traditional video franchising, the telephone industry is already building full-service wireline broadband systems at a blistering pace

"It is much easier to be critical than to be correct."

Benjamin Disraeli

[64] *See* charts, *infra* at page 47 - 48.
[65] *See* chart, *infra* at page 47.

III. A National System for Video Franchising Already Exists

Core Knowledge

A national policy governing cable communications already exists. This system was originally adopted by Congress in 1984, and has been maintained by Congress over the course of the two Communication Act rewrites that followed.

Some will be surprised to learn that a national policy governing cable communications already exists – especially after listening to the telephone industry. According to phone company advocates, the local video franchising process is "balkanized" and "undisciplined by any federal rules or time lines."[66] To the unsuspecting, traditional video franchising might sound like the "wild west" of communications regulation – a place where little law exists, and local governments can do as they please.

A well-established national video franchising system already exists

That's not the case, of course. "[A] national policy concerning cable communications"[67] was adopted in 1984, when Congress first passed the Cable Act and codified the "structured dualism" favored by the FCC a dozen years earlier.[68] This national video franchising policy proved to be so adaptable that it was maintained by Congress in the two Communications Act rewrites that followed the 1984 Act.[69]

Importantly, a framework that balanced the need for regulatory oversight with the desire for new investment wasn't easily developed. To pass the 1984 Cable Act, "Congress had to balance the public's right to free flowing information, the local government's interest in franchising and regulating cable operators, the cable industry's desire for growth and stability, and the

In 1984, Congress struggled to balance the competing interests of the parties

[66] Comments of AT&T Inc., *In the Matter of Implementation of Section 621(a) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, FCC MB Docket No. 05-311, at 39 (Filed Feb. 13, 2006).
[67] "[A] national policy concerning cable communications" was one of the stated purposes of the Cable Communications Policy Act of 1984, and remains one of the stated purposes of the Title today.
[68] FCC quote, *supra* at page 22.
[69] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. 102-385, 106 Stat. 1460 (1992); 1996 Telecommunications Act, Pub. L. 104-104, 110 Stat. 118 (1996).

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potential of satellite to offer valuable competition."[70] To accomplish this goal, Congress established a delicate balance which splits regulatory authority over video systems. For its part, local governments negotiate franchises for use of local rights-of-way to deliver cable service.[71] During this process and among other things, local officials ensure that the cable systems are responsive to local needs and interests, local governments require that certain social and customer service obligations are met by the video provider, and local franchising authorities establish a franchise fee for the use of local rights-of-way. The federal government, in the fulfillment of its role, has identified a number of areas where nation-wide consistency is required. For example, a defined set of customer service standards for cable operators has been established,[72] a limitation on the amount of franchise fees that can be collected is in place,[73] and a limitation on the design details of a provider's system exists.[74] Therefore, significant uniformity is already driven by the process because the discretion that local governments can exercise is already limited by the Cable Act.[75] Even the telephone companies will

Our national system of video franchising already places significant limits on the discretion local governments can exercise

[70] *Centel Cable Television* v. *Admiral's Cove Associates*, 835 F.2d 1159 (11th Cir. 1998), *citing* 130 Cong. Rec. H10, 435 (daily ed. Oct. 1, 1984) (statement of Rep. Wirth).
[71] 47 U.S.C. §544(e).
[72] Report & Order, *In the Matter of Implementation of Section 8 of the Cable Television Consumer Protection and Competition Act of 1992, Consumer Protection and Customer Service*, 8 FCC Rcd. 9 (Rel. April 7, 1993).
[73] 47 U.S.C. §542.
[74] 47 U.S.C. §544(e).
[75] *See, e.g.*, 47 U.S.C. §556(b) ("any provision of law of any State, political subdivision, or agency thereof, or franchising authority, or any provision of any franchise granted by such authority, which is inconsistent with this Act shall be deemed to be preempted and superceded"); 47 U.S.C. §544(a) (a franchising authority may not regulate the services, facilities, and equipment provided by a cable operator "except to the extent consistent with this title"); 47 U.S.C. §531(a) (a franchising authority may only establish requirements in a franchise with respect to the designation or use of channel capacity for public, educational and governmental use to the extent provided by the section); 47 U.S.C. §532 (to promote competition in the delivery of diverse sources of programming and perspective, a cable operator offering more than 100 channels shall designate 15% of those channels to leased access use; also directs the FCC to establish a method for calculating rates for leased access); 47 U.S.C. §533(c) (a franchising authority cannot prohibit the ownership or control of a cable system based on other media interests held by the operator); 47 U.S.C. §534 (restricts discretion over programming that a cable operator must carry); 47 U.S.C. §536 (directs FCC to establish regulations related to carriage agreements between operators and programmers); 47 U.S.C. §541(a)(1) (a local franchising authority may not unreasonably deny the issuance of a competitive franchise); 47 U.S.C. §542 (limits the amount that a franchising authority may collect as a franchise fee from a cable operator); 47 U.S.C. §543 (prevents a local franchising authority from regulating a cable operator's rates in a manner different than that established by the

occasionally acknowledge that local discretion has already been limited in areas where nation-wide uniformity is required.[76]

Our nation's existing policy on cable communications, therefore, strikes a delicate balance in many areas. Over the course of the last thirty-plus years, there have been modest changes in how the responsibility for video franchising is shared between local and federal governments. Importantly, however, Congress has always recognized and respected the key role played by local governments in the video franchising process.[77]

Congress has always recognized and respected the key role played by local officials in the video franchising process

Why has local franchising survived six decades and three Communications Act rewrites? Despite industry claims to the contrary, the answer is simple: local franchising works.

FCC); 47 U.S.C. §544(e) ("No state or franchise authority may prohibit, condition or restrict a cable systems' use of any type of subscriber equipment or transmission technology.")

[76] *See, e.g.,* Comments of Qwest Communications Int'l., Inc., *In the Matter of Implementation of Section 621(a) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, FCC MB Docket No. 05-311, at 18 (Filed Feb. 13, 2006) (a local government's authority under the Cable Act "must be exercised consistent with a number of federal limitations on their power").

[77] *See, e.g.,* H. REP. NO. 934, 98th Cong., 2d Sess., (1984), reprinted in 1984 U.S.C.C.A.N. at 4656 (noting that the 1984 Cable Act "continues reliance on the local franchising process as the primary means of cable television regulation" and that the "critical role of municipal governments in the franchising process" will be preserved).

IV. The Good, the Bad, and the Ugly: The Telephone Companies' Campaign

Core Knowledge

Telephone companies appear to finance many "grassroots" groups that support "streamlined" franchising. Thoughtful lawmakers should ask tough questions about an organization's membership and its funding before a group is assumed to have an unbiased view on this matter.

A striking number of similarities exist between the "national franchise" debate of 1972 and the one occurring now.[78] One thing, however, is different: Today, things are less likely to be as they first appear.

According to telephone company lobbyists, the elimination of local franchising will result in a nearly immediate explosion in competitive video services, saving consumers billions of dollars per year.[79] Telephone companies want their message to stick: The mantra has been repeated tens of thousands of times in TV and radio ads in just the last few months. Hundreds of millions of dollars have also been spent on state and federal lobbyists, and on so-called "astroturf" groups (*i.e.*, fake grass roots organizations).[80] Some things have changed since 1972 – unfortunately, a lot of it isn't for the better.

Aggressive lobbying and promotional campaigns are expected by some. After all, very large corporations are involved (in many cases, Fortune 100-size companies),[81] and each has a sizable stake in the outcome of these debates. It's not unusual for one company to try to gain ground on a competitor through

"Pay no attention to the man behind the curtain."

The Great Wizard,
The Wizard of Oz, 1939

"This appears to be an example of special interests using their financial clout to buy public policy."

Ned Wigglesworth,
California Common Cause

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[78] *See supra*, pages 20 – 24.
[79] *See, e.g.*, Verizon Comments at ii – iii, *citing* Hazlett Decl. at ¶¶50-52.
[80] *See, e.g.*, Common Cause Report, *Unintended Consequences and Lessons Learned*, May 9, 2005, at 3 ("Since 1997, just eight of the country's largest and most powerful media and telecommunications companies, their corporate parents, and three of their trade groups, have spent more than $400 million on political contributions and lobbying in Washington").
[81] Verizon is number 18 on the Fortune 500 List for 2006 ($75.1 billion in revenue, $7.4 billion in profits); AT&T is number 39 ($43.9 billion in revenue, $4.8 billion in profits); Time Warner ranks number 40 ($43.7 billion in revenue, $2.9 billion in profits); and Comcast is number 94 ($22.3 billion in revenue, $928 million in profits) (available at http://money.cnn.com/magazines/fortune).

the regulatory process. There's also little harm in fueling consumer interest in competitive video systems. In fact, more competition in the video market is something everyone wants. However, even the most experienced state and federal policymakers have been stunned by the size of the lobbying and advertising campaign launched over this matter. In just one state, for example, AT&T "pulled out all the stops in making their case before [state] lawmakers, spending more than *$200,000 a day* during a three-month promotional blitz."[82] For the same three-month period, AT&T and Verizon spent almost $19.7 million to influence a vote on the state bill.[83]

AT&T reportedly spent $200,000 a day on a promotional blitz in one state alone

In the *Wizard of Oz*, Dorothy is skeptical about the tremendous noise and frightening image that the Great Wizard attempts to make for his first impression – when she questions this image, though, Dorothy is told to "pay no attention to the man behind the curtain." What's "behind the curtain" in the case of the video franchising debates? It's often tough to tell . . . but we're certainly not in Kansas any more. Consider the following reports:

Many groups calling for new video franchising laws receive funding from the telcos

» "Consumers for Cable Choice" fronts a very active media campaign critical of the local franchising process. This organization and its various state chapters didn't appear to exist, however, until they were created by seed money provided by telephone companies.[84] Telcos continue to fund the organization.[85]

» Earlier this year, the mayor of Red Bank, New Jersey, received about 200 letters by fax, all calling for cable competition. Every letter appeared to be written by a different resident, but they all came from the same fax machine. Upon further investigation, the mayor discovered that half of the

[82] Matthew Yi, *Big Business Lobbies Hard for Video Licensing Bill*, S. F. CHRON., August 28, 2006 (available at http://sfgate.com).
[83] Id.
[84] Common Cause Report, *Wolves in Sheep's Clothing: Telecom Industry Front Groups and Astroturf*, March 2006 at 5 – 6.
[85] Id. at 6.

letters were allegedly sent from addresses that didn't even exist.[86] Other individuals who had "sent" the letters had never even heard of the campaign for cable choice.[87] Eventually, the effort was traced back to a Verizon fax number.[88]

» On February 23, 2006, the National Hispanic Media Coalition became a client of a beltway lobbying firm which also represents Verizon.[89] The group was among 15 signers on a letter sent to the Senate Commerce Committee urging video franchise relief.[90] The National Hispanic Media Coalition later said that six of the Hispanic groups listed on the letter had not, in fact, taken a position on the matter.[91]

» The League of United Latin American Citizens signed the same letter urging relief from local video franchising. Notably, the group had received a $1 million grant from SBC Communications, now the "new AT&T," in the prior year.[92]

» Several New Jersey residents were "stunned to find themselves unwilling recruits in Verizon's drive to change New Jersey's 30-year-old cable television laws."[93] One resident reported that Verizon had even fabricated stationery to make it look as if she had sent a personalized note.[94]

» Telephone companies are not alone in the active cultivation of "astroturf" efforts. "Broadband Everywhere" is a cable-sponsored group.[95]

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[86] Jeff Pillets, *Verizon Campaign Raises Questions*, N. J. REC., Jan. 24, 2006 (available at http://www.bergen.com).
[87] Id.
[88] Id.
[89] David Hatch, *Franchising Letter from Hispanic Groups Questioned*, National Journal's Tech Daily, March 17, 2006 (subscription-based service available at http://www.nationaljournal.com).
[90] Id.
[91] Id.
[92] Id.
[93] Jeff Pillets, *Verizon Campaign Raises Questions*, N. J. REC., Jan. 24, 2006 (available at http://www.bergen.com).
[94] Id.
[95] *See*, http://www.broadbandeverywhere.org/about_us.

» According to a Common Cause analysis, "[s]ince 1997, just eight of the country's largest and most powerful media and telecommunications companies, their corporate parents, and three trade groups, have spent more than $400 million on political contributions and lobbying in Washington."[96]

Since just 1997, eight of the nation's largest media and communications companies and their trade groups have spent over $400 million on lobbying

» In just one state – Texas – phone companies spent more than $10.2 million last year on lobbying a statewide franchising law.[97]

» In California, the cable and phone industries have reportedly spent $30 million on media buys related to the statewide video franchising law. "Both sides also are showering key lawmakers with campaign contributions, and Verizon Communications advertisements have thanked Assembly Speaker Fabian Nunez for moving the bill. The lobbying pits former Senate President Pro Tem John Burton and former Senate Appropriations Committee Chairwoman Deidre Alpert against former campaign chiefs of Governor Arnold Schwarzenegger and ex-Governor Gray Davis."[98]

Despite the attention that the Abramoff lobbying scandal has created and the suspicious view that most voters would harbor toward such tactics, these carefully cultivated media groups and political campaigns are flourishing. In this case, the telephone industry, and to a lesser extent the cable industry, have both actively fostered interest in an issue that wouldn't survive without corporate nurturing.[99] The problem with this process, of course, is that a story repeated often enough is soon treated as fact – particularly when it appears to

Unfortunately, a story repeated often enough is soon treated as fact

[96] Common Cause Report, *Unintended Consequences and Lessons Learned*, May 9, 2005, at 3.
[97] Claudia Grisales, *Phone Industry Outlobbied, Outspent Cable Rivals in Legislative Fight*, COX NEWS SERVICE, August 18, 2005 (available at http://www.statesman.com).
[98] Congressional Journal, *Tech Daily Report*, June 16, 2006 (citing *The Mercury News*).
[99] There is little doubt that voters want more wireline video competition. Confusion has been created, however, over the role that local franchising plays in the speed with which competitive services are brought to the market. As detailed *infra* at pages 33 – 42, two "Super Steps" play a much larger role in the pace of a competitive video market's development than does traditional video franchising.

be coming from an “unbiased” (but cultivated) source. As one nonprofit watchdog group put it, "This appears to be an example of special interest(s) using their financial clout to buy public policy."[100]

When tens of millions of dollars are being spent on lobbying, campaign contributions, media buys and so-called "astroturf" organizations, lawmakers who are focused on serving the best interest of all people should consider a check "behind the curtain." Minimally, policymakers might follow the lead of one federal lawmaker and require financial disclosures before relying on any of the economic analyses or poll results being cultivated for the current franchising debates.[101]

Lawmakers should require financial disclosures from all debate participants, as many groups may not be as objective as they first appear

Fortunately**,** even without such disclosures, lawmakers don’t have to rely on information from carefully cultivated interest groups. Instead, those willing to invest a little intuition and common sense can quickly sort through the issues raised in these debates. . .

[100] Matthew Yi, *Big Business Lobbies Hard for Video Licensing Bill*, S. F. CHRON., August 28, 2006 (quoting Ned Wigglesworth, policy advocate of California Common Cause) (available at http://sfgate.com).

[101] One group was exposed by Rep. Ed Markey (D-MA), who questioned the Chairman of the Video Access Alliance before the House Commerce Committee on March 30, 2006: Rep. Markey: Is your organization supported by the Bell companies in any way? . . . A: I have a consulting firm that works for a variety of companies, generally in the regulatory space. Rep. Markey: But are the Bell companies amongst those companies that pay you? A: Yes.

V. Don't Try This at Home: How Competitive Video Services Really Move from Idea to Market

Core Knowledge

Telephone companies are still years away from delivering competitive wireline video services on a widespread basis. Massive right-of-way construction projects and the need to establish new customer service infrastructures are "Super-Steps" responsible for throttling broadband deployment. The extensive amount of required work simply takes time and requires patience – neither of which is created through the elimination of our traditional video franchising system.

Telephone companies assert that compulsory video franchising systems will quickly result in the construction of more broadband systems.[102] Consumers, in turn, will begin to save billions of dollars because competitive video services will become widely available.[103] Can traditional video franchising really be the impediment that industry lobbyists claim? Let's apply intuition and common sense, and then test the conclusion with the evidence that has surfaced to date.

Can traditional video franchising really be the primary impediment to competitive video system deployment, as phone companies claim?

First, consider the tremendous scope of the projects the phone companies are pursuing. AT&T's Project Lightspeed will deploy 40,000 miles of new fiber optic cable in local rights-of-way.[104] Verizon's FiOS upgrade placed 4.5 million feet of new facilities in the local rights-of-way, through the use of 10 different contractors and 2,000 subcontractors at the same time, in the same county, over the course of just a few months.[105] A tremendous amount of construction will be required nationwide – fortunately, that construction is already underway.[106]

It will still take years for the telcos to build and provision full-service broadband networks

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[102] *Supra*, fn. 6.

[103] *See, e.g.*, Verizon Comments at iii, *citing* Hazlett Decl. at ¶52.

[104] *See*, http://att.sbc.com/gen/press-room ("U-Verse Experience Facts ... AT&T is adding about 40,000 miles of fiber to its already fiber-rich network, bringing fiber even closer to customers' homes.")

[105] Jill Greenwood, *Verizon Continues Some Digging*, TAMPA BAY ONLINE (available at http://www.msnbc.msn.com/id/6516815).

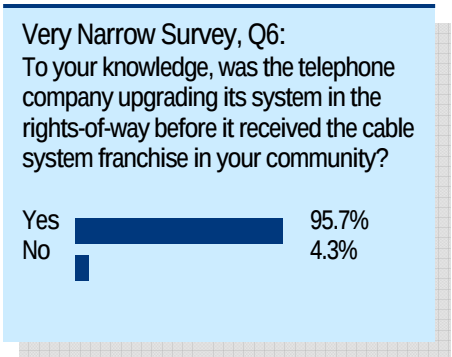
[106] In the substantial majority of cases, surveyed ICMA members reported that the phone companies were placing new fiber-optic cable and engaged in construction in local rights-of-way *before* a video franchise was even requested. Very Narrow Survey Q. 6; Narrow Survey Q. 3. Verizon also recently reported that it will have a video-ready network passing 6 million homes in place by the end of this year. Seeking Alpha Transcript,

Next, think about the other things required to bring any product to market. Products have to be tested, for example, and new customer service organizations must be put in place. In the case of new wireline broadband networks and video services, securing a traditional video franchise is just one step among literally hundreds of others. This multitude of steps can generally be placed into two categories, or "Super-Steps." Importantly, a video franchise can be sought by the telephone companies at any time before, during, or after the much more time-consuming Super-Steps are being pursued. Here's a glimpse of what Super-Step #1 and Super-Step #2 require:

Telcos can easily seek traditional video franchises during the years of required construction and provisioning that lie ahead

■ Super-Step #1: Before a Telephone Company Offers Its Own Video Services, That Telco Must First Build "Network Ready" Broadband Systems

Before the dream of a more competitive video marketplace ever becomes a reality, telephone companies must first build "Network Ready" broadband systems capable of delivering video services. The creation of a "Network Ready" broadband system is tremendously time-consuming, however, and it throttles the pace of broadband deployment to a much greater extent than does local franchising.



◘ A Brief Comparison of the Old and the New

For nearly its entire history, telephone companies delivered "Plain Old Telephone Service" over a relatively straightforward system. "POTS" networks are not terribly sophisticated, because POTS network requirements are not very demanding.[107] Delivery of voice service requires a "small pipe," (*i.e.*, little "bandwidth"), and the technology for transmitting a

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Verizon Communications Q2 2006 Earnings Conference Call, Aug. 1, 2006 (quoting Doreen Toben, Verizon CFO: "As of mid-July [2006], we have passed an additional 1.5 million homes, bringing the cumulative homes passed to 4.5 million. We are well on our way to reaching 6 million total homes passed by year-end.") (available at http://www.SeekingAlpha.com).

[107] HARRY NEWTON, NEWTON'S TELECOM DICTIONARY, 17th ed. (CMP Books 2001). "POTS. Plain Old Telephone Service . . .[t[he basic service supplying standard single line telephones, telephone lines and access to the public switched network. Nothing fancy. No added features. Just receive and place calls."

voice signal has existed for more than a century.[108] Over the last one hundred years, "twisted pair," copper-wire-based POTS networks have developed into some of the most reliable in the world. POTS networks also require little in the areas of maintenance or upgrade. Our daily experience proves the point: For the most part, phone service is only lost after a severe storm, or when some other unusual event occurs. Relatively speaking, POTS systems are simpler networks with simpler needs.

Modern broadband networks, however, are very different. A significantly "larger pipe" (*i.e.*, more "bandwidth") must be created, because video and high speed Internet services contain much more "information" than do one or two voice-only signals. Advanced broadband networks also rely on digital protocols to a greater extent than do "analog" systems, like traditional POTS networks. When compared to analog networks, advanced digital broadband networks can provide several advantages. For example, digital networks can deliver signals more accurately,[109] and other shortcomings typically associated with analog networks can also be minimized or avoided entirely.[110] Consequently, a network incorporating some level of digital technology is preferred for the delivery of video signals.

Existing telephone networks can't carry video signals without significant modifications

◘ More Bandwidth Is Achieved Only Through More Construction

In the broadband world, telephone companies can't rely on old POTS networks. For "Super-Step #1," therefore, telephone companies must first build higher bandwidth, digital networks capable of delivering video services.

More bandwidth means more construction in local rights-of-way — a lot of it

[108] In late 1876, Alexander Graham Bell and Thomas Watson strung telegraph wire around their neighborhood in Boston and a "long distance" telephone call of two miles occurred. Automated switching was first implemented in 1892. At that time, a telephone customer paid roughly $100 per year for a residential telephone, and $150 per year for a business line. ED PAULSON, THE COMPLETE COMMUNICATIONS HANDBOOK. at 13 & 17 (2d. ed. 1996).

[109] ANNABEL Z. DODD, THE ESSENTIAL GUIDE TO TELECOMMUNICATIONS at 8 (3d. ed. 2002).

[110] For example, "noise" is reduced. An analog system boosts signals that have faded over distance through the use of amplifiers. Such amplifiers, however, also boost noise created by power lines, electric machinery and other sources. Digital systems, can distinguish between signals and noise, and are designed to discard noise or static and regenerate only the signal. Digital systems also require fewer "active" electronic components than do analog systems, leaving fewer opportunities for possible failures in the network. Id. at 7 – 9.

Telephone companies can do this in either of two ways. First, a telco could make significant modifications and additions to its existing POTS networks to enable video delivery. Alternatively, a telephone company could conclude that network upgrades to a POTS system are so extensive that it would be better to start from scratch.

The amount of time and money required to become "Network Ready" for the delivery of video services depends on the system design and delivery technology that a particular telephone company plans to use. In all cases, however, such projects will be large, costly, and time-consuming. For most of its service territory,[111] AT&T has apparently chosen to upgrade its existing POTS network. The company expects its "Project Lightspeed" construction to take at least until the end of 2008 – and even then, resulting "U-Verse" video products will be available in just 50 percent of AT&T's service area.[112] Verizon has adopted a different approach. As one company executive recently said, that telco is building "brand new video networks."[113] Consequently, Verizon's FiOS project is more time-consuming and considered more financially aggressive by some. FiOS is expected to be available to about 45 percent Verizon's current customers by the end of 2010.[114] At the current pace of construction, FiOS wouldn't reach all Verizon customers until 2013 -- a full seven years from now.[115]

Even after another two-plus years of construction, AT&T's "U-Verse" video services are expected to reach only 50 percent of AT&T's service area

At the current pace of construction, Verizon's FiOS service wouldn't be available to all of its customers until 2013—a full seven years from now

But we've skipped ahead. A "Network Ready" system must first be built by the telephone companies before

[111] In "new build" or "greenfield" situations like new subdivisions, AT&T's plan may call for fiber-to-the-home network architecture like that being deployed by Verizon. *See, e.g.*, AT&T Press Release, *AT&T Deploys Next-Generation Fiber-To-The-Premises Network in Northern Nevada at Kiley Ranch*, Feb. 13, 2006 (available at http://att.sbc.com/gen/press-room).

[112] Telco-IP Update, *Exec. Sheds Some Light on Lightspeed Trial*, Jan. 16, 2006. In the other 50% of its existing service territory, AT&T apparently intends to offer video service known as "Home Zone," which reportedly uses a set-top box to integrate digital subscriber line technology with programming delivered via direct-to-home satellite.

[113] Comments of Virginia Ruesterholz, President of Verizon Telecom, *Verizon Communications Inc. FiOS Briefing Session*, held on September 27, 2006.

[114] *Verizon Communications Inc. FiOS Briefing Session*, held on September 27, 2006.

[115] Verizon has stated that it will pass 20% of its households, or 6 million homes, by the end of this year, and proceed at a build pace of 3 million homes per year for each subsequent period. Seeking Alpha Transcript, *Verizon Communications, Inc. Q4 2005 Earnings Conference Call Transcript*, Jan. 26, 2006 (available at http://www.seekingalpha.com).

competitive video services can ever be offered. But even reaching the point of construction is a time-consuming process. Since upgrade projects are expensive, a company must first go through its budgeting process to ensure that necessary capital is available. As with all businesses, the amount of capital that can be devoted to network upgrades in any one year is not unlimited: Paying down debt from acquisitions and delivering consistent returns for shareholders also need to be considered.[116] As one AT&T executive recently put it,"[c]apital dollars in most corporations are in short supply[.]"[117]

Assuming that capital is available, the telephone company must next find an adequate number of qualified construction contractors.[118] Contractors are required because the scope of the project is much more demanding than the typical maintenance and build projects that a POTS network requires. Contractors are also preferred to employees because they are not bound to a specific location and, unlike the case with employees, no "reduction in force" is necessary once an upgrade project in a particular region is completed.[119] Finding qualified contractors, however, is not always easy. A request for proposals is typically developed, and competitive bids need to be considered. A contractor also has to be qualified to do the work. Advanced communications networks are complex, and often placed near other utilities like electricity and gas. Significant risks to the health, safety and welfare of those near the construction site exist and threats can

Very Narrow Survey, Q8:
To your knowledge, have any of the following problems occurred during the telephone company's recent work (whether before or after the approval of the cable franchise)? Check all that apply.

Gas line(s) have been hit	21.7%
Water main hit	47.8%
Sewer line hit	21.7%
Facilities owned by other companies (e.g., electric utility or cable) has been hit	56.5%
To my knowledge, no problems have arisen	21.7%
Other (please specify)	26.1%

[116] "Seidenberg is faced with deep skepticism on Wall Street about Verizon's multibillion-dollar investment in a fiber-optic network to carry TV, high-speed Internet and old-fashioned phone service . . . Moody Investors Service[] and Standard and Poors [recently decided] to downgrade Verizon's debt. Analysts are particularly worried about the company's spending on FiOS as Verizon's traditional local phone business shrinks . . ." Arnold Mohammed, *Verizon Lays It on the Line*, WASH. POST, Feb. 1, 2006, at DO1.

[117] Matthew Yi, *Big Business Lobbies Hard for Video Licensing Bill*, S. F. CHRON., August 28, 2006 (available at http://sfgate.com) (quoting AT&T California President Ken McNeely: ""Capital dollars in most corporations are in short supply, and those capital dollars will be invested in communities and states that are receptive and encourage new services, investments and innovation.")

[118] In one Florida county alone, Verizon reportedly utilized 10 contractors and 2,000 subcontractors during its fiber optic cable installations. Jill Greenwood, *Verizon Continues Some Digging*, TAMPA BAY ONLINE (available at http://www.msnbc.msn.com/id/6516815).

[119] Sometimes a "lower-cost workforce" is used instead of traditional contractors. Such a workforce is designed around "special or term employees with significantly less benefits than traditional employees." Comments of Doreen Toben at Bear, Stearns & Co. 19th Annual Media Conference, Feb. 27, 2006.

also be posed to public facilities – not every company with a backhoe should make the cut.[120]

Assuming that the capital budgets are in place and qualified contractors are located, permits need to be pulled because a significant amount of work occurs in the rights-of-way.

Only then, after all of these preliminary steps are completed, can construction work actually begin. Before any digging starts, however, other utility systems, like gas and electric, need to be "located."[121] If damage to other utilities nevertheless occurs, that damage needs to be repaired.

The challenges and time required to complete "Super-Step # 1" and become "Network Ready" were recently demonstrated in Hillsborough County, Florida. Verizon began construction of its FiOS network there in the summer of 2004. Here's what happened:

The challenges created in building thousands of miles of "network ready" systems are significant

Verizon's construction in Hillsborough County, Florida, left gaping holes in streets, and boil-water orders were issued as a precaution

» Between August and December 2004, Verizon installed 4.5 million feet of fiber-optic cable in Hillsborough County's local rights-of-way;[122]

» Over the same four-month period, Verizon's workers "ruptured nearly 200 water, sewer and reclaimed water pipes, [left] some customers without service; creat[ed] gaping holes in lawns, driveways and streets; and forc[ed] [local] officials to issue boil-water orders as a precaution;"[123]

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[120] Hillsborough County, Florida issued a stop work order to Verizon after "workers . . ruptured 200 water, sewer and reclaimed water pipes, leaving some customers without service; creat[ed] gaping holes in lawns, driveways and streets; and forc[ed] officials to issue boil-water orders as a precaution." Jill Greenwood, *Verizon Continues Some Digging*, TAMPA BAY ONLINE (available at http://www.msnbc.msn.com/id/6516815). Since that time, Verizon appears to have made some progress in the quality of its work, but many issues remain. Of the ICMA members surveyed, almost 22% reported that gas lines had been hit; nearly 48% noted a water main hit; and nearly 22% said that sewer lines had been damaged. Facilities of other utilities, like the cable or phone company, had been cut in more than 56% of the responding communities. Very Narrow Survey at Q. 8.

[121] *See, e.g.*, Michigan's "Miss Dig" statute, M.C.L. §460.701 *et seq*.

[122] Jill Greenwood, *Verizon Continues Some Digging*, TAMPA BAY ONLINE (available at http://www.msnbc.msn.com/id/6516815).

[123] Id.

» Hillsborough County officials had to issue a stop-work order the day after a Verizon crew hit a 12-inch water main, which sent 12,000 gallons of water per minute gushing into a street intersection for seven hours. The stop-work order applied to 10 contractors and nearly 2,000 subcontractors working at the same time on the Hillsborough County project.[124]

» Despite the fact that Verizon's construction began in 2004, all portions of that one county will not receive competitive video products for "several years" because construction is continuing.[125]

It will still take "several years" for Verizon to complete construction in Hillsborough County, FL

Hillsborough County's experience with Verizon's FiOS project underscores the extent of the challenge: Building "Network Ready" systems will be costly and time consuming, and will often be a dangerous proposition for telephone companies and community residents.[126] In all cases, however, "Super-Step #1" must occur before broadband services, like competitive video programming, can be offered to anyone. Put differently, the elimination of traditional video franchising does not remove the need for telephone companies to first plan and build new full-service broadband networks.

■ Super-Step # 2: Before a Telephone Company Offers Its Own Video Services, That Telco Must Also Create Back Office Systems and Hire Employees to Become "Market Ready"

The elimination of traditional video franchising, according to industry advocates, will result in competitive broadband services becoming available

[124] Id.

[125] Louis Hau, *Verizon Makes TV Push into Hillsborough*, ST. PETERSBURG TIMES ONLINE, Jan. 26, 2006 ("Because Verizon is still installing the fiber-optic lines needed to deliver a TV signal to its customers, many households may have to wait several years to order the service.") (available at http://www.sptimes.com/2006).

[126] ICMA members surveyed also reported problems with private driveways being cut but left without repair, private fencing being damaged, entering private property without prior notice, and similar issues. The challenge faced by one city manager was particularly notable: "The [phone company's] "repair" continues to block the sewer line. We had to call them for three weeks before they would come and unblock the line. It took a call to the external affairs manager …to get something to happen." Narrow Survey at Q 5.

throughout the country at a very rapid pace.[127] What telephone company advocates regularly fail to mention, however, is that "Network Ready" systems will first take years to construct. Even when Super-Step #1 is finished, though, the telephone companies' work is not done. “Super-Step #2" still lies ahead: Telcos must have a customer service infrastructure in place to ensure that their new products are “Market Ready.” As with Super-Step #1, Super-Step #2 is much more time-consuming and costly than the local franchising process.

The end of construction doesn’t mean that new services are deliverable to customers

Super-Step #2 involves "back office" systems and customer service organizations that are required before a new service is deliverable to customers. What's involved in becoming "Market Ready"? First, a new customer service infrastructure has to be created. To roll out a new service within a region, employees in that area need to be hired and trained so the new services can be installed in homes -- and later repaired if something goes wrong. Even this incremental step is more difficult than it may first appear. For example, customers ordering Verizon's FiOS services have reported installation times of around 3 - 4 hours per home.[128] Of course, Verizon and its employees will get more efficient over time, and the company has said that it will eventually be able to reduce installation times by an hour.[129] Even so, it's clear that the hiring and training process associated with “installs” alone is enormously time-consuming.

New employees have to be trained and equipped to install and repair new services

Telephone companies also have to lease or purchase trucks to get those new employees to the new customers' homes. An adequate inventory of supplies has to be purchased, and each truck has to be equipped with the appropriate items.

A new dispatch system has to be put in place, so the new employees know which new customer homes to

Dispatch, billing, and other IT systems must also be put in place

[127] *Supra*, fn. 6.
[128] *See, e.g.*, http://www.dslreports/comment/2568.
[129] Comments of Doreen Toben, EVP and CFO, Verizon Communications, at Bear, Stearns & Co. 19th Annual Media Conference, Feb. 27, 2006.

visit when . . . and these steps just relate to the physical installations and repairs!

A new billing system may have to be put in place so invoices for the broadband services can be generated. These systems are often very complicated because they need to be coded for a large number of possible events. Discount codes, targeted promotions, new bundled service offerings, and taxes or other fees associated with each combination have to be developed and tested in order for the billing system to work properly. One billing system vendor recently said that it can take up to six months to analyze and reprogram data collected on an old billing system.[130] "The process can be so complicated that vendors will make several test runs to verify that data is logging the way programmers anticipate. Employees must be trained to operate the new programs. And, for safety's sake, the final switchover usually takes place on a weekend."[131]

New call centers have to be established, or existing call centers expanded

Once the bills are sent to new customers, many more customer calls are generated. New services mean that customers have new billing and other questions. Consequently, call centers need to be built or expanded, and customer service agents need to be hired and trained.

Those employees can't address questions raised on a call unless they have new information technology systems in place that include items like the channel lineup in each particular location, the prices and discounts that are being applied in that market, and the calling customers' current balance, to name just a few items.

All of this also assumes that the telephone company has a product to deliver. Agreements for distribution rights have to be struck with each programmer. AT&T, for

[130] Linda Haugsted, *An Awful Lot to Digest*, MULTICHANNEL NEWS, August 7, 2006 at 4 (quoting Convergys vice president of marketing and product strategy Curt Champion on the integration of Adelphia cable properties into Time Warner and Comcast operations).
[131] Id.

one, still appears to be in the process of securing such agreements.[132]

■ Common Sense Conclusions: The Real Impact of Traditional Video Franchising

Telephone companies' latest interest in wireline video delivery and the investments those companies intend to make are commendable. But the real impact that traditional video franchising has on the phone companies' deployment plans should be placed in context. How long might it take for a telephone company to: i) identify the markets it wants to build; ii) establish that an adequate capital budget for construction exists; iii) design the required network upgrades for the particular market; iv) issue requests for proposals; v) identify and hire qualified contractors; vi) secure all necessary permits for construction; vii) complete all "Network Ready" upgrades; viii) hire and train new employees to install the new services; ix) put a new billing system in place and code that system for anticipated products and local promotions; and x) build new call centers and hire and train additional staff on an ongoing basis as more customers are obtained? Is it possible that a local franchise negotiation that might require 6 or even 12 months could be scheduled when a new market is first identified by a telephone company and completed well before the company is ever ready to launch services?

The telcos' latest interest in wireline video systems is commendable – but the impact that traditional franchising has on their deployment plans has to be placed in context

It's not only possible that the "Network Ready" and "Market Ready" Super-Steps would take more time than the local franchising process, but it seems likely. Information publicly available -- and additional data gathered from ICMA members – confirm the conclusions reached through common sense: Despite previous[133] industry claims to the contrary, traditional video franchising plays no role in the speed at which broadband systems are being deployed by telephone companies.

***Q**: How much time does it take to complete the two "Super Steps?"*
***A**: Years—plenty of time for telcos to comply with traditional video franchising requirements*

[132] Programming issues nearly tripped-up Verizon's first service launch in Kellar, Texas, as well. *See, e.g.*, *Verizon Debuts FiOS TV*, TVTechnology.com, Oct. 19, 2005 (noting that programming deals with Disney-owned programmers were late in coming) (available at http://www.tvtechnology.com/features/news.
[133] *See supra*, fn. 6.

VI. The Impact of Local Video Franchising on Broadband Deployment: Evidence to Date

Core Knowledge

Telephone company lobbyists tell lawmakers that traditional video franchising delays broadband deployment. Telephone company executives, however, tell a very different story -- and one that is more accurate -- to financial analysts.

Those who have managed large capital projects know that a significant amount of planning is involved. Being technologically able to deliver services (*i.e.*, being "Network Ready") is just half the equation. New broadband products also have to be tested, installed, billed and serviced (*i.e.*, services must be "Market Ready" as well). Common sense leads to the conclusion that these two Super-Steps are far more time-consuming than the traditional video franchising process. Even so, the telephone companies – either through their lobbyists or through the organizations they fund – often assert that local video franchising is the impediment in the rapid availability of competitive broadband services.[134]

Local video franchising plays no role in slowing the telcos' broadband network deployment plans

Is the traditional video franchising process responsible for nearly all broadband deployment delays, as telephone companies have claimed -- or is local franchising just one step among hundreds that telephone companies can anticipate? While intuition and common sense lead to the right conclusion, recent evidence also confirms that local franchising plays no role in slowing the deployment of the telephone companies' broadband networks:

Verizon is actively building Network Ready systems regardless of whether it has first obtained a local video franchise

» Despite the fact that the traditional video franchising process remains in place, Verizon has already passed 4.5 million homes with a "Network Ready" system that can deliver broadband services.[135] Put differently, Verizon is actively

[134] *Supra*, fn. 6.

[135] Seeking Alpha transcript, *Verizon Communications Q2 2006 Earnings Conference Call Transcript* Aug. 1, 2006 (available at http://www.seekingalpha.com).

building Network Ready systems regardless of whether it has first obtained a local video franchise. While one expert hired by Verizon has claimed that "the large investments needed to prepare existing phone networks for high-bandwidth video services are [being] held hostage,"[136] this clearly isn't the case.

» Verizon's FiOS video product is already "open for business" in 1 million homes.[137] Importantly, the number of homes "open for business" (*i.e.*, "Market Ready") always lags the number of homes passed (*i.e.*, those that are "Network Ready"). As one Verizon executive explained to financial analysts when reporting on first quarter 2006 results, the delay is not related to local franchising:

> [W]hat we have said now was that we have about 1 million homes that we have franchises for. *That doesn't mean we are actually marketing to 1 million homes yet* . . . we have been very successful with our franchising lately . . . and we will have enough franchising for where we're building to be able to sell.[138]

"We have been very successful with our franchising lately…we will have enough franchising for where we're building to be able to sell."

Doreen Toben,
CFO, Verizon

» ICMA members confirm that phone companies typically install their Network Ready upgrades without first having a traditional video franchise. In fact, nearly 96 percent of the communities responding to the first of ICMA's surveys report that telephone companies begin work on their systems before those telcos receive a video franchise.[139]

ICMA members report that the telcos regularly start to build full-service broadband networks in their communities, regardless of whether a video franchise has been issued

» ICMA members also report that "Network Ready" and "Market Ready" issues often exist well after the video franchise has been issued. In some cases, more than 6 – 9 months have passed between the time when a local franchise was issued and the

[136] Hazlett Decl. at ¶11.
[137] *Verizon Communications Inc. FiOS Briefing Session*, held on September 27, 2006.
[138] Comments of Doreen Toben at Bear, Stearns & Co. 19th Annual Media Conference, Feb. 27, 2006.
[139] Very Narrow Survey at Q. 6.

time when competitive video service actually became available.[140]

» AT&T's Chief Financial Officer, Rick Linder, has confessed that Network Ready upgrades for Project Lightspeed could not proceed more rapidly. According to Mr. Linder, "To be honest, I think moving it significantly faster would be difficult just in terms of the residential requirements and the ability to launch to the number of markets that we plan to launch . . ."[141]

"To be honest, I think moving [Project Lightspeed] significantly faster would be difficult…"

Rick Linder,
CFO, AT&T

» Given the magnitude of their projects, AT&T admits that no more than 50 percent of its network can be upgraded over the next 2½ years.[142] Verizon's FiOS video product will reach less than 50 percent of in-region Verizon-passed homes by the end of 2010.[143] If it maintains its current pace, Verizon won't be able to cover its current service territory until the end of 2013 – a full seven years from now.[144]

» During its forth quarter, 2005 earnings conference call, financial analyst Jeff Halpern of Sanford C. Bernstein & Company asked Verizon whether the pace of broadband system deployment had been different where there was "a state level approval process for franchising versus a . . . municipality by municipality one?" Ivan Seidenberg, Verizon's Chairman and CEO, provided a candid response:

> . . . I don't think there's a big issue associated with timing. I don't think there's, by the way, any story there. I think the law is the law. I think we have to go out and get, and get franchise approvals and we're doing that and we're doing it aggressively. And we're queued up. We don't feel that there's any impediment

[140] Id. at Q. 24.
[141] *Exec Sheds Some Light on Lightspeed Trial*, Telco-IP Update, Jan. 16, 2006.
[142] Peter Grant, *AT&T Readies Service Uniting Internet and TV*, WALL STREET JOURNAL , June 19, 2006 at B1, Corrections and Amplifications.
[143] *Verizon Communications Inc. FiOS Briefing Session*, held on September 27, 2006.
[144] *See*, *supra* fn. 115.

to our rolling out FiOS during the year, 2006. Admittedly, as we go into ['07] and ’08, we’ll need to be more aggressive because we’ll be in more communities. But by that time, I’m sure we will have had so much success with . . . the early deployment, that the whole political environment starts to … change as we go forward.[145]

» Even though Verizon began construction in Hillsborough County, Florida, in August 2004[146] and subsequently negotiated a local video franchise,[147] it will be several years before construction is complete and all portions of that one county receive competitive video products.[148]

More proof that construction and provisioning are the real factors throttling broadband system development

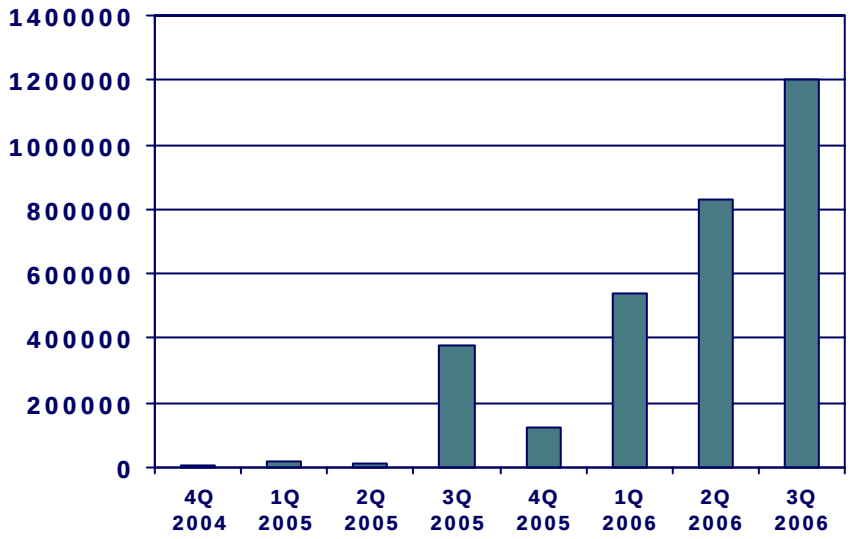
» In Plano, Texas, Verizon began construction of its FiOS system in December, 2004. More than fifteen months later, only about one-third of the 65,000 available homes in Plano could actually receive video service from Verizon.[149]

» The phone companies' momentum and success in securing traditional video franchises is clearly building. In fact, the telcos set a record pace in the second and third quarters, 2006 for the number of homes they could serve through local franchises:

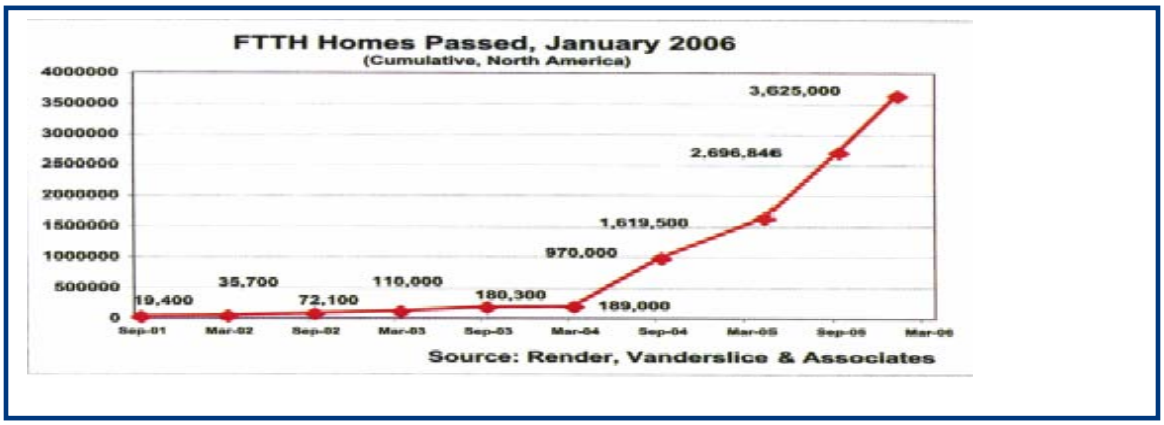
The telcos set a record pace in their traditional video franchising efforts in the second and third quarters of 2006

[145] Seeking Alpha, *Verizon Communications Inc., Q4 2005 Earnings Conference Call Transcript*, Jan. 26, 2006 (available at http://www.seekingalpha.com).
[146] See, Jill Greenwood, *Verizon Continues Some Digging*, TAMPA BAY ONLINE (available at http://www.msnbc.com).
[147] Verizon’s local video franchise with Hillsborough County, FL was approved in February, 2006. Verizon News Release, *Verizon Expands FiOS TV in Hillsborough County*, March 27, 2006.
[148] Louis Hau, *Verizon Makes TV Push into Hillsborough*, ST. PETERSBURG TIMES ONLINE, Jan. 26, 2006 ("Because Verizon is still installing the fiber-optic lines needed to deliver a TV signal to its customers, many households may have to wait *several years* to order the service") (emphasis supplied; available at http://www.sptimes.com/2006).
[149] Verizon News Release, *Verizon Begins Offering FiOS TV Service in Its Largest Texas Market of Plano*, April 18, 2006.

Traditional Video Franchises Secured
By Telcos
(est. homes passed)[150]



» Overall, phone companies are deploying competitive, full-service broadband networks at a breakneck pace, despite previously voiced concerns over local video franchising.[151]



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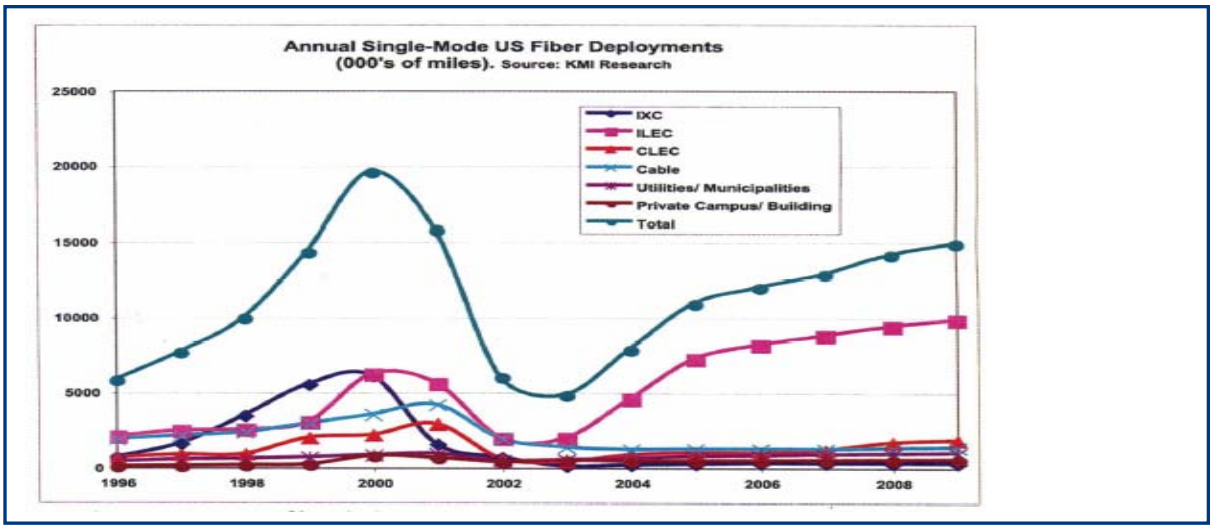
150 Compiled from reference to telco news releases and 2000 US Census data.

151 *In Four Months: Fiber Gains 1 Million New Homes and a Quarter Million New Customers*, BROADBAND PROPERTIES MAGAZINE, February, 2006 at 14.

» This frantic pace of broadband system deployment is also expected to continue for the phone companies for the foreseeable future:[152]



Has traditional franchising slowed the telcos' deployment of full-service broadband networks? No relevant, objective measurement suggests that such claims are credible. In fact, comments made by the telephone companies' own executives rightly tout the telcos' recent successes.

Telcos are already setting a record pace for construction of full-service broadband networks, and the blistering pace is expected to continue

■ The Texas Two-Step

Texas developed an incubator for a "shall issue" video franchising process last year, largely at the urging of SBC, *i.e.*, the "new AT&T."[153] The Lone Star state was the first to adopt a state-wide video franchising policy in the newest round of franchising debates. SB 5 was signed into law by Governor Perry on September 7, 2005. If traditional video franchising is the cause of

[152] *TIA Report: Fiber Deployments Boom, Paced by ILECs*, BROADBAND PROPERTIES MAGAZINE, February, 2006 at 10.

[153] Claudia Grisales, *Phone Industry Outlobbied, Outspent Cable Rivals in Legislative Fight*, COX NEWS SERVICE, Aug. 18, 2005 (available at http://www.statesman.com).

most broadband deployment delays as industry advocates assert, it would also follow that residents throughout Texas would now be the beneficiaries of a much more competitive video market. Unfortunately, that hasn't been the case.

Texas was the first state to try a new "shall issue" video franchising process; the state has served as an incubator for the concept

For its part, Ivan Seidenberg, Verizon's CEO, recently wrote that "[w]e're expanding into *seven* more communities in Texas, where we have statewide franchise authority to offer video."[154] Nearly two years after Project Lightspeed was first announced,[155] the "new AT&T" continues to operate just one controlled, commercial system, in San Antonio.[156] AT&T continues to promise that market trials will begin in other areas sometime soon.[157]

Despite the telcos' promises, just 42 of Texas' 1,210 communities are expected to have video competition from the telcos by the end of this year

After giving Verizon and AT&T the benefit of any doubt as to whether their current 2006 plans will be fully executed, it appears that these two phone giants -- each a Fortune 50 company -- will provide video competition in portions of just 42 of Texas' 1,210 incorporated communities by the end of 2006[158] -- fewer than 4 percent of all cities in Texas. By the end of this year, just parts of 6[159] of Texas' 254 counties[160] will have seen the telephone companies' new broadband services, *i.e.*, less than 3 percent of all counties. By the end of this year – and again assuming that 2006 plans are fully executed – Verizon hopes to be able to offer its FiOS service to 1 million people in Texas.[161] While an impressive-sounding plan -- and eagerly anticipated

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[154] Ivan Seidenberg, *Delivering the Total Broadband Experience*, BROADBAND PROPERTIES, Feb. 2006, at 17.
[155] AT&T announced its Project Lightspeed project on an SBC Investor Update Conference Call held on November 11, 2004.
[156] Karen Brown, *AT&T Expands U-Verse in San Antonio*, MULTICHANNEL NEWS, June 26, 2006.
[157] AT&T expects its next "U-Verse" launch to occur in Houston in the fourth quarter of this year. Company executives "still expect this year to be in 15 to 20 markets by the end of the year." Seeking Alpha, *AT&T, Inc., Q2 2006 Earnings Conference Call*, July 25, 2006 (quoting AT&T CFO Rick Lindner) (available at http://www.seekingalpha.com).
[158] Texas Almanac, 2006-2007 ed. (available at http://www.texasalmanac.com/facts).
[159] Plans include service to portions of the following Texas counties: Collin, Denton, Dallas, Potter, Randall, Rockwell, and Tarrant.
[160] Texas Almanac, 2006-2007 ed. (available at http://www.texasalmanac.com/facts).
[161] Verizon News Release, *Verizon Expands FiOS TV Availability in North Texas*, Dec. 12, 2005.

-- that's still only around 4 percent of the Texas' total population.[162]

Phone company lobbyists promised a simple two-step plan in Texas when it lobbied SB 5: adopt a state-wide video franchising plan as step 1, and, as step 2, allow consumers throughout Texas to reap the rewards of a more competitive video marketplace. By the end of 2006, sixteen months will have passed since SB 5 was enacted in Texas. By any real measure, however, the experiment will have produced significantly less than promised, as roughly 96 percent of all Texans are still waiting for wireline video competition.

Even though a state-wide compulsory video franchising bill was signed into law in 2005, about 96 percent of all Texans are still waiting for the phone companies to provide competitive wireline video services

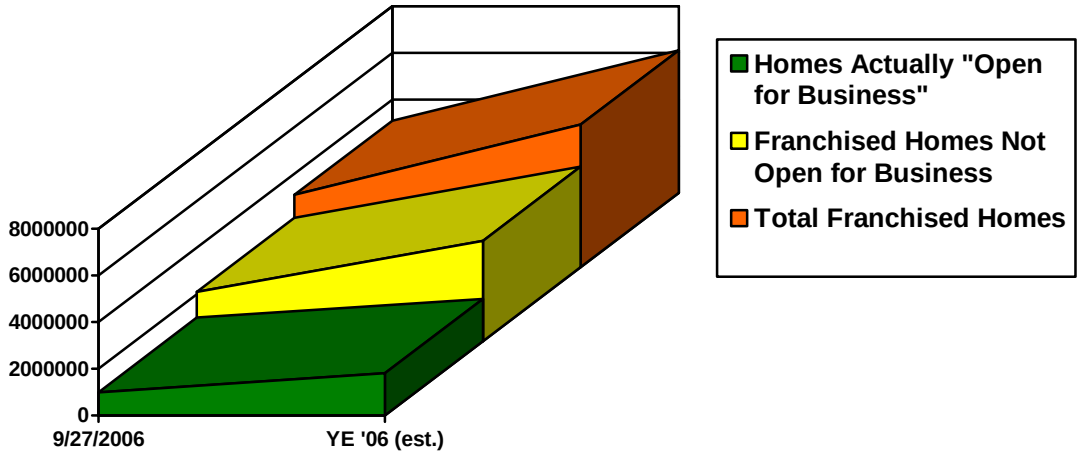
■ Proof Positive: The Impact of the Super-Steps on Verizon's FiOS Effort

The Super Steps – not traditional video franchising – throttle the pace of competitive video deployments. A presentation recently made by Verizon executives confirms this conclusion. According to company executives, Verizon already has video franchises covering more than 3 million homes.[163] The company is actually "open for business," however, in just 1 million homes.[164] By the end of 2006, Verizon expects the gap to grow even larger: The company will have video franchises for more than 6 million homes, but will be open for business in just 1.8 million of those households.[165] Put differently, Verizon's video franchising is outpacing its operational capacity to connect video customers at a rate of 3 to 1. The difference can be depicted as follows, with the block in the middle representing homes already franchised but not yet being offered service:

Verizon already has local video franchises covering three times more homes than it can currently serve

[162] Texas has a population of 22,490,022. Texas Almanac, 2006-2007 ed. (available at http://www.texasalmanac.com/facts).
[163] *Verizon Communications Inc. FiOS Briefing Session*, held on September 27, 2006, slide 14.
[164] *Id*.
[165] *Id*.

VERIZON FRANCHISING OUTPACING COMPLETION OF SUPER STEPS[166]



A Verizon executive recently placed the role of traditional video franchising in context:

> This was an area where we had to learn and see if this was going to be an issue for us. Right now we feel very, very confident that we have [our franchising] moving in the right direction, and this isn't holding us back in our deployment of video.[167]

Recent comments by telephone company executives confirm what common sense and available evidence already reveals: The deployment of full-service video broadband networks really depends on factors other than traditional video franchising. The real "gating factors" are the operational issues found in Super-Step # 1 and Super-Step #2: Phone companies must first build Network Ready systems and then put back-office

***Conclusion**: traditional video franchising plays no role in determining the pace of broadband network deployment*

[166] Derived from information presented during *Verizon Communications Inc. FiOS Briefing Session*, held on September 27, 2006.

[167] Comment of Virginia Ruesterholz, President of Verizon Telecom, made during *Verizon Communications Inc. FiOS Briefing Session*, on September 27, 2006.

infrastructure and customer service organizations in place to make their services Market Ready.
A "streamlined" franchising process doesn't hold the key to unleashing competitive, wireline video services. Instead, the extensive amount of required work simply requires time and patience – neither of which is created through the elimination of traditional video franchising.

VII. A Secret Obstacle to Broadband Deployment: The Phone Companies' Ever-Changing Business Plans

Core Knowledge

Just five years ago, telephone companies held local video franchises which authorized video service to 60 percent of the country – more than 63 million homes nationwide. Consequently, traditional video franchising hasn't delayed the telephone companies' entry into the video market – instead, the real culprit has been the phone companies' vacillating commitment to full service, wireline broadband networks.

Telephone companies claim, at least when appearing before state or federal lawmakers,[168] that traditional video franchising slows their ability to deliver competitive video services.[169] Available evidence, however, reveals that broadband deployment is really throttled by the need to first build Network Ready systems and the subsequent need to create back office systems and customer service infrastructures so products are Market Ready.[170] Even telco executives have recently conceded that traditional video franchising has had no detrimental effect on their ability to deploy new networks.[171]

A third real obstacle – again rarely mentioned by the phone companies – also exists. In addition to delays caused by Super Steps #1 and #2, another culprit is found in the telephone companies' own vacillating commitment to the deployment of full-service wireline broadband networks.

If the telcos had stuck to the business plans they had just a few years ago, they would already have local video franchises authorizing service to more than 63 million homes nationwide

Prior to 1996, phone companies were generally prohibited by federal law from offering video services to customers within their local telephone service areas.[172] Active lobbying and an increasingly

[168] When reporting to the financial community, however, AT&T and Verizon have told a different story. When before that audience, the telephone companies assert that local franchising has not caused any delays in their deployment. *See, e.g*, quoted comment of Virginia Ruesterholz, President of Verizon Telecom *supra* at page 2.. *See also*, quoted comment of Rick Linder, AT&T's Chief Financial Officer, *supra* at page 46.
[169] *Supra*, fn 6.
[170] *Supra*, at pages 33 – 42.
[171] *See, e.g.*, telco executive quotes *supra* at pages 2 and 44 – 46.
[172] The telephone-cable cross ownership restriction was enacted as part of the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, §613(b), and previously codified at 47 U.S.C. §533(b).

competitive telephone industry, however, encouraged a new approach in 1996. All communications companies, the theory went, should be permitted to compete with each other in all lines of business.[173] Consequently, the 1996 Telecommunications Act[174] gave telephone companies four new options for getting into the video business within their local markets. Telephone companies could provide video services through either: 1) Title III of the Communications Act, which relates to radio-based systems such as Multichannel Multipoint Distribution Service networks; or 2) Title II common carriage systems; or 3) Title VI cable systems; or 4) Title VI open video systems created by the 1996 Telecommunications Act.[175]

In 1996, Congress gave the telcos four clear paths into the video business

The cable industry quickly sized up the telcos as new potential competitors. Cable began to upgrade its existing networks so high-speed Internet and telephone service could be offered in addition to traditional video services. In fact, since passage of the 1996 Act, the cable industry has reportedly invested more than $100 billion in such network upgrades.[176] As a reward for that foresight and investment, cable companies are strong competitors in both high speed Internet access and telephone services today[177] – all while the cable industry has been subject to local video franchising.

Following the 1996 Telecommunications Act, the cable industry quickly went to work to get into the telephone and high-speed Internet access businesses

Soon after the 1996 Telecommunications Act was passed, telephone companies also seemed anxious to be in the video business. Ameritech, one of the original "Baby Bells," formed a new venture called "Ameritech New Media Enterprises." Ameritech's franchising team was comprised of "only one Ameritech New Media

[173] For example, §302 of the 1996 Telecommunications Act added a new §651 to the Communications Act (47 U.S.C. §571) which permits telephone companies to enter the video business. At the same time, Congress also added new §253 to the Communications Act which Congress intended to "remove all barriers to entry in the provision of telecommunications services." According to that section, "No State or local statute or regulation, or other local requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."

[174] 1996 Telecommunications Act, Pub. L. 104-104, 110 Stat. 118 (1996).

[175] 1996 Act §302, codified at Communications Act §651, 47 U.S.C. §571.

[176] Ted Hern, *Telcos Push Franchise Revamp Uphill*, MULTICHANNEL NEWS, Feb. 20, 2006, at 3.

[177] *See, e.g.*, TIA Report, *Fiber Deployments Boom, Paced by ILECs*, BROADBAND PROPERTIES, Feb. 2006, at 11.

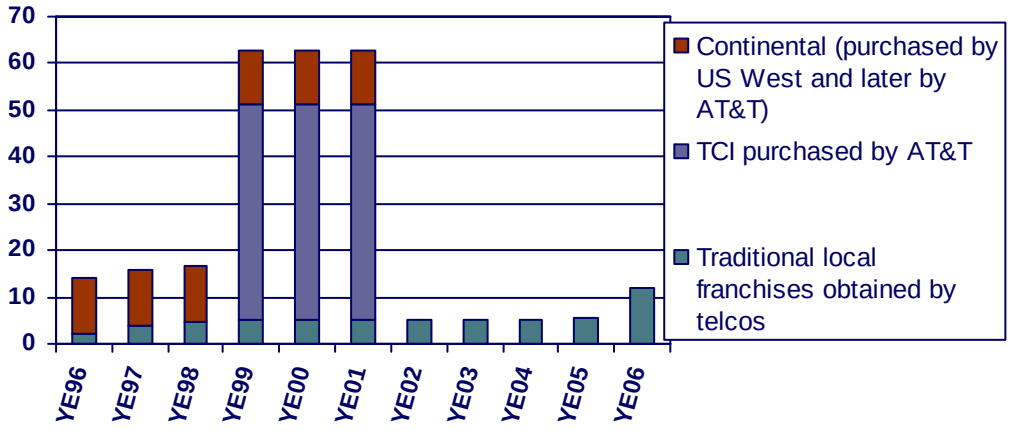
executive…[and] a three-man team of attorneys."[178] With this four-person team, Ameritech New Media pursued video franchises throughout the Midwest. Despite the modest size of its devoted staff, the Baby Bell had significant success in franchise negotiations, and gathered 111 franchises passing 1.7 million homes in less than 36 months.[179] US West (now Qwest), also demonstrated its enthusiasm for broadband networks when it bought Continental Cablevision in 1996 for nearly $11 billion.[180] BellSouth, too, gathered traditional video franchises in order to offer video service.[181] AT&T was the most bullish of all the Bells – it created "AT&T Broadband" by acquiring TCI and MediaOne, then the largest and fifth largest cable operators in the country. AT&T's commitment to broadband technology seemed unequivocal – its cable system purchases came with a price of around $110 billion.[182]

From 1996 to 2000, the telcos all appeared anxious to get into the video business, too

Just seven years ago, then, the telephone companies all appeared to be anxious to get into the video business. By year end 1999, phone companies controlled local video franchises that authorized the phone companies to provide video service to more than 63 million homes – 60 peercent of all households nationwide:

[178] Reply Comments of Southeast Michigan Municipalities, *In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984*, at 32 (Feb. 28, 2006).
[179] *In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, 15 FCC Rcd. 978, 1036-37 (Rel. Jan. 14, 2000).
[180] Shira McCarthy, *Closing the Deal, Continental Buyout Sheds Light on US West's Video Strategies*, TELEPHONY ONLINE, October 14, 1996 (available at http://www.telephonyonline.com/mag) (quoting Chuck Lillis, then-president and CEO of US West Media Group: "We continue to have great faith in [cable system] network technologies. In our view, no other network combines speed to market, economics, speed of transmission and [ability to integrate] as [a hybrid fiber coaxial network does]").
[181] *See, e.g., In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, 13 FCC Rcd. 24284, 24355 (Rel. Dec. 23, 1998).
[182] *See*, William Schaff, *Taking Stock: Ma Bell's Apron Tears as AT&T Divests Its Broadband Division*, INFORMATION WEEK, Dec. 24, 2001 (available at www.informationweek.com).

Homes Passed by Telco-Controlled Local Video Franchises[183]
(est. millions of homes passed)



Soon thereafter, though, the telephone industry's business plans began to change. Telcos rushed to get out of the wireline video business as quickly as they had rushed to get in. After buying Continental Cablevision in 1996, US West sold its video operations just a few years later. Ameritech, Southern New England Telephone, and Pacific Bell had all been pursuing traditional video franchises – but once SBC and Verizon acquired those companies, the acquirers quickly pulled the plug on the acquired phone companies' broadband projects.[184] AT&T's reversal was even more dramatic, and is now legendary. After spending more than $110 billion on cable systems and local franchises from 1999 - 2001, AT&T Broadband was sold in its entirety for a little more than half of what it had paid just three years earlier.[185] As a result,

By 2002, the telcos pulled the plug on wireline video; they believed partnerships with direct broadcast satellite companies provided a cheaper and faster way into the video business

[183] Compiled from the FCC's Annual Assessments of the State of Competition in Markets for the Delivery of Video Programming for years 1996 -2001, together with reference to 2000 U.S. Census data and various articles associated with telephone company purchases of Continental Cablevision, MediaOne and TCI.

[184] *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 13 FCC Rcd. 1034, 1099 (Rel. Jan. 13, 1998) (emphasis supplied).

[185] *See, e.g.*, Comments of AT&T Inc., *In the Matter of Implementation of Section 621(a) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, FCC MB Docket No. 05-311, at 24 -25 (Filed Feb. 13, 2006) (asserting that Ameritech New Media suffered regular and repeated delays in the local franchising process as a result of process abuse); *Cf.*, Reply

AT&T became a shadow of its former self, with no real chance to fully regain its past glory.

Traditional video franchising made no difference in the telcos' decision to get into the wireline video business in the mid-1990s, or to get out of the business just a few years later

While there is some effort to revise history on the matter,[186] there were very few complaints about local governments or the video franchising process when telephone companies were actively engaged in the business between 1996 and 2001. Instead, the telephone companies' complaints generally centered on access to programming owned by the cable companies, and on the cable companies' increasing concentration in markets.[187] Simply put, local video franchising made no difference in the telcos' decisions to get into the video business or to later retreat from that business. Instead, the telcos' business plans fell victim to the demands of financial analysts, the need to pay down debt, the hope that broadband services could be delivered in a less costly manner through the existing POTS systems, and other business considerations.[188]

◘ What Goes Around . . .

After abandoning wireline video efforts just five years ago, the telcos have now come full circle

AT&T and Verizon have recently come full circle on the matter, and now voice a renewed interest in the wireline video business. Had the phone companies stuck to their business plans following the 1996 Telecommunications Act, those companies would still hold far more local franchises than their nearest cable industry competitor. Hindsight, however, is "20/20." Five years ago, the telcos believed that opportunities to partner with direct broadcast satellite companies

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Comments of Southeast Michigan Municipalities, *In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984*, at 32 (Feb. 28, 2006) ("The Southeast Michigan Communities filing these Reply Comments do not recognize any of [AT&T's] complaints. [The communities] asked for none of the things [that AT&T claimed] and what they experienced was starkly different from what AT&T says occurred"); *see also* fn. 222 and related text.

[186] Comments of AT&T Inc., *In the Matter of Section 621(a)(1) of the Cable Communications Policy Act*, at 24 (Filed Feb. 13, 2006).

[187] *See, e.g.*, *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming* , 16 FCC Rcd. 6005, 6075 (Rel. Jan. 8, 2001) (relates to concerns about the horizontal concentration of ownership on the purchase of programming; also notes concerns that "excessive concentration of ownership may create media gatekeepers…")

[188] As noted by the FCC in 2001, "Most incumbent local exchange carriers ("ILECs") are seeking to sell their MVPD facilities preferring instead to market DBS services to their customers." *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 16 FCC Rcd. 6005, 6060 (Rel. Jan. 8, 2001).

warranted a different business model.[189] Now the pendulum has swung back toward the vision of full service networks capable of delivering wireline video products.

Unfortunately, however, the telephone companies' newest plans also suffer some degree of uncertainty. Financial analysts, for example, are concerned over whether the huge capital outlays will really pay off:

Even though the telcos appear committed to a renewed wireline video effort, uncertainties remain

> Seidenberg is faced with deep skepticism on Wall Street about Verizon's multibillion-dollar investment in a fiber-optic network to carry TV, high-speed Internet and old-fashioned phone service . . . Moody Investors Service[] and Standard and Poors [recently decided] to downgrade Verizon's debt. Analysts are particularly worried about the company's spending on FiOS as Verizon's traditional local phone business shrinks . . .[190]

The telcos' remaining ambivalence over the construction of full-service, wireline broadband networks is also demonstrated through the local franchises the telcos seek. For example, according to a standard provision sought by Verizon:

Verizon's standard video franchise has a three year "backout" provision

> Franchisee Termination: [Verizon Delaware Inc.] shall have the right to terminate this Franchise and all obligations hereunder within 90 days after the end of three years from the service date of this Franchise, if at the end of such three year period [Verizon Delaware Inc.] does not then in good faith believe it has achieved a commercially reasonable level of subscriber penetration on its cable system.[191]

AT&T's standard video language seeks the right to offer video services without the obligation to ever offer those services

Likewise, the "Competitive Video Services Agreement" proposed to communities by AT&T contains a provision that provides AT&T the right to offer video

[189] Id.
[190] Arnold Mohammed, *Verizon Lays It on the Line*, WASH. POST, Feb. 1, 2006, at DO1.
[191] City of Newark, DE Code granting a Cable Communications System Franchise to Verizon Delaware, Inc. at §15-72(f).

service without a corresponding obligation to ever provide that service.[192]

As for other phone companies, BellSouth's Chief Financial Officer Pat Shannon recently reported that his company was "encouraged with the technical trials being conducted in 250 homes in Atlanta," but that the company was "*still looking for the right business model*."[193] BellSouth's chairman has made similar comments, noting that his company "continues to focus on the business model and profitability."[194]

◘ Should Our National Policy Be Changed in the Midst of Such Uncertainty?

A critical question has to be asked if the lessons of history are to be applied: Will the telephone companies remain committed to full-service, wireline broadband systems this time around, or will promises made in return for legislative accommodations again fall victim to changing business models? It wasn't long ago when telephone company lobbyists claimed that a federal prohibition was the only thing stopping the industry from providing wireline video competition. Ten years have since passed, and no real competition exists. Now phone company advocates assert that traditional video franchising is the only thing standing in their way, even though the real evidence indicates otherwise: Building "Network Ready" systems will still take several years,[195] and the ability to have back-office systems in place to make advanced services deliverable, *i.e.*, becoming "Market Ready," is another significant obstacle to deployment.[196]

We shouldn't make dramatic changes to traditional video franchising while the telcos' latest commitment to full-service broadband networks remains uncertain

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[192] According to one such agreement that has been proposed by AT&T, "AT&T Michigan shall determine, in its sole discretion, where in the Municipality its facilities and the IP Network shall be constructed, operated, maintained, repaired and upgraded to provide . . . Competitive Video Service." A separate provision in the same document defines the term of the agreement as running for a "period of (3) years from the date AT&T Michigan provides [ ] written notice of commencement of service on a commercial basis . . ."

[193] Comments made at Bear, Stearns & Co's 19th Annual Media Conference, Feb. 27, 2006.

[194] *Ackerman Cautious on Video*, Telco-IP Television Update, January 16, 2006 (citing comments made at Citigroup's 16th Annual Global Entertainment, Media and Telecommunications Conference).

[195] In the case of AT&T, just 50% of its total market area will see "Project Lightspeed" construction by the end of 2008. As for Verizon, its FiOS products, at their current rate of deployment, could not reach all Verizon customers until the end of 2013. *See supra*, at page 46.

[196] *See supa*, at pages 39 – 42.

Despite the fact that the telcos have been permitted to be in the business for ten years, just 100 or so of the country's 33,000 communities currently enjoy wireline video competition from a telephone company.[197] By any measurement, it will still be a very long time before the telcos' promise to deliver wireline video competition on a widespread basis becomes a reality. Local governments are eager to see that day come – but until a more competitive video marketplace becomes a widespread reality for communities nationwide, traditional video franchising and local oversight of cable systems remain appropriate.

It will be years before the telcos' promise of wireline video competition becomes a widespread reality – until then, local oversight of cable systems remains appropriate

[197] *See*, fn 41.

VIII. Why Local Franchising Works

Core Knowledge

Traditional video franchising amounts to more than the sum of its parts. The glue that holds it together is made up of the negotiation that occurs between the video provider and local officials and the oversight by local government that follows. The telephone and cable industries both prefer less government oversight of their businesses – but until sustained wireline video competition actually develops, reduced oversight poses risks to residents.

Local video franchising has been a cornerstone of communications regulation for sixty years.[198] Under our traditional franchising system, a video provider must secure a franchise from the local government.[199] Without such a franchise, no video service can be offered, and no business can be built.[200]

Local video franchising has been a cornerstone of communications regulation for 60 years

A video franchise is an agreement which is negotiated between the video provider and the local government. During the negotiation process, local officials ensure that cable systems are responsive to local needs and interests. Importantly, however, all documents which result from the negotiation must respect our nation's long-standing policy of "structured dualism" in video regulation:[201] If any provision of a local cable ordinance or franchise agreement conflicts with the Cable Act or FCC regulations, the local provisions are deemed pre-empted.[202]

A significant amount of uniformity is created as a result of our existing national policy.[203] Even so, the negotiation of a video franchise can still take some time – as it should. Many important issues are involved, from construction standards in the local rights-of-way

Our national policy in cable communications already creates significant uniformity in video franchises

[198] *Supra*, at pages 25 - 27.
[199] In some cases, the authority to issue video franchises is maintained at the state level of government. In the vast majority of cases, however, video franchises are negotiated and issued at the local level.
[200] 47 U.S.C. §541(b)(1).
[201] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. 102-385, 106 Stat. 1460 (1992); 1996 Telecommunications Act, Pub. L. 104-104, 110 Stat. 118 (1996).
[202] *See, e.g.*, 47 U.S.C. §556: "…any provision of law of any State, political subdivision, or agency thereof, or franchising authority, or any provision of any franchise granted by such authority, which is inconsistent with this Act shall be deemed to be preempted and superceded."
[203] *See, e.g.*, fn. 75, *supra* and corresponding text.

to the need to protect the free-flow of information to residents. Therefore, the completion of a franchise negotiation is an important accomplishment. One cable operator recently put the matter plainly: Because franchise agreements confer "the right to build and operate cable systems within [a franchising authority's] geographical limits . . . [f]ranchise [a]greements represent *valuable assets*…"[204]

A video franchise is now considered a valuable asset by video providers because it is the product of a negotiation

■ Nuances Created Through Negotiation

Because a local franchise is *now* considered a "valuable asset" by video providers, the authority to grant the video franchise creates a substantial amount of bargaining power that can be exercised on behalf of residents by local officials – bargaining power that will be diluted or lost entirely if the act of local video franchising is reduced to an administrative task by state or federal statutes.

Currently, local officials can leverage their bargaining power to their residents' advantage and secure certain obligations from the video provider. A local government, for example, secures the payment of a franchise fee (up to 5 percent of gross revenues "derived from the operation of the cable system to deliver cable services").[205] In most cases, local officials devote these franchise fees to their community's general fund in order to finance things like police and fire protection, street repair and maintenance, and city-wide street lighting.[206] Still other communities devote franchise fee revenue to parks and recreation programs, the research and development of new information technology systems, or PEG (Public, Educational and Governmental) programming.[207] Despite the importance of such endeavors, some forced franchising proposals would dramatically reduce the amount of

In most cases, franchise fees are used for critical purposes like police and fire protection, street repair and city-wide street lighting

[204] In re: Adelphia Communications Corp., et al., Southern District of New York Bankruptcy Case No. 02-41729, Debtors' Omnibus Response to the Contract and Plan Objections of Local Franchising Authorities (Filed May 26, 2006)(emphasis supplied).
[205] 47 U.S.C. §542.
[206] Approximately 54% of ICMA survey respondents reported that all franchise fees received from cable operators are devoted to the communities' general fund. Approximately 5% of the respondents devote all franchise fee revenue to PEG programming. Remaining communities typically devoted the majority of franchise fees to the general fund, but also dedicate substantial portions to other projects. Broad Survey Q. 5.
[207] Id.

funds available for these purposes. According to the Congressional Budget Office, for example, one forced franchising proposal currently being considered by federal legislators would cost local governments between $100 million and $350 million per year by 2011.[208]

Right-of-way construction standards are also sought as part of the negotiation process. These are important provisions because gas lines, water mains, electrical lines and other utilities are often "hit" during the construction of a video system.[209]

Construction issues are often the first that come to mind when many policymakers consider local government's role in the video franchising process. However, while the supervision and coordination of construction is vitally important, local governments have also become skilled in other aspects of video franchise negotiations. In return for the promise of a franchise, a number of other social and service commitments are often sought by local officials for their residents and promised by a video provider. Among them:

Both social and service commitments are sought by local officials on behalf of their residents during a video franchise negotiation

» Local governments establish *customer service guidelines* to ensure that the company is responsive to service requests.[210] Such guidelines may be particularly important, for example, if a video provider plans to launch service personnel from a location some distance away from the community's residents.

» In the absence of competition, many local governments continue to regulate prices charged by video providers for the basic tier of service (*i.e.*, the only tier where prices may still be regulated under federal law). Video providers often agree to *rate-*

[208] Congressional Budget Office Cost Estimate, *H.R. 5252, Communications Opportunity, Promotion, and Enhancements Act of 2006* (Rel. May 3, 2006).
[209] *See* fn. 120, *supra*.
[210] Currently, a community can provide notice to the cable operator that it intends to enforce the customer service rules promulgated by the FCC. A community may also adopt more stringent standards if it has had chronic problems with the operator in a particular customer service area or otherwise believes that stricter standards are warranted. 47 U.S.C. §552.

setting procedures and to provide notices of rate changes to customers.

» No-charge *parental controls* and "trapping" devices are often sought by local officials so parents can take control of offensive programming that might otherwise be viewed by their children.

» If some areas of a community are more affluent than others, local officials will typically require a video provider to make services available in all areas of the community to *prevent discrimination*.

A local government's "legitimate interest" in video franchising is not limited to right-of-way issues

» Many communities negotiate the times during which the video provider opens rights-of-way or makes repairs to *minimize disruptions* to rights-of-way and the delivery of service. Coordination of right-of-way construction may be particularly important if a community has a master plan in place to improve streets and roadways.

» Some local governments are able to negotiate access to a *local emergency alert system*, in addition to the national emergency alert system, so local officials can better inform residents of a local emergency or a homeland security threat.

» Similarly, some local governments seek *institutional networks* (*i.e.*, private communications networks, often called "I-Nets") as part of the franchise negotiation process. Many such networks provide a redundant path for communications between public facilities – a critical consideration when planning for responses to homeland security threats, natural disasters, and other emergencies. Other communities use I-Nets to deliver distance learning opportunities for first responders.

» Many communities have successfully required the video operator to provide *free high speed Internet access to schools, libraries and other public buildings* in return for a video franchise.

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» Some communities with a high senior-citizen population have successfully negotiated *senior citizen discounts;* customer credits have also been negotiated or later sought when customer service commitments are not kept.

» Public, Educational, and Governmental ("PEG") programming can distribute information about the community and its government, promote the educational growth of residents, provide residents with access to digital technologies, and create a direct dialogue between a government and its citizens. Communities that pursue the development of PEG programming have found these goals to be vitally important: There is little reason to question that judgment, given the number of important purposes that PEG efforts can serve.

» PEG facilities also provide residents a chance to *leverage a mass medium* to deliver a message – an opportunity that has become increasingly scarce with the massive media consolidations of the past decade.

Importantly, nearly every traditional video franchise also has some sort of enforcement mechanism. For example, in many cases the parties will agree to a "liquidated damages" schedule if franchise defaults occur. If the franchise breach is substantial, the franchise itself might even be placed at risk.

■ Three Characteristics Contribute to the Traditional Franchising System's Past Success

Traditional video franchising works because…

These and many other matters deemed important to local residents will be negotiated as part of the video franchise process. For the past six decades, three characteristics have formed the foundation for the success of traditional franchising. First, local officials have been in the best position to know what their residents want, and how to best protect those

interests.[211] Local officials understand the demographics of their particular community, and whether a company might be tempted to serve some neighborhoods but exclude others – if so, local officials will prevent discrimination by requiring the availability of services throughout the community.[212] The same holds true for other negotiated terms: For example, what may be considered offensive programming in a rural community may be considered less so in an urban environment. Put differently, video franchising has never been a one-size-fits-all system. As a result, local franchising can respond quickly to changes in technology or local interests.

Local officials understand the demographics and the particular needs and interests of their communities and residents

The second reason for the effectiveness of traditional video franchising is that local officials are in the best position to gauge the performance of the video providers and provide necessary oversight of what essentially remains a monopoly-like business. If a street is left open after a video provider completes underground construction, local officials immediately know about the problem. If a provider is regularly missing scheduled appointments or not picking up customer calls, residents dial city hall to complain -- not their Congressmen (at least, that's the way they do it now . . .).[213] If video competitors are damaging each other's plants during construction or maintenance work, city engineers are in the best position to coordinate and supervise competing work.

Local officials are in the best position to gauge the performance of the providers

The third key to the success of local franchising is that local officials are in the best position to consider possible franchise defaults and enforce franchise promises. In the event that a video provider fails to perform a franchise obligation, local officials typically become aware of that failure quickly. In most cases, local governments will ask the provider to correct the

Local officials are in the best position to consider potential defaults and to enforce franchising promises

[211] This unique position was recognized by the FCC in 1972, for example, when it noted that local governments are "familiar with local needs, and necessarily more responsive to community desires . . ." 1972 Order at 206.
[212] Importantly, not all city managers believe that a community-wide buildout of a competitive video system would be desirable or required if the community were approached for such a franchise. Almost 20% of ICMA members surveyed indicated that they would not require a community-wide buildout or that they would need to evaluate the issue before determining that such a buildout was appropriate. Broad Survey Q. 11.
[213] National Association of Telecommunications Officers and Advisors Press Release, Survey Indicates Local Governments Resolve Large Number of Customer Service Complaints Each Year, April 26, 2006.

problem, and the matter will be resolved. In those situations where a default is significant, local governments will often provide notice of the alleged default and an opportunity for the video provider to cure that default. If a default is not cured or if the existence of the default is challenged by the video provider, a hearing is typically conducted by the local governing body and additional information is gathered. If enforcement of the franchise obligation is then deemed necessary, local officials can, and in many cases do, impose liquidated damages. In very rare cases, franchise revocation proceedings might also occur. Again, this level of government oversight is essential and appropriate, at least until sustained, wireline video competition develops from a *promise* into a *reality* for residents.

The risk of losing a franchise the video provider worked hard to negotiate can provide powerful motivation in appropriate circumstances

If lessons are to be taken from the sixty-year history of local video franchising, it is important that legislators consider the factors that have contributed to the existing system's success. Because a negotiated franchise is considered a substantial asset by the video provider, local officials currently have the bargaining power to negotiate both social and economic commitments for their residents in return for a franchise. This bargaining power will be lost or substantially diluted if state or federal statutes reduce video franchising to an administrative task. Any system of video franchising, whether residing principally at the federal, state, or local level of government, must also: 1) be flexible enough to respond to the needs of residents and issues of local concern; 2) provide for active oversight of the video provider's performance and responsiveness; and 3) contain effective due process and enforcement mechanisms that can be instituted quickly if a franchise default is believed to exist.

To be successful, any system of video franchising must minimally exhibit three characteristics

◘ Local Governments Should Remain Empowered to Resolve Local Problems and Represent Residents' Interests

Local governments are in a unique position: They are close to construction and close to residents. This position will be increasingly relied upon as the

telephone companies execute their construction plans and new video broadband services come to market.

Local governments should remain empowered and at the center of video franchising

Importantly, more than one million miles of cable plant has been placed in local rights-of-way while traditional video franchising has been in place. [214] Telephone companies are already engaged in massive construction projects to make their systems "Network Ready," full-service broadband systems. The telephone companies' construction is not always going smoothly, however, and risks to the health, safety and welfare of residents have resulted. Consider these results from one of the recent ICMA surveys:

Very Narrow Survey Q. 8:

To your knowledge, have any of the following problems occurred during the telephone company's recent work (whether before or after the approval of the cable franchise)?

		Response Percent
Gas Line(s) have been hit	■■■■	21.7%
Water main has been hit	■■■■■■■■■	47.8%
Sewer line has been hit	■■■■	21.7%
Facilities owned by other Companies (e.g., electric utility or cable) has been hit	■■■■■■■■■■	56.5%
To my knowledge, no Problems have arisen	■■■■	21.7%
Other	■■■■■	26.1%

Construction accidents like these pose serious health and safety risks. Other problems less grave but nevertheless annoying to residents are also being reported at a troubling rate. City and county managers have already related stories of damaged fencing, driveway cuts that go without restoration, concerns over unannounced trespass, and poorly coordinated tree trimming efforts.[215] Many lawmakers don't think of

The telcos' broadband network construction can threaten the health, safety and welfare of residents

[214] Hazlett Decl. at ¶26 fn. 14, *citing* National Cable & Telecommunications Association, *Cable & Telecommunications Industry Overview 2003: Mid-Year* (2003).
[215] Narrow Survey Q 5.

such issues when they refer to the "legitimate concerns" of local governments in managing rights-of-way – but damaged fences, unrepaired driveways and the like are nevertheless annoying to voters and arise with great frequency.

◘ A Real-World Problem

Problems don't come to an end once construction is completed, either. Even when customers are generally happy with the phone companies' broadband products, complaints about the telcos' back-office customer service can sometimes surface. Here's just one customer's experience:[216]

7/12: I ordered the ***** service within 2 days of it becoming available in my neighborhood. I ordered online, selected my install date (nearly 2 weeks out) and happily printed out my confirmation page.

On 7/24: I became slightly nervous when no one had come by to trench my yard (to get the fiber to the side of the house). I called ***** and was told everything was OK and the contractor who would put the fiber in the ground would show up prior to the install tech, since I had a morning appointment, I was not particularly relieved but accepted the answer and hung up.

7/25: Comes and about halfway through my install window, I call ***** and find out that everything is not OK. The Fiber Solutions Center sees my order and it's OK to them, but their dispatch center shows my order as cancelled. The tech at FSC says he will investigate and will call me back in 1 hour. He calls back in 1 hour to tell me there is nothing he can do and he escalates to their dispatch group. He says I will get a call back in 4 hours. No call (surprised?) . . .

7/31: Rolls around and once again, no trench. I call *****, they say that the order has been issued to a contractor (god help me-I have had the worst luck with

How would a state or federal agency handle this sort of problem?

If a state or federal agency could resolve this problem, would it take days—or could it take weeks or even months?

[216] www.dslreports/comments/57427.

contractors) and he should show up sometime the following day to trench the yard for the permanent line. What can I do but accept it and I hang up.

8/1: My install window is an entire day but at 9am, guess who shows up? The contractor? NO. The inside wiring tech from ***** is here to install the service. I just happen to be on the phone with the FSC when the tech shows up and after a short talk between the tech and the FSC, the tech says he will attempt a temp drop and then put in an order for the contractor to come out and get the final line in the ground. I get up and online in about 3 hours (just internet, no voip or TV) but with the temp drop running across a sidewalk and my neighbor's yard. Happy to be online again (I had just disco'd my cable internet), I send him on his way, hoping the line will be buried within a week or so.

8/2: Called ***** and was informed no such order had been placed for a permanent drop and get a ticket created. Was told I would be contacted within 24-48 hours.

8/7: No contact so far, so I call in. They had my home and cell numbers, so there was no attempt for contact. I was told that they had "manpower issues" and that's why the permanent drop didn't get put in on 7/31. I am given a date of 8/11 for them to come out and get the permanent line in. I am told it would be good for me to be home when the installer comes.

8/10: I come home and the cable is buried! Woohoo! I think I am one day away from the end of this saga.

8/11: Come home and the temp drop is still in place. Shocker, huh?

8/14 I call back in and am given no explanation why the tech did not come to do the swap. I am now told that I do not need to be at home for this service order to be completed. He submits another ticket and says they should be out today. About noon today, they show up and finally complete the installation with the permanent drop. . .

Total damage:

2.5 days of work missed, hours on the phone with *****, and now just praying that it doesn't stop working since I'd go insane to talk to their tech support after all of this....

In the world of traditional video franchising, the video provider in this case would be bound to a negotiated franchise agreement which would probably include provisions related to customer service, complaint resolution, and customer credits. Local officials would also have established relationships with the video provider's local executives through the franchise negotiation process. The customer would likely call city hall, which would then escalate the issue through use of its relationships with the provider and/or through franchise enforcement mechanisms. If such problems were chronic, liquidated damages might be assessed by local officials, or, in extreme cases, the video franchise might even be placed at risk.

Local officials already deal with hundreds of issues like these on a daily basis

Traditional video franchising, therefore, places local officials in a position to escalate a customer's ongoing problem quickly and press for resolution. It's difficult to imagine how this system could be efficiently replaced by any state or federal process, as many forced franchising plans nevertheless propose.

The benefits of the traditional video franchising system often amount to more than first meet the eye

The benefits of the traditional video franchising system regularly amount to more than first meet the eye. Significant caution and reluctance should be exercised before dramatic changes – such as those proposed by phone company lobbyists – are made to our time-tested system of video franchising.

IX. Competitive Franchising: The Changing Landscape of Negotiation

Core Knowledge

Traditional video franchising will adapt as competitive wireline video systems begin to materialize. Among other things, video providers will be able to gather traditional franchises on their own terms more easily, and the length of time required to negotiate a competitive franchise will decrease.

A video franchise agreement is a bilateral contract negotiated between a local government and a video provider. As part of the negotiation process, the local government promises to issue a franchise so the provider can offer video services and conduct its business. In return, local officials seek promises on behalf of their residents, and these commitments are included in the franchise agreement. These promises can be either social or economic in nature, and have included items ranging from customer service standards, parental controls over programming, commitments for public, educational and governmental access programming, free high speed Internet access for libraries and schools, senior citizen discounts, the payment of franchise fees, and many others.

How many promises might be sought from the video provider during a franchise negotiation? Generally, the answer depends on two factors. First, how many needs are perceived by local officials to be unique to their community? For example, does the potential for discrimination need to be addressed in the franchise? Do local schools have the resources to purchase Internet access, or could they use help? Is the video provider's technical operations center some distance away, or are trucks and service personnel close by so response times for service outages are less of a concern? If many needs are considered unique, local officials will attempt to secure a longer list of items during the franchise negotiation. Conversely, if few local needs are identified, fewer commitments will be sought.

The number of commitments sought on behalf of residents from a video provider depends on two factors: needs that are unique to a community, and the relative bargaining position of the parties

The second influence on the number of commitments sought is the relative bargaining position of the

participants. For example, is the video market already competitive -- meaning that it is potentially less profitable for each competitor -- or is the incumbent provider the only full-service wireline company in town? Are houses in the community close to each other, or are there relatively few homes per mile of broadband plant that could be served? Because a franchise agreement is a negotiated contract, the terms that the parties ultimately establish will depend, in very large part, on the relative strength that each party possesses as it comes to the bargaining table.

Telephone companies are eager to "streamline" video franchising because franchises would no longer be negotiated locally – instead, franchising would be reduced to an administrative task left for local governments. This change would dramatically reduce – and possibly eliminate – any bargaining position local officials now leverage for the benefit of their residents. Accordingly, the number of social and economic commitments that could be sought from video providers for residents would be significantly reduced if forced franchising schemes were adopted.

New video franchising schemes necessarily reduce the number of social and economic commitments local officials can seek for their residents

■ Competition Shifts the Bargaining Position and Interests of the Participants

As in all contract negotiations, the relative bargaining strength of the parties determines the number and type of commitments that can be sought from the other party. Importantly – and without the intervention of new state or federal statutes -- the relative bargaining position of local officials in video franchise negotiations is already in transition. Consequently, the scope of commitments that local officials will request from a competitive video provider will also be in transition for the foreseeable future. Two factors contribute to the current shift in bargaining position and interests.

Developing wireline video competition will begin to speed the pace of competitive franchise negotiations

◘ Factor 1: The Promise of Competition

First, local officials understand that their residents will likely benefit financially if wireline video competition exists. Sustained competition, for example, has been

known to lower prices by as much as 15 percent.[217] In fact, this promise alone is so powerful that 95 percent of ICMA members surveyed report that their residents "want more competition in video and broadband services."[218] Because competition is so highly valued by residents, local officials are already under tremendous pressure to deliver that competition. This necessarily means that fewer commitments will be sought in other areas as part of the franchise negotiation. Instead, the desire for competition begins to drive the process. As one phone company executive recently noted, "[c]ities [are] eager to bring competition to [their] market[s]."[219]

◘ Factor 2: The Benefit of Competition

While the *promise* of competition is a powerful incentive, the benefits derived when competition actually develops are more powerful still.

Once wireline video competition really develops, local officials will begin to search out that competition for their residents, and fewer financial commitments will be sought from the competitive provider

At one time, the economics of the video business suggested that only one wireline video provider could be successful financially.[220] In such an environment, local governments had to concentrate on issues like rate regulation, customer service obligations, and commitments for network upgrades. Put another way, if only "one game in town" existed, residents could be forced into a "take it or leave it" proposition. Regulation became a substitute for real competition.

Wireline video competition has the potential to change the equation. Competition, for example, can create better customer service. When Ameritech New Media Enterprises began operations in the Midwest during the late 1990s, for example, all service personnel that entered a customer's home put "booties" over their shoes so dirt wasn't dragged throughout the customer's house. Soon after, incumbent cable operators had their

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[217] *See* fn.12, *supra*.
[218] Broad Survey Q. 8.
[219] *Verizon Communications Inc. FiOS Briefing Session*, Sept. 27, 2006 at slide 14.
[220] DANIEL BRENNER & MONROE PRICE, CABLE TELEVISION AND OTHER NONBROADCAST VIDEO, at §3.06 [5](a) (Rel. #8, 1995) ("The United States Tax Court agreed that cable should be viewed as a 'natural monopoly,' finding that the 'capital intensive' nature of cable television generally precluded competing systems" *citing Tele-Communications, Inc.* v. *Comm'r of Int. Rev.*, 95 T.C. No. 36 (1990)).

technicians wear "booties" as well. This type of customer-friendly policy was never sought as a franchise commitment by local officials. Instead, competition was the driving force. Local officials, like all policymakers, understand that regulation is often a poor substitute for real competition.[221] Once a more competitive video market is established, lower prices, better customer service and increased technological innovation are more likely to occur. Real competition works better than if a single provider is compelled to comply with a lengthy franchise that requires such efforts as a matter of regulation. Local officials will naturally begin to seek *fewer* commitments in these areas when wireline competition begins to develop in neighboring communities and the benefits of that competition can be viewed first hand.

Local officials understand that regulation is often a poor substitute for real competition. When wireline competition develops, local officials will naturally begin to seek fewer regulatory commitments in areas like customer service

The impact that developing competition will have on franchise negotiations is not merely a theory. The effect was experienced firsthand in southeast Michigan during the late 1990s. There, Ameritech New Media's first franchising proposals included an application fee of $50,000.[222] As interest grew in Ameritech's competitive video offering, however, things quickly changed:

Soon after Ameritech began its video business, it discovered that franchise negotiations started to change

> [Ameritech] never filed any kind of application documents or paid any application fees, regardless of what the local cable television ordinance required. [Its] small franchise negotiating team insisted on and achieved a very high degree of uniformity in adhering to the terms of their model franchises not only with regard to the nitty-gritty of insurance, bonding, right-of-way and other boilerplate clauses but they vigorously insisted on capping

[221] Congress recognized this preference as it passed the Cable Communications Policy Act of 1984. According to §601(6) (47 U.S.C. §521(6)), one purpose of the 1984 Act was to "promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems." A stated purpose of the 1996 Telecommunications Act the establishment of a "pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies to all Americans by opening all telecommunications markets to competition . . ." S. REP. NO. 104-230, 104th Cong., 2d. Sess. (1996).

[222] Reply Comments of Southeast Michigan Municipalities, *In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984*, at 32 fn. 40 (Feb. 28, 2006).

> reimbursable expenses incident to the awarding of these franchises, limited to three the number of [PEG] access channels, proposed constructing their system so as to geographically match up with public school district boundaries . . . offered a maximum upfront PEG cash grant according to a murky formula and on-going PEG support up to 1 percent of gross revenues. They [just] by-passed communities which found these limitations unacceptable.[223]

Competitive video providers are already amassing much greater bargaining power in the franchising process than incumbent providers have enjoyed. Local officials are motivated to bring competition to their residents – in fact, the promise and benefit of competition will be so significant that most communities may seek little more in the competitive franchise negotiation.

Telcos already see their momentum building

Importantly, the telephone companies' substantial bargaining power isn't something that ICMA members alone recognize – the telephone companies see it, too. According to Ivan Seidenberg, CEO at Verizon:

> I think the law is the law. I think we have to go out and get, and get franchise approvals and we're doing that and we're doing it aggressively. And we're queued up . . . but by [2007 and 2008], I'm sure we will have had so much success with . . . the early deployment, that the whole political environment starts to …change as we go forward.[224]

"[C]ities are eager to bring competition to [their] market[s]"

Virginia Ruesterholz
President, Verizon Telecom

Verizon's progress around the Washington, D.C., area is also notable. As one Verizon document notes:

> In the Washington, D.C. metropolitan area, Verizon affiliates have obtained or are obtaining a franchise everywhere they have sought one, with the sole exception of Montgomery County.

[223] Id. at 33 – 34.
[224] Seeking Alpha, *Verizon Communications Inc., Q4 2005 Earnings Conference Call Transcript*, Jan. 26, 2006 (available at http://www.seekingalpha.com).

> In Maryland, Howard County, Bowie, and Laurel have all granted Verizon a franchise; Anne Arundel County is expected to grant a franchise in the next few weeks. Negotiations with Prince George's County are proceeding well. In northern Virginia, a Verizon affiliate has obtained franchises from Arlington County, Loudo[u]n County, Fairfax County, Herndon, the City of Fairfax, Falls Church, the Marine Base at Quantico, and Prince William County. The company expects to receive a franchise from the remaining community, Leesburg, in the next few weeks.[225]

Since the statement was made, Verizon did, in fact, secure all of the franchises it predicted it would. Importantly, Verizon has also completed the negotiation of a franchise for Montgomery County, Maryland. A proposed agreement was reached there shortly after Verizon sued the county and claimed that the franchising authority had unreasonably refused to award a competitive franchise.[226] Among other things, the franchise agreement will require new cable connections for 100 public buildings and a $1,000,000 grant, paid over a five year period.[227]

In the Washington, D.C. metropolitan area (and others), Verizon affiliates have obtained a traditional video franchise everywhere they have sought one

■ As Competition Develops, the Need for Local Oversight Will Continue to Develop, Too

As markets begin to develop full-scale, sustained wireline video competition, the continuing need for local oversight of cable systems may actually decline. Importantly, regulation places burdens not only on the regulated entity, but on the regulators as well. As competitive markets become established, local officials may be in a position to be less concerned with customer service issues, pricing matters, accurate communication between the cable operator and its customers, and

Developing wireline competition creates unique issues and requires ongoing local oversight

[225] Complaint for Declaratory and Injunctive Relief filed in the U.S. District Court for the District of Maryland, Case No. 06-1663.
[226] *See* fn. 312, *infra*.
[227] The proposed franchise agreement between Verizon and Montgomery County is available on the Verizon-Maryland website (http://www22.verizon.com).

similar issues. In most communities, this would be a welcome change.

At this point, however, telcos provide wireline video competition to just 100 or so of our country's 33,000 communities.[228] Until wireline video competition becomes a widespread reality, residents' interests will still have to be protected through the active oversight provided by local officials. Importantly, this oversight will be especially critical as wireline video competition begins to develop. When large companies start to experience real competition firsthand, growing pains often surface. Local officials can play an important role in fostering quick resolutions when these problems arise. For example, when Ameritech first began to compete in the video business in southeast Michigan, several unique problems developed. Accusations of unauthorized disconnection of service were sometimes made by one competitor against the other, as were allegations that uniform pricing was not being offered throughout the franchise area by the other competitor.[229] Claims of shoddy construction and concerns over damage done to the incumbent provider's network were also raised. In one case, both video providers were engaged in door-to-door marketing in the same neighborhood. The provider that first canvassed the neighborhood asserted that its trailing competitor had removed all doorhanging-promotional material that the first competitor had left, and had piled that material at the entry to the subdivision. Ownership of the internal wiring in customers' homes and the interconnection of PEG programming were regular issues as well.[230] Some of these were issues for the FCC to resolve – but others were more quickly mediated by the local franchising authority.

Because telcos provide wireline video competition in just 100 or so of 33,000 communities nationwide, it's much too early to assume that competition will one day serve as a substitute for local oversight

Local officials are often in the best position to quickly resolve disputes that arise between competitors

Traditional video franchising has survived and adapted to six decades of change in the communications industry. The promise of wireline video competition is already shifting the interests and bargaining position of

[228] *See* fn. 41, *supra*.
[229] *See, e.g.*, *In re Complaint Against Comcast Corporation*, EB 02-MD-033 (Rel. Jan. 8, 2004).
[230] The author was employed by the incumbent cable operator during the period when Ameritech began to seek franchises and offer video service in southeast Michigan. He experienced each of these issues firsthand.

local governments because local officials know that wireline competition will be highly valued by their residents. As wireline video competition transitions from a promise to a reality, however, the need for continuing local oversight will remain critical. Industry calls for reduced government oversight should be considered only when such competition truly exists.

X. The Sky Isn't Falling: Responses to Specific Phone Company Claims

Core Knowledge

While telephone company anecdotes about traditional video franchising can add color, it's often difficult to determine whether such stories reflect the exception or the rule. ICMA surveys suggest that telco lobbyists have exaggerated the industry's experiences on many fronts.

All government representatives – local officials among them – want to see the rapid deployment of competitive, wireline video networks. Experience has already taught that increased wireline video competition will likely mean lower prices, better customer service, and more technological innovation. However, this is not the telephone companies' first promise of a more competitive video market. Past promises left unfulfilled – combined with recent exaggerations created by industry advocates about the traditional franchising process – should lead policymakers to proceed with skepticism and caution before adopting the dramatic changes advocated by the industry.

■ Telephone Companies Have Made These Promises Before – But They Have Not Delivered

In 1996, Congress "fundamentally changed the statutory framework for [telephone company] entry into markets for the delivery of video programming by repealing the telephone-cable cross-ownership restriction that had generally prohibited a [telephone company] from providing video programming directly to subscribers in its local telephone service area."[231] These fundamental changes were adopted at the urging of telephone companies. Much as they do today, the industry promised Congress that the country would experience competitive video services, more jobs, and lower prices if Congress would simply lift the

In 1996, the telcos urged Congress to allow them into the video business—but promises of more wireline video competition never materialized

[231] *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 12 FCC Rcd. 4358, 4395 (Rel. Jan. 2, 1997).

restriction on the telcos' ability to provide video service within their territories.[232]

Congress granted the relief the telephone companies sought. Soon thereafter, the FCC trumpeted that "[t]he legal and regulatory changes that occurred in the past year as a result of the passage of the 1996 Act are likely to have a significant effect on [telephone company] entry into markets for the delivery of video programming."[233] By the end of 1996, telephone companies seemed to be following through on their promises, and had gathered about 45 video franchises.[234] "[G]iven the short period of time since the passage of the 1996 Act," however, the FCC noted that the telephone companies' entry into video had not yet gained momentum.[235]

Some now feel that there is reason to question the telcos' credibility in this debate

By the end of 1997, just a little more than one year after the passage of the 1996 Telecommunications Act, the FCC was not as ebullient. According to the Commission, "[telephone companies] represent a competitive presence in a small (although growing) number of markets for the delivery of video programming. [This presence], however, has proceeded sporadically and has been highly dependent on the business strategies of the individual companies involved."[236] By year-end 1997, telephone companies had gathered 92 local franchises and 1 state-wide franchise, which together covered around 4 million homes.[237] Southern New England Telephone had grand plans in Connecticut, which had issued the state-wide video franchise. According to SNET, it would provide

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[232] "The [1996] Act largely reflected the priorities of special interests – local phone companies, long-distance providers, and cable and broadcast corporations. While these special interests disagreed among themselves, they all wanted Congress to rewrite the rules to allow them more flexibility to get into each other's businesses, and they wanted less regulation. In return, they promised more diversity, more choices, lower prices, more jobs and a thriving economy." Common Cause, *The Fallout From the Telecommunications Act of 1996: Unintended Consequences and Lessons Learned*, May 9, 2005 at 7.

[233] *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 12 FCC Rcd. 4358, 4394 (Rel. Jan. 2, 1997).

[234] Id. at 4397 – 4399.

[235] Id. at 4394.

[236] *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 13 FCC Rcd. 1034, 1099 (Rel. Jan. 13, 1998) (emphasis supplied).

[237] Id. at 1101 – 02.

competitive video service to one-third of all the homes in the state by the end of 1998, and to every home in the State of Connecticut by 2007.[238] Video plans at other phone companies, however, were already beginning to fade. Just two years following passage of the 1996 Act, SBC (now the "new AT&T") was already retreating from the video business: It pulled the plug on video projects it had acquired when it purchased Pacific Bell, and the company also ended its own trial of video services that same year.[239]

By 1998, telephone companies had amassed 117 franchises through their own efforts.[240] Even though the number of telephone company video franchises had increased, the FCC noted that "Bell Atlantic['s] video distribution system in Dover Township [NH], however, which seemed likely at one time to be the prototype for telephone company entry into the video business, will be terminated in 1998 or very early in 1999."[241]

Local video franchises secured through traditional video franchising peaked in 1999, after 184 franchises had been obtained.[242] That same year, SBC decided to discontinue SNET's effort to bring competitive video services to all Connecticut homes.[243] SBC also suspended existing efforts to seek additional local video franchises until a "deep review" of all business operations had been completed.[244] A statement issued at the time by then-FCC Commissioner Gloria Tristani summed up the frustration over promises the phone companies had not kept: "[I]ncumbent local exchange carriers, which once clamored for the right to offer video (and, indeed, took the issue all the way to the Supreme Court), continue to show limited interest in large-scale entry. Indeed, it appears that Ameritech (now SBC) – always the "poster child" for [telephone

"Incumbent local exchange carriers, which once clamored for the right to offer video…show limited interest in large-scale entry. Indeed… Ameritech—always the "poster child" for video entry—may be dropping out of the cable business altogether."

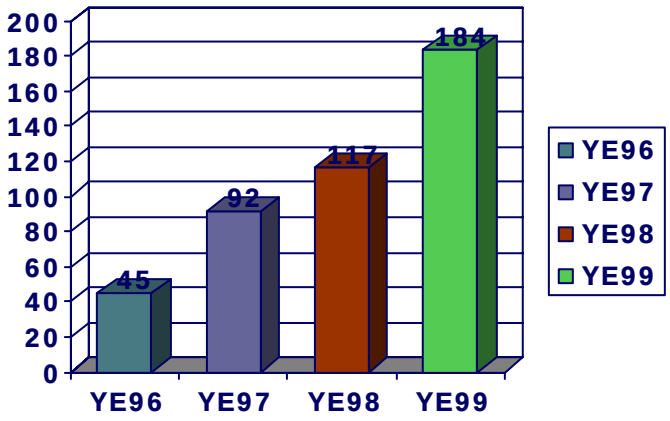
Gloria Tristani,
FCC Commissioner in 2000

[238] Id. at 1102.
[239] Id.
[240] *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 13 FCC Rcd. 24284, 24358 (Rel. Dec. 17, 1998).
[241] Id.
[242] *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 15 FCC Rcd. 978, 1036-37 (Rel. Jan. 14, 2000).
[243] Id. at 1038.
[244] Id. at 1039.

company] video entry – may be dropping out of the cable business altogether."[245]

By the end of 2001, telephone companies were in full retreat from their own early efforts. As the FCC put it, "[I]n [our last] Report, we noted that it appeared that the rate of entry might have been slowing by even the most aggressive [telephone companies], and that several [companies] had reduced or eliminated their [multichannel video programming distribution] efforts. This trend continued and accelerated this year. Most incumbent [local exchange carriers] are seeking to sell their [multichannel video programming distribution] facilities, preferring instead to market [direct broadcast satellite] services to their customers."[246]

Traditional Video Franchises Secured by Telcos Following Passage of the 1996 Telecommunications Act [247]



In the five years following the telcos "clamor[ing] for the right to offer video," they had secured fewer than 200 franchises as a result of their own efforts

Therefore, in the five years that followed phone companies' "clamor[ing] for the right to offer video," the telcos had secured just 184 traditional video franchises, and had all but abandoned the concept of wireline broadband video. Importantly, the phone

[245] Statement of then-FCC Commissioner Gloria Tristani, *In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, 15 FCC Rcd. 978, 1122 (Rel. Jan. 14, 2000).
[246] *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 16 FCC Rcd. 6005, 6060 (Rel. Jan. 8, 2001).
[247] Compiled from the FCC's Annual Assessments of the State of Competition in Markets for the Delivery of Video Programming for years 1996 -2001, together with reference to 2000 U.S. Census data.

companies' decision wasn't driven by the video franchising process. Instead, telephone companies believed that they could provide voice and high-speed Internet services over their existing networks, and provide video service through partnerships with direct broadcast satellite companies.[248] That alternative, of course, remains available and is being pursued by some of the remaining telcos today.[249]

■ Fool Me Once, Shame on You; Fool Me Twice . . .

The story now told to policymakers sounds a lot like the one related to lawmakers in 1996. A decade ago, the communications industry claimed that 1.5 million jobs and $2 trillion in the country's Gross Domestic Product would be created through the 1996 Act.[250] In fact, 500,000 jobs were eliminated between 2001 and 2003,[251] and the market value of the communications industry had been reduced by about $2 trillion.[252] Much of the market value loss has since been attributed to the deregulatory effect of the 1996 Act and the corporate malfeasance that followed.[253] Jobs were also lost as the industry quickly consolidated in the manners permitted by the 1996 Act.[254] "Reductions in force" continue to this day at a rapid pace. AT&T, for example, cut more than 10,000 jobs last year;[255] Verizon has targeted job cuts of 18,000 in 2006.[256]

Promises made prior to the adoption of the 1996 Telecommunications Act sounded a lot like they do today: more jobs and a better economy. But many previous promises were not fulfilled

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[248] Id.

[249] AT&T, for example, markets video service provided by Dish Network. AT&T is also marketing a new service called "Homezone" which is a hybrid digital subscriber line / digital broadcast satellite product. *See, e.g.*, Steve Donohue, *AT&T Expands Homezone to San Diego*, MULTICHANNEL NEWS, Aug. 17, 2006. BellSouth markets DirecTV service. *BellSouth Reports Healthy DSL, DBS gains in Q4*, CED MAGAZINE Jan. 25, 2006 (available at http://www.cedmagazine.com).

[250] Common Cause Report, *The Fallout From the Telecommunications Act of 1996: Unintended Consequences and Lessons Learned*, May 9, 2005 at 6 (available at http://www.commoncause.org).

[251] Id.

[252] Id.

[253] Id. at 8.

[254] *See*, Id.

[255] Seeking Alpha, *AT&T Inc. Q4 2005 Earnings Conference Call Transcript*, Jan. 26, 2006 (quoting AT&T CFO Rick Lindner, who noted a "substantial reduction in force" of 10,000) (available at http://www.seekingalpha.com).

[256] Seeking Alpha, *Verizon Communications Q1 2006 Earnings Conference Call Transcript*, May 7, 2006) (Doreen Toban, Verizon CFO, notes that "head counts" were down 6,000 in the first quarter, 2006, and that the company was "at about one-third of our total force reduction target for the year.") (available at http://www.seekingalpha.com).

Prior to the 1996 Act, phone company lobbyists asserted that the only thing preventing the telcos' entry into the video business – and the jobs and consumer savings that would surely follow – was the then-existing statutory prohibition on their right to provide video services within their territories. The promises fell short, and history has since taught an important lesson: The industry's own business plans and financial goals had a much greater influence on their entry into video than did any statutory requirement or prohibition.

History teaches an important lesson: industry promises often hinge more on business plans and financial goals than they do on statutory requirements or prohibitions

Now, ten years later, telephone industry advocates can't claim that they are prevented from being in the video business, as they did when lobbying the 1996 Telecommunications Act. Instead, telephone company lobbyists have claimed that the only significant impediment to the widespread availability of competitive broadband services is a different statutory requirement: The need to negotiate local video franchises. Unfortunately, though, the telcos are still slow to admit that changing market conditions, competitive responses, and a myriad of other business issues have a much greater influence on the deployment of competitive video services than the traditional video franchising system will ever have.

■ Skepticism and Caution Are Appropriately Applied This Time

If history serves as a guide, the claims made by industry lobbyists should be viewed with skepticism and caution this time around. Telephone companies knew that local franchising would be a continuing requirement when the prohibition on their ownership of video systems was lifted in 1996.[257] Additionally, during the five years that telephone companies did seek local video franchises, the franchise negotiation process was almost never mentioned by the phone companies as a competitive impediment. Instead, the telcos focused the majority of

Telcos very rarely complained about local video franchising when they first tried the business following passage of the 1996 Telecom Act

[257] Congress, through the 1996 Telecommunications Act, permitted telephone companies to enter the video business in any of four ways. If the telephone company did not offer video through either of the first two options (radio-based or common carriage of video), the telephone company would be "subject to the requirements of this title [VI]," which, of course, requires a franchise before cable service is offered. 47 U.S.C. §571.

their complaints on issues like the incumbent cable operator's competitive response,[258] cable operators' strategy to "cluster" their systems (*i.e.*, the effort to trade or purchase systems in an effort to better regionalize owned systems),[259] or on cable operators' control over video programming.[260] Even though the phone companies had clamored to get into the video business and knew what the effort would entail, the video competition the industry promised when lobbying the 1996 Telecommunication Act never materialized: Ten years later, just 100 or so of the nation's 33,000 communities enjoy wireline video competition provided by a phone company, and most of those are the result of the telephone companies' very recent efforts.

This experience begs an important question: Shouldn't reduced government oversight be considered *after* competition really develops, rather than before the renewed promises of a more competitive video marketplace become a reality? Telephone and cable companies understandably prefer less government oversight of their businesses – that preference runs particularly deep with respect to oversight provided by local officials, who are often in the best position to gauge the performance of a provider and to enforce franchise commitments.[261] History, however, establishes that policymakers have been here before: More competition was promised by the telephone and cable industries when lobbying for the 1996 Telecommunications Act, too. Ten years later, though, wireline video remains a monopoly-like business, and real competition in local wireline phone service is just now beginning to develop. Real competition is still preferred to regulation. Until competition becomes a

Shouldn't reduced government oversight be considered after competition really develops in the wireline video business, rather than before the telcos' renewed promises become a reality?

[258] "[C]ommenters argue that cable operators are filing nuisance lawsuits, maintaining perpetual contracts, and offering selective discounts to disadvantage their rivals." *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 12 FCC Rcd. 4358, 4451 (Rel. Jan. 2, 1997).

[259] "Clustering also better positions cable as a potential competitor for local exchange services." *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 13 FCC Rcd. 24284, 24371 (Rel. Dec. 17, 1998). *See also*, *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 16 FCC Rcd. 6005, 6073 (Rel. Jan 8, 2001).

[260] "Several commenters raise concerns about the anticompetitive effects of horizontal concentration of ownership on the purchase of programming." Id. at 6075.

[261] *See supra*, pages 65 - 67.

reality rather than just a *promise*, however, oversight by local officials – a part of video franchising for the past 60 years – should remain an integral part of video franchising.

■ Telephone Company Anecdotes: Distinguishing Between the Exception and the Rule

Anecdotes are regularly offered by phone company advocates in an effort to illustrate the problems the industry believes exist in traditional video franchising. Among the primary telco complaints: Traditional video franchising negotiations create unreasonable delays,[262] local officials demand unreasonable concessions in return for the franchise,[263] and excessive application or processing fees are demanded by municipal consultants motivated to extend the negotiation.[264]

Are stories told by the telcos about traditional video franchising the exception or the rule?

While anecdotes can offer some color, they can also be misused to create an inaccurate picture. It is important to first determine whether the stories shared by phone companies are the exception or the rule. Consequently, ICMA surveyed those communities that have recently issued a video franchise to a telephone company. Other communities that were recently approached for a video franchise were also polled. The responses were revealing, and they provide new information about how communities are really responding to telephone company requests for franchises. These responses suggest that problems with the traditional franchising process are significantly overstated by the telephone company lobbyists. ICMA's polling also leads to the conclusion that traditional video franchising poses no risk to the telephone companies' current business plans – the same conclusion that phone company executives

[262] "Of the more than 300 municipalities with whom Verizon is currently negotiating, more than half of the negotiations have dragged on for more than six months, and some have already been ongoing for more than one year." (O'Connell Decl. at ¶10).

[263] "[M]any LFAs use the franchise process as an opportunity to demand all manner of additional concessions . . . some communities have sought free or discounted Internet access service or cell phone service for themselves or their employees. Others have sought a flat 3 percent fee – on top of the 5 percent cable franchise fee – to support PEG, without ever showing that this fee is used for that purpose." O'Connell Decl. at ¶¶42, 46, 32.

[264] "LFAs frequently demand excessive application or processing fees over and above the 5-percent franchise fees they are authorized to collect." O'Connell Decl. at ¶34.

have themselves reported to the financial community.[265] Among the important conclusions of ICMA's research:

» Conclusion 1: Phone Companies Shouldn't Claim That Widespread Problems Exist within Traditional Video Franchising – Their Experience Is Too Limited.

Totaled, the phone companies have sought traditional video franchises in less than 1 out of every 50 communities nationwide. Real trends can't be predicted from such a limited universe.

Phone companies have very limited experience in traditional video franchising, as they have sought such franchises in fewer than 2 percent of all communities nationwide

According to their public statements, Verizon has applied for video franchises in about 300 communities in 12 states.[266] BellSouth hasn't recently applied for *any* local video franchises. AT&T (formerly SBC) has taken the position that its "IP Video" architecture isn't a cable system and has vigorously opposed any effort to impose a franchise requirement.[267] As a consequence, AT&T has not actively sought local authorization until very recently.[268]

All totaled, then, the phone companies appear to be pursuing local franchises in roughly 300 - 350 communities nationwide. The FCC recognizes roughly 33,000 local community units (*i.e.*, franchising authorities).[269] Consequently, telephone companies have tried to obtain traditional video franchises in far fewer than 2 percent of all communities nationwide. Their anecdotal experience – which regularly fails to identify the communities of which they complain – has also been concentrated in certain geographic areas,

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[265] *See, e.g.*, telco executive quotes, *supa* at pages 2 and 44 – 46.

[266] O'Connell Decl. at ¶10 (made as of Feb. 13, 2006).

[267] Comments of AT&T, Inc., *In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984*, MB 05-311 at 3 (Filed Feb. 13, 2006).

[268] Some information exists that AT&T is seeking operating authority through a "Memorandum of Understanding," rather than through a "franchise" in Michigan, for example. AT&T's effort, however, may be a public policy response to 600 different Michigan communities which invited AT&T to provide competitive video service in their communities. Michigan Municipal League News Release, *Michigan Communities to AT&T: Can You Hear Us Now?*, May 8, 2006.

[269] *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 16 FCC Rcd. 6005, 6066 (Rel. Jan 8, 2001).

principally along the east coast.[270] It is unlikely that any reliable trend can be extrapolated from such limited experience.

» Conclusion 2: The Phone Industry's Franchising Effort Appears Designed to Support Its Lobbying Campaign.

Telephone company lobbyists suggest that their clients have been pursuing local franchises for a significant amount of time, and that delays have been experienced nearly everywhere. Verizon, for example, has noted that: "Of the more than 300 municipalities with whom Verizon is currently negotiating, more than half of the negotiations have dragged on for more than six months, and some have already been ongoing for more than one year."[271]

Most phone company requests for video franchises appear to have been recently made

Based on ICMA surveys, however, these representations of delay seem implausible. For example, most of Verizon's local video franchising requests appear to be recent: 14 percent of the requests were made in the second quarter of 2005; 23 percent in the third quarter of 2005; 8 percent in the fourth quarter of 2005; and nearly 20 percent in the first quarter of 2006.[272] Consequently, claims that "most negotiations have dragged on for more than six months, and some have already been ongoing for more than one year," seem unlikely because most of Verizon's 300 franchise requests didn't even appear to have been pending for six months when the assertion was made.

Instead, the majority of the telephone industry's franchise requests appear to have been made since the middle of last year, timing which, incidentally, seems to track closely with comments being prepared in FCC Dockets addressing local franchising issues.[273] The phone companies'

[270] *See, e.g.*, O'Connell Decl. Ex. 1.
[271] O'Connell Decl. at ¶10 (made as of Feb. 13, 2006).
[272] Compiled from Very Narrow Survey Q. 9 and Narrow Survey Q. 6.
[273] For example, Verizon filed comments with the FCC in September, 2005 in response to the Commission's Annual Assessment of Video Competition, MB Docket 05-255 ("[t]he single biggest obstacle to widespread

aggressive lobbying campaign was also launched in several states and in Congress shortly thereafter. Consequently, the phone companies' spate of video franchise requests may have been designed in large part to support their concurrent lobbying efforts, as these requests appear to accelerate in advance of public comments or other significant lobbying activities. As one ICMA poll respondent noted, "SBC [now AT&T] would not talk other than their first contact to us. They still will not talk to us."

Phone company franchising activity appears to increase just before comments are filed with agencies or large lobbying efforts begin

Spikes in local franchise requests could be coincidental, but they may also be calculated. Sophisticated public policy advocates often engage in underlying activities in order to lend credibility to a larger lobbying campaign. This conclusion is supported when one considers the resources the phone companies have devoted to each effort. While Verizon has publicly stated that it has 50 full-time employees working on local franchising,[274] for example, the phone companies registered three times that many lobbyists in Texas alone to advocate passage of SB 5.[275]

The telcos hired three times more lobbyists to work on the passage of one state franchising bill than Verizon has full-time employees working to secure traditional franchises

» Conclusion #3: The Time Required to Negotiate a Franchise Shouldn't Be Measured from the Moment When a Call Is First Placed.

Some telephone company claims appear to measure the time it takes to negotiate a franchise from the moment when interest in a franchise is first communicated.[276] This approach is questionable, as all requests are not created equally.

Telcos appear to measure the time it takes to negotiate a franchise from the moment they first make a call

Of the very few local governments actually approached for a video franchise, the majority of

competition in the video service market is the requirement that a provider obtain an individually negotiated local franchise in each area where it intends to provide service.") Shortly thereafter, the FCC announced that it would initiate a rulemaking to determine if local franchising authorities were unreasonably refusing to award competitive franchises. FCC Press Release, *FCC Initiates Rulemaking to Ensure Reasonable Franchising Process for New Video Market Entrants*, Nov. 3, 2005 (available at http://www.fcc.gov).

[274] O'Connell Decl. at ¶12.

[275] Claudia Grisales, *Phone Industry Outlobbied, Outspent Cable Rivals in Legislative Fight*, COX NEWS SERVICE, Aug. 18, 2005 (available at http://www.statesman.com).

[276] *See, e.g.*, O'Connell Decl. at Ex. 1 (measures length of negotiation from "date on which Verizon initiated franchise discussions with LFA").

communities were approached informally, most often through a phone call which simply requested a personal meeting to share or gather information.[277] Only 17 percent of the requests were made by a letter which included a franchise agreement proposed by the phone company.[278] In many cases, local officials had to raise the issue of a video franchise after observing that the telephone company was *already* constructing a "Network Ready" system for video services.[279]

Not all types of requests, of course, should be prioritized in the same way. A request that includes a proposed franchise and asks for a meeting schedule is a substantive inquiry. If the proposed franchise is fairly balanced, much of the groundwork has already occurred and a negotiation would be expected to proceed promptly. A telephone call, however, sits at the other extreme. Informal inquiries like calls could fairly be perceived as a request for additional information, rather than a request for a franchise.

Consequently, measuring time from the date when an initial inquiry was made can lead to false conclusions about how long the negotiation process has really taken. Nevertheless, the industry appears to treat all inquiries – no matter how they were posed – as requests that require prompt consideration.[280] This treatment results in an exaggeration of the amount of time actually taken to process the video franchise request.

» Conclusion #4: When a Bona Fide Request for a Local Video Franchise Is Made, Local Governments Have Responded Promptly.

Once a request for a local video franchise has clearly been made, local governments have

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[277] Narrow Survey Q. 2.
[278] Id.
[279] Id.
[280] The phone companies do not distinguish between or evaluate the amount of time necessary to negotiate a franchise based how the initial inquiry was made. Instead, time in all cases appears to be measured from the "date on which Verizon initiated franchise discussions with LFA." *See, supra* fn. 270.

generally responded promptly.[281] This isn't a surprise, as local governments are as anxious to foster competitive video services as telephone companies are anxious to provide those services. However, ICMA's polling reveals that there are often lengthy delays between the time that the very first contact is made and the time that the phone company requests the next meeting. In one case, for example, the original meeting was held in April 2006. According to the city manager, however, that meeting revealed that the telco "had not researched our cable franchise regulations and didn't know they needed to file an application." The required application was actually received from the company two months later.

"SBC [now AT&T] would not talk other than their first contact to us. They still will not talk to us."

ICMA Member

» Conclusion #5: Telephone Companies Do Not Voice as Many Complaints to Local Governments about Delays.

When they appear before state and federal policymakers, telephone industry lobbyists and some company executives complain about widespread delays created by the local franchising process.[282] Such complaints, however, are not made with the same frequency to local governments. While the phone companies did complain about the franchising process about 30 percent of the time, no complaint about slow progress has been made to the majority of the franchising authorities dealing with a video franchise request.[283] Similarly, the telephone company rarely demanded that the community take "final action" on the franchise request: Such a demand has been made in just 16 percent of the communities currently negotiating a franchise with a telephone company.[284]

Despite occasional complaints about delays, it's clear that traditional franchise negotiations have not slowed the telcos' video network deployment plans

These results support two earlier conclusions. First, many of the telephone companies' franchise requests were made relatively recently, so legitimate complaints about the pace of progress

[281] *See, e.g.,* Narrow Survey Q. 8.
[282] *See, e.g., supra* fn. 6.
[283] Very Narrow Survey Q. 14.
[284] Narrow Survey Q. 16.

can't really be made. Second, it appears that the telephone companies' actual experience with the local franchising process, while limited, bears a closer resemblance to the message that most telephone company executives convey to financial analysts. As Verizon's CEO has put it: "I don't think there is, by the way, any story [associated with the timing of franchise approvals] . . . we're queued up."[285] Another executive recently confirmed that conclusion:

> This was an area where we had to learn and see if this was going to be an issue for us. Right now we feel very, very confident that we have [our franchising] moving in the right direction, and this isn't holding us back in our deployment of video.[286]

» Conclusion #6: When Delays in the Franchising Process *Are* Experienced, Phone Companies Share in the Responsibility.

Telephone industry advocates claim that some communities have intentionally delayed the negotiation of a video franchise so local officials could gain bargaining power.[287] In other cases, the phone companies assert that the delays were unintentional, but driven by "inattentiveness or complicated procedural requirements…"[288]

Unfortunately, while telephone companies are quick to complain about the process, they have been slow to accept any responsibility for delays. Negotiations can often take more time than either party expects. For example, in the case of ICMA members currently engaged in the negotiation of a video franchise with a telco, 34 percent report that progress on the phone companies' franchise request was "slower than expected."[289] Where franchise

While the telcos are quick to complain about delays, they are slow to accept any responsibility for slow progress

[285] Seeking Alpha, *Verizon Communications Inc., Q4 2005 Earnings Conference Call Transcript*, Jan. 26, 2006 (available at http://www.seekingalpha.com).
[286] Comment of Virginia Ruesterholz, President of Verizon Telecom, made during *Verizon Communications Inc. FiOS Briefing Session*, on September 27, 2006.
[287] *See, e.g.*, Verizon Comments at IV.
[288] Id. at 6.
[289] Narrow Survey Q. 9.

negotiation has been completed, however, only 22 percent of respondents reported that the negotiation proceeded more slowly than expected.[290]

Because a franchise is a bi-lateral contract negotiated between the local government and the video provider, however, either party can cause or contribute to delays. It would be unusual for one party to be solely responsible for all delays, as phone company advocates have nevertheless suggested. In fact, a number of variables, most of which are currently outside local governments' control, are rarely mentioned by the phone companies. These uncontrollable factors are, nevertheless, critical to the pace at which a negotiation can proceed. According to surveyed ICMA members whose communities are currently negotiating a video franchise with a telephone company:

Many factors can cause delays in a franchise negotiation, and are under the telcos' direct control

» 68 percent of communities that have been approached for a franchise say they have to consider the impact of state "level playing field" statutes, which could be used by the incumbent cable operator to file a lawsuit[291]

» 68 percent of communities currently negotiating the franchise note that the negotiation has been slowed because the telephone company has been reluctant to modify its standard boiler-plate franchise[292]

» 27 percent of the communities in the midst of negotiations say the process has been delayed because the phone company didn't want to provide *any* financial support for public, educational, or government access programming[293]

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[290] Very Narrow Survey Q. 12.
[291] Narrow Survey Q. 11.
[292] Id.
[293] Id.

» 22 percent of the local governments said that they had to respond to cable company claims that the process was unfair or that certain procedures hadn't been followed[294]

» 8 percent of local governments noted that they lacked adequate staff to promptly address and negotiate the request.

The phone companies' reluctance to deviate from their preferred language is the greatest factor contributing to delays in franchise negotiations

Several general themes also emerged from comments offered by the survey participants. One community official said "Verizon has spent considerable time on technical issues and not on priorities. Verizon insists on using their model franchise." Another community representative noted that "[w]e have been waiting for a proposal." Still others observed that the phone "[c]ompany is waiting for federal legislation."[295]

In fact, telephone companies control many of the factors that create the delays in franchise negotiations. Other slowdowns result from factors controlled by neither the phone company nor local officials: Some cable companies, for example, make use of the franchising process and state "level playing field" statutes to create confusion.[296]

Because experience can often be the best teacher, the responses from ICMA members whose communities have already issued a competitive video franchise to a phone company are also valuable:

[294] Id
[295] Id
[296] Id.

Very Narrow Survey Q. 8:

Did any of the following factors slow the progress of the discussions? Choose as many as apply:

		Response Percent
We needed to consider the franchise carefully because our state has a "level playing field statute"	■■■■■■■■■■	52.4%
The telephone company was reluctant to change its standard franchise language	■■■■■■■■■■■■■■■■■■■■	95.2%
The cable company claimed that the process was unfair or That the governing procedures had not been followed	■■	9.5%
Our community lacked the staff to respond to the request or to engage in regular discussions with the telephone company about franchise terms	■■	9.5%
Fears were raised by the community's regular counsel or special cable counsel that the process was moving too quickly or that additional issues had to be considered	■	4.8%
We needed to assess our community's current cable-related needs so that we could better bargain with the telephone company	■■■■	19%
The telephone company didn't want to provide cable service throughout the entire community	■■■■■■■■■	42.9%
The telephone company didn't want to provide additional financial support for public, educational, or government access programming (above and beyond the franchise fee)	■■■■■■■■	38.1%
The telephone company didn't want to indemnify our community if the cable operator sued after the telephone company's cable franchise was approved	■■■■■	23.8%
Our state has a multi-level cable franchise approval process; after the franchise was approved by the community, it still had to be approved by the county or the state	■	4.8%
Other	■■■■■■■■	38.1%

Lobbyists' suggestion that local governments lack the interest or the staff to promptly respond to a video franchise request again appears to be the rare exception, rather than the rule.

Narrow Survey, Q7:
Did your community charge an "application" or other fee as a prerequisite to consideration of the telephone company's request?

No	87.5%
Yes: $0 - $5,000	7.5%
Yes: $5,001 - $10,000	2.5%
Yes: $10,001 - $20,000	0%
Yes: $20,001 - $30,000	0%
Yes: $30,001 - $50,000	2.5%
Yes: $50,001 - $100,000	0%
Yes: $100,000+	0%

» Conclusion #7: Communities Rarely Require "Application Fees" Before a Franchise Request Is Considered.

Telephone company material has also claimed that communities regularly demand excessive application or processing fees before their request for a local video franchise is even considered.[297] However, in over 75percent of the communities

[297] Verizon Comments at 59.

surveyed, no application fee was ever charged. In those few cases where such a fee has been charged, only one respondent currently in negotiation reported a fee of more than $10,000[298] – certainly reasonable given the time and expense that even the shortest negotiation can involve.

» Conclusion #8: Few Communities Request the Reimbursement of Fees Associated with Consideration of a Telephone Company Request.

Nor has abuse been revealed in community requests for the reimbursement of the legal fees that will be incurred, as at least one telco suggests.[299] Of the communities that have already issued a competitive franchise to a telco, 78 percent report that they sought no reimbursement of counsel fees. Nearly the same intention is reflected within those communities currently negotiating with a telco.[300]

Narrow Survey, Q22:
Has your community told the telephone company that it will seek reimbursement of the legal fees your community incurs for the consideration of the telephone company's franchise request?

No	75.7%
Yes: $0 - $5,000 given as estimate	5.4%
Yes: $5,001 - $10,000 given as estimate	5.4%
Yes: $10,001 - $20,000 given as estimate	2.7%
Yes: $30,001 - $50,000 given as estimate	2.7%
Yes: $50,001 - $100,000 given as estimate	5.4%
Yes: $100,000+ given as estimate	2.7%

» Conclusion #9: Institutional Networks are Not Sought in the Majority of Franchise Negotiations.

The industry has also claimed that many communities make demands for costly "institutional networks" – private systems connecting government buildings.[301]

Importantly, those communities that do make a request for an institutional network often seek such a network for important governmental purposes like emergency notification, distance learning opportunities for first responders, and to create secure and redundant communications networks that connect public buildings. In the Washington D.C. area, for example, the "I-Net" is used to provide training to first responders and can be used to facilitate an evacuation of our nation's capital, if necessary. As another example, the City of Houston ties the franchise-required I-Net to its traffic management system. Houston and other

Narrow Survey, Q11:
Has your community sought an "institutional network" ("I-Net") or some other type of new communications network as part of its discussion with the telephone company?

Yes, and the telephone company agreed to provide the network or funding to support the existing network; 16.7%

Yes, but the telephone company refused to provide the network or funding to support the existing network; 13.9%

No, we didn't seek an "institutional" or other type of network; 69.4%

[298] Narrow survey Q. 7.
[299] Id.
[300] Narrow survey Q. 22.
[301] Verizon Comments at 72.

Gulf Coast cities can use I-Nets to effectively manage traffic flow when natural disaster evacuations become necessary.

While I-Nets serve a vitally important purpose in many of the nation's largest communities, a request for an institutional network is not made in every franchise negotiation. In fact, nearly 70 percent of the communities currently considering a telephone company's video franchise request have not raised any issue related to I-Nets.[302] Although 14 percent of the communities did ask for such a network or funding to support an existing I-Net, the telephone company refused the request. In nearly 17 percent of the cases, the telephone company agreed to provide an I-Net or funding to support an existing I-Net.[303] Again, this does not appear to be the widespread, troubling issue that the telephone industry makes it out to be.

■ Local Officials View Video Franchising As a Serious Responsibility

Telephone company lobbyists have relied on a few anecdotes to suggest that widespread abuse of the traditional video franchising process exists. This position, however, is inconsistent with recent information gathered about the telcos' current franchising efforts and experiences developed over the last two decades.

The purpose and discipline demonstrated by local governments in video franchising is revealed through the history of cable franchise renewals. When our "national policy" governing cable communications was officially established by the 1984 Cable Act,[304] the

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[302] Narrow Survey Q. 11.

[303] Id.

[304] P.L. 98-549, 98 Stat. 2779 (1984). According to 47 U.S.C. §521, "the purposes of this title are to – (1) establish a national policy concerning cable communications; (2) establish franchise procedures and standards which encourage the growth and development of cable systems and which assure that cable systems are responsive to the needs and interests of the local community; (3) establish guidelines for the exercise of Federal, State, and local authority with respect to the regulation of cable systems; (4) assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public."

adopted legislation included a process to be applied to franchise renewals. When initially issued, a video franchise typically runs for a period of 10 or 15 years. Once that franchise is three years away from expiration, the renewal process begins.[305] Negotiations occur in franchise renewals just as they do when an initial franchise is issued, and a similar set of issues is involved.[306] If a franchise renewal is denied by a local franchising authority, the video provider can appeal that decision to a state court of general jurisdiction or to a U.S. District Court.[307] In the 22 years since passage of the 1984 Cable Act, at least 50,000 video franchises have been renewed.[308] Despite this massive number of franchise renewals, however, there are only a few reported cases where a video provider appealed a local franchising authority's franchise renewal decision.[309] This is a truly remarkable testament to local officials' skill, experience, and judgment in video franchising matters.

More than 50,000 video franchise renewals have been successfully negotiated by local officials during the past 20 years

The anecdotes offered by the telephone industry do raise some concerns. Unfortunately, the telcos have been slow to identify the communities involved in their stories. This makes the claimed events difficult to verify and impossible to defend or rectify. In any event, such alleged abuses appear to be the rare exception rather than the rule. Video providers that do not have their franchises renewed can appeal that decision to the courts, even though such appeals very rarely occur.[310] Importantly, the same protection exists

The nation's Cable Act already protects the telcos from any claimed abuses

[305] 47 U.S.C. §546.

[306] Arguably, a renewal negotiation involves a narrower set of issues than those considered when a video franchise is first issued. In a franchise renewal, the parties have an established relationship; potential issues can be anticipated and resolved with greater ease based on an established "track record" of performance or non-performance.

[307] 47 U.S.C. §555.

[308] Calculation is considered a conservative estimate, based on an average franchise duration of 12.5 years, and 33,000 local community units recognized by the FCC. In the 24 years since the 1984 Act was passed, then, a franchise with an average duration would have been renewed 2.08 times (26 years divided by 12.5 year average duration). When applied to the universe of LFAs recognized by the FCC, more than 60,000 renewals would be expected to have occurred: 2.08 x 33,000 = 68,640 renewals.

[309] *See, e.g.*, *Union CATV, Inc*. v. *City of Sturgis*, Slip Op. No. 96-5053 (6th Cir. 1997) (noting that courts will defer to local city councils in the determination of local, cable-related needs); *Eastern Telecom Corp*. v. *Borough of East Conemaugh*, 872 F.2d 30 (3d. Cir. 1989) (holding that a franchising authority must provide a deadline for submission of a formal renewal proposal to the operator in writing).

[310] Id.

for competitive providers. If a request for an initial franchise is unreasonably denied, 47 U.S.C. §541(a)(1) permits a video provider to appeal that decision to the courts. Even though this right has been established since the 1992 Cable Act,[311] however, very few appeals have been reported.[312] One such lawsuit was recently filed by Verizon against Montgomery County, Maryland.[313] The matter was quickly ordered to mediation by the court, however, and the dispute was resolved between the parties shortly thereafter[314] -- proof again that our traditional franchising system provides protections and remedies for competitive video providers, and is responsive to their needs.

History proves that local franchising authorities take their responsibilities in this area very seriously. If the anecdotal abuses referenced by the phone companies truly exist, judicial intervention is available and remedies may be sought -- as was recently the case.

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[311] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. 102-385, 106 Stat. 1460 (1992)

[312] *See*, *Nepsk* v. *Town of Houlton*, 283 F.3d 1 (1st Cir. 2002) (holding that, in some circumstances it may be appropriate for community to grant only one cable franchise, and that such a community need not automatically consider other proposals as a request for a competitive franchise); *see also*, *James Cable Partners* v. *City of Jamestown*, 43 F.3d 277 (6th Cir. 1995) (holding that prohibition on exclusive cable franchises established in 1992 Cable Act does not apply retroactively, and that the franchising authority must respect the exclusive nature of the previously granted franchise); *Cox Cable Communications, Inc*. v. *United States of America*, 992 F.2d 1178 (11th Cir. 1993) (supports Air Force Base decision to honor competitive franchise, even where exclusive franchise was issued prior to 1992 Cable Act, because to do otherwise would be an unreasonable denial of a competitive franchise). Recently, Verizon filed an action in the United States District Court for the District of Virginia, Case No.: 06-1663. As part of its eighty-four page, twenty-five count Complaint, Verizon alleged that Montgomery County unreasonably refused to issue a competitive cable franchise, and, consequently, that the County has violated 47 U.S.C. §541(a)(1) (count twenty-three at p. 78).

[313] *See*, Id.

[314] A copy of the proposed franchise agreement is available at Verizon Maryland's website.

XI. Suggestions and Best Practices to Consider

Core Knowledge

Dramatic changes to traditional video franchising are not warranted at this time. Instead, local officials should continue their effort to develop best practices designed to speed competitive franchising.

Traditional video franchising has served this country well for over six decades, and has regularly adapted to changes in the communications industry. Even so, the system – like most that need to balance a variety of competing interests – is not perfect. The dramatic changes advocated by telephone companies, however, pose the risk of creating more problems and uncertainty than they resolve.

Modest, incremental suggestions, however, might be considered. While much less dramatic than an entirely new system, these ideas have the potential to speed the pace of competitive franchising. Some of these thoughts can be implemented by local governments now; others might be considered by state and federal policymakers.

◘ Suggested Practice: Pursue the facilitation of model franchise language, with participation from the telephone and cable industries and local governments.

A staggering amount of time, money and other resources has been devoted to lobbying and media campaigns related to a new video franchising system – all totaled, something likely approaching $100 million.[315] There have been few reported efforts, however, to facilitate model franchise language on an area-wide or regional basis.

The facilitation of model franchise language should be considered by the parties-in-interest

Telephone companies, cable operators, and local governments each have a critical interest in these debates. Left to the legislative process, however, each party also faces significant uncertainty as to the eventual outcome of legislation – not to mention the

[315] *See, e.g., supra* at 29 – 31 (detailing subtotal expenditures in some states where phone companies have advocated new franchising schemes).

exorbitant costs associated with advocating its own interests.

The facilitation of model franchise language would give each party an opportunity to have more influence over potential outcomes. A facilitation would be championed by an organization or agency with significant credibility across an area or region in a state. The facilitation(s) would necessarily involve a "neutral" party who would encourage discussion and the development of consensus. The goal: Design model language and model alternatives that could be used on a community-by-community basis to speed the video franchising process and drive as much consistency between franchises as possible.

Video franchising is not a one-size-fits-all system; consequently, some terms would necessarily be left for local negotiation. However, model language, and model alternatives for certain franchise terms, could be developed for an area or region within a state if all parties-in-interest wanted to pursue such a goal.

Such a process has the potential to considerably reduce the number of issues that are currently negotiated on a community-by-community basis. Facilitation also creates a sense of ownership in the eventual product. Therefore, the process would reduce the number of legal challenges that typically follow any legislative mandate of similar magnitude.

◘ Suggested Practice: Consider negotiation as part of a consortium.

While efforts to facilitate model franchise language have not yet been pursued extensively, some success has already been achieved through community consortia.

Communities have successfully formed groups to negotiate video franchises with Verizon

A consortium brings together communities in a particular area; the consortium then negotiates, as a group, with the video provider. Once a franchise agreement is reached, each community passes the agreement individually.

Consortia have already had some success. In Pennsylvania, for example, one consortium represented 26 communities and 225,000 potential viewers.[316] A franchise agreement was reached with Verizon, and is now being passed by each member community.

Consortia can be an appealing approach for both the local government and the competitive provider. Local needs and interests are regularly found to be similar across narrow geographic areas -- but a need that is unique to a particular community can also be raised, if necessary. Consequently, each participant conserves resources because different franchise agreements are not negotiated in each community.

For more information on how a consortium can be established and how the system works, contact Rob Carty at ICMA (rcarty@icma.org).

◘ Suggested Practice: Consider whether a competitive franchise that covers less than the entire community will meet community needs.

Local officials know that every resident matters. Consequently, many elected officials and chief administrators begin with the assumption that any competitive franchise request should include a promise to serve all areas of the community.

A number of important implications, however, can be triggered by a community-wide "buildout" requirement. Some of these implications are detailed on pages 118 - 121 of this paper. Consequently, local officials will provide appropriate accommodations to new competitors to ensure that those providers are positioned to offer competitive services on a long term, sustained basis. For example, when RCN could not meet the build obligations of its competitive franchise agreement with the City of Chicago, the city provided RCN additional time to complete its construction. In that case, Chicago's officials believed relief was

[316] The communities are located in Montgomery County, PA. *See*, Verizon Press Release, *Hatfield Borough First Community in Montgomery County Consortium to Grant Verizon Cable Franchise*, June 29, 2006.

appropriate in order to ensure RCN's economic viability in the Windy City.

ICMA firmly believes that decisions related to community-wide buildout requirements can *only* be correctly made on a community-by-community basis. As in Chicago, accommodations may even have to be considered after build commitments are negotiated and secured in an initial franchise agreement. Therefore, guidance on the ultimate question of whether community-wide buildouts should be required of all competitors can't be given. ICMA acknowledges that legitimate reasons for serving portions of a community, rather than the entire community, may exist in some cases. For example, telephone systems developed at a time when there was little need to follow a community's geographic boundaries. Conversely, cable franchises were typically issued on a community-by-community basis, and cable systems developed accordingly.

Decisions related to community-wide buildout requirements can only be accurately made on a community-by-community basis

This does not mean that a telephone company should dictate the particular areas in a community that it will serve. It may be the case, however, that technological or other legitimate considerations counsel against imposing a community-wide buildout requirement. Such considerations, if raised by a telephone company, should be carefully considered on a case-by-case basis by local officials.

Every resident counts -- telephone companies shouldn't be allowed to determine which neighborhoods deserve wireline video competition and which do not

◘ Suggested Practice: If an application fee is imposed on competitive franchise requests, consider a flat fee, rather than the reimbursement of fees incurred.

In the vast majority of cases, ICMA survey respondents do not charge an application fee when a request for a competitive franchise is submitted.[317] Similarly, very few communities seek reimbursement of legal fees associated with a competitive provider's request.[318]

Consider alternative fee arrangements with consultants and special counsel

In those few cases where reimbursement of legal or consulting fees has been sought, however, phone

[317] Very Narrow Survey Q. 10; Narrow Survey Q. 7.
[318] Very Narrow Survey Q. 23; Narrow Survey Q. 22.

companies have complained that third-party consultants and attorneys have little motivation to complete negotiations because they are typically paid on an hourly basis.[319] In some cases, this may be a legitimate concern.

Communities should proceed cautiously in this area. For example, some case law suggests that an application fee and the reimbursement of legal fees are subject to the 5 percent franchise fee cap.[320] This paper does not attempt to address the issue. As with the community-wide buildout requirement, though, ICMA acknowledges that an attorney or consultant may be tempted to extend negotiations in some situations. This possibility should be kept in mind regardless of whether the community or the competitive provider will eventually pay the bill. If such a tendency is a potential concern, other consulting fee arrangements – such as a flat fee rather than an hourly fee -- might be raised by a community.

◘ Suggested Practice: Consider the value of a more competitive marketplace when dealing with both the new video provider and the incumbent, and modify expectations appropriately.

A more competitive video market necessarily changes the relationship of the parties and the nature of video franchises that might otherwise be negotiated. Once a competitive market develops, local governments' expectations in franchise negotiations should develop, too.

Once wireline competition develops, local governments' expectations in franchise negotiations should develop, too

A market with sustained wireline video competition may significantly reduce the price that all residents pay for video services.[321] That development, however, poses a number of additional implications. For example, while the combined revenue derived by all providers within a particular community may increase, the revenue derived by the incumbent provider will

[319] Verizon Comments at 59.
[320] *Robin Cable Systems, L.P.* v. *City of Sierra Vista*, 842 F.Supp. 380 (D. Ariz. 1993) ($30,000 fee related to processing costs was not incidental to the award of the franchise).
[321] *See supra*, fn 12.

likely decrease because a portion of its existing market share will be split with a new provider. Likewise, the margin earned by each video provider will probably be lower than the margin that could be extracted by a single provider; put differently, lower prices will have to be reflected somewhere, and a large part will probably show up as a reduction in the bottom line that could otherwise have been projected by a provider.

Sustained wireline competition may eventually lead to fewer regulatory demands in certain areas, such ascustomer service

Beyond a reduction in prices, sustained competition may also lead to fewer regulatory demands in other areas, such as customer service. Consumers who receive poor customer service from one service provider will often seek out another when a choice exists. The same result would presumably occur in a more competitive video market (assuming, of course, that all providers don't deliver equally poor service).

New providers assert that they shouldn't be shouldered with the same set of commitments that have been required of the incumbent. In many cases, this may be true. It might also be true that the incumbent shouldn't be shouldered with the same set of obligations, either: After all, that incumbent may experience a decline in market share and margin with the entry of a new competitor.

Ultimately, the only way to ensure that the needs of local residents are met and that treatment of all video providers is competitively neutral is to rely on the sound judgment of local officials, who will have firsthand experience with the dynamics of their market. A continuous assessment of developments will help to ensure that an increasingly competitive market functions smoothly.

◘ Suggested Practice: Consider a division of existing obligations between the video providers.
In keeping with the prior suggested practice, many communities may conclude that it is appropriate to *divide* the current obligations of the incumbent video provider *between* the competitors, rather than to require that the new provider *match* the incumbent's obligations.

An example illustrates the point. Assume that the incumbent video provider agreed in its franchise to pay $25,000 annually in support of public, educational and government access programming, and that the provider currently has 5,000 customers in the community: The incumbent provider, therefore, pays an annual PEG programming grant of $5 per customer per year, or about 42 cents per customer per month. When approached by a competitive provider for a video franchise, a community might be inclined to seek an annual grant of $25,000 from the competitive provider, too -- that would be one way to maintain consistency between the franchises. A developing, more competitive video market, however, will change the relative position of the parties. For example, a new provider will have no customers, and the incumbent provider will likely lose customers to the new competitor. Consequently, another approach, which also maintains competitive neutrality, should be considered: The existing obligation could be divided between the providers, with each paying 42 cents per customer per month as determined on pre-defined dates.

Dividing the incumbent video provider's existing obligations between the competitors should be considered as one way to ensure competitive neutrality

Arguably, this approach better reflects developing market conditions: The new provider picks up its share of the PEG grant as its customer base grows, and the incumbent's obligation declines proportionately if it loses customers. Most importantly, the residents in the community will benefit, as more video competition can mean lower prices and better customer service.

Of course, this is a simple example. Careful thought should be given to each matter, as complicated issues of equity can develop. For example, how should a grant be split between wireline providers if that grant was paid by the incumbent in a lump sum, two years before? And what about in-kind grants, like cable connections for schools and public buildings – there isn't a need to have both competitors provide service to each location, is there? While the issues can become complicated, the same approach can be applied: Many communities will maintain competitive neutrally by *splitting* the

incumbent's current obligations between the competitors.

◘ Suggestion: Bills considered by lawmakers should focus on an equitable distribution of existing obligations between providers, not on an immediate reduction of obligations for all providers.

Legislators in a few states have already passed bills that reduce or eliminate traditional video franchising and the oversight that local officials exercise through that process. Presumably, these states have concluded that reduced oversight by local officials will mean that new broadband networks will be deployed more quickly, and that a more competitive video marketplace will soon follow.

There's a lot at stake. These states have essentially traded less oversight by local officials for telephone company promises of a more competitive video market. But will the elimination of traditional video franchising really unleash the rapid deployment of competitive broadband services? It seems unlikely. Years of construction still lie ahead of the telcos,[322] and that construction is already occurring even before the phone companies request a video franchise.[323] Nor is comfort provided by the situation in Texas – the incubator state for compulsory video franchising. About 96 percent of all Texans still find themselves waiting for video competition provided by a telco.[324]

States that have already passed forced franchising bills have traded a reduction in local oversight for the promise that broadband networks will be deployed more quickly. That's a big gamble.

Over the years, telephone and cable companies have been accused of price gouging, poor customer service, and monopolistic practices. Some of those charges may have been warranted, others not. Regardless, a reduction in government oversight strikes many as counterintuitive if based solely on telephone and cable industry promises that more competition will eventually develop between them. Make no mistake – more competition in video and other broadband services is eagerly anticipated and welcomed by local governments

[322] *Supra*, page 45.
[323] *See supra*, fn. 139 and accompanying text.
[324] *See supra*, pages 48 - 50.

– but promises of more competition in return for less oversight have failed to materialize in the past.[325]

A more prudent approach is to maintain local oversight until sustained wireline video competition really develops. As noted throughout this paper, traditional video franchising is working and keeping pace with the development of a more competitive video market. If additional legislation is nevertheless deemed appropriate, policymakers might focus on how existing franchise obligations should be apportioned between competitive providers. In this way, needs unique to local residents would continue to be met, local oversight would be ensured as a more competitive market develops, and differences of opinion related to how one provider is being treated relative to a competitor would be minimized.

A prudent approach would maintain local oversight on behalf of residents' interests until wireline video competition really develops

◘ Suggestion: If forced franchising schemes are being considered, such federal or state laws should be drafted to sunset after three years.

Phone company lobbyists assert that traditional video franchising (and its 60 year legacy of success) should be abandoned because the time required to negotiate video franchises creates delays in the rollout of competitive services.

There is little evidence to conclude that this is really the case. Roughly put, there are few government affairs professionals (who typically negotiate video franchises) who are proficient in the construction and operational issues required to bring competitive broadband services to market. Nevertheless, lawmakers who are somehow persuaded by industry arguments should consider legislative provisions designed to move a more competitive video market from a promise to a reality.

If legislative accommodations are offered to the phone companies, those accommodations should be designed to encourage the telcos to quickly follow through on their promises

An incentive could be created, for example, if any shall-issue franchising legislation being considered is

[325] *See supra*, pages 80 – 84.

drafted to automatically sunset after three years.[326] Telephone companies could take advantage of the shall-issue franchise law during the three year window. At the end of the three year period, telcos might also be permitted to maintain shall-issue authorizations for an additional seven years, but *only* in those areas where construction throughout the particular authorized area is complete and competitive video services are actually available throughout that constructed area. After the three year window closes, telephone companies would be required to pursue traditional video franchises from local governments, just as cable companies have done for six decades. To ensure competitively neutral treatment, cable operators would also be permitted to receive comparable operating authority in those areas where telephone companies are permitted to maintain shall-issue franchises after the three year window closes.[327]

Traditional video franchising is keeping pace with the telephone companies' own network deployment goals.[328] In addition, there seems to be no real connection between the speed of broadband network deployment and the requirements of traditional video franchising.[329] If additional legislation is nevertheless deemed appropriate, an approach which offers a relatively brief window for shall-issue video franchising could accomplish several public policy goals. First, this approach encourages the rapid deployment of competitive video systems by telephone companies -- once the three year window closes, so does the opportunity to circumvent traditional franchise negotiations. Second, this approach could eventually narrow the regulatory oversight currently exercised by local officials, but only after the telephone companies' promises of a more competitive video market actually are fulfilled. Finally, in those areas where competition

[326] The idea of keeping the window open for just two or three years is an integral part of the concept. If the window were kept open any longer, telephone companies would presumably have more than enough time to seek video franchises through the traditional process of negotiation.

[327] Existing franchise commitments should not be abrogated, nor should the needs of local residents, as reflected in the incumbent video provider's franchise agreement, be ignored. Any shall-issue franchising scheme would, of course, be required to address these issues as well.

[328] See telco executive comments, supra at pages 2, and 44 – 46; *see also*, chart, *supra* at page 51.

[329] *See supra*, pages 43 – 52.

has actually been established within the three year window, *both* the new provider *and* the incumbent would be permitted to maintain shall-issue operating authority for several additional years. This period would provide the opportunity for local officials to assess the real, long-term impact of a more competitive video market. If sustained competition supplants the ongoing need for regulation in some areas, much less would be sought from the providers when the term of the shall-issue franchise expires and a renewal is sought from the local government. If limited benefits have been sustained, however, ongoing deficiencies could be remedied through the traditional franchise renewal process.

◘ Suggestion: A repeal of state-wide "level playing field" statutes may be appropriate.

Finally, a notable percentage of communities that have already issued a video franchise to a phone company -- more than 52 percent -- report that the process was slowed because the community had to consider the impact of a state-wide "level playing field" statute.[330] In more than 20 percent of the cases, the incumbent cable operator also threatened to file a lawsuit over the process.[331] These factors pose a risk that must be carefully considered, and one that can often slow a competitive franchise negotiation.

State "level playing field" statutes may no longer serve their intended purpose

In all cases, communities need to maintain competitive neutrality between video providers. This is a fundamental concept engrained in our Constitution's equal protection clause.[332] Of course, the need to maintain competitive neutrality also makes perfect sense – governments should not "pick winners and losers" through the agreements they strike. This concept was the purported purpose of many state-wide level playing field statutes when enacted. No competitive video franchise, according to such statutes, should be more favorable or less burdensome than the

[330] Very Narrow Survey Q. 13.
[331] Id. Q. 25.
[332] The Equal Protection Clause is part of the 14th Amendment to the U.S. Constitution, and prohibits states from denying any person "the equal protection of the laws." Essentially, no person or group will be denied such protection under the law as is enjoyed by similar persons or groups.

franchise issued to the incumbent provider. While laudable in concept, such statutes also provide ample fodder for the creation of delays and litigation. For example, should such statutes be interpreted after considering a franchise as a whole, or must a comparison be made on a term-by-term basis? Other interpretive questions will exist – and since competitive video franchising has not been widespread in the past, little guidance will have been provided by the courts on such matters.

The policy considerations underlying such state-wide statutes are beyond the scope of this paper. However, such statutes appear to principally protect the interests of the incumbent cable operator. Also unclear is how these "level playing field" statutes extend Constitutional protections already owed to providers. In any event, ICMA surveys suggest that state-wide statutes may cause delays in competitive franchising. Legislators may find it worthwhile to determine whether such statutes continue to serve a meaningful purpose, or if they instead compromise local officials' efforts to establish a competitively neutral environment.

XII. National and State Franchising: The Unintended Consequences

Core Knowledge

The Cable Communications Policy Act of 1984 struck a delicate balance among a variety of interests. Any contemplated change to our traditional video franchising system should be viewed in the context of how that change would affect the overall balance of existing law. A review that considers matters only on a provision-by-provision basis (*i.e.*, without regard to the overall balance that currently exists) will lead to unintended consequences.

Our national policy in cable communications splits regulatory responsibilities between federal and local governments. This federal policy has remained largely unchanged through more than thirty years and three Communications Act rewrites.[333] Why has the critical role of local governments been acknowledged and respected by lawmakers over the past several decades? The answer is simple: traditional video franchising works.

Traditional video franchising has accomplished a great deal over its 60 year history

Consider the following. While subject to traditional video franchising and the related oversight of local officials:

» The cable industry has placed one million miles of coaxial and fiber optic cable in local rights-of-way;[334]

» Cable service has become available to 105 million homes nationwide;[335]

» The cable industry has achieved the highest level of broadband availability in the communications

[333] Cable Communications Policy Act of 1984, P.L. 98-549, 98 Stat. 2779 (1984); Cable Television Consumer Protection and Competition Act of 1992, Pub. L. 102-385, 106 Stat. 1460 (1992); 1996 Telecommunications Act, Pub. L. 104-104, 110 Stat. 118 (1996).

[334] Hazlett Decl. at ¶ 26, fn. 14, *citing* National Cable & Telecommunications Association, *Cable & Telecommunications Industry Overview 2003: Mid-Year* (2003).

[335] *See, e.g.*, Ted Hearn, *Telcos Push Franchise Revamp Up Hill*, MULTICHANNEL NEWS, February 20, 2006 at 3.

industry – 91 percent, as compared to the telephone industry's 76 percent;[336]

» Voice Over Internet Protocol phone service is now available to almost every U.S. home that has access to cable modem service;

» As many as one million customer issues/cable complaints are successfully resolved by local governments each year, which saves state and federal agencies hundreds of thousands of hours of labor costs annually;[337]

» Residents have had access to new digital technologies through use of public access studios required by local franchising authorities;[338]

» Despite the rapid consolidation of the media industry over the course of the last decade, the public continues to enjoy free-flowing information and First Amendment rights because local governments have enforced leased access rules and public file requirements, and have sought public, educational and government access channels and programming;

» Thousands of schools throughout the country have access to next-generation tools for learning, like educational programming provided through Cable-in-the-Classroom and information that can be delivered in days rather than weeks through cable modems;

» Homeland security and police and fire protection have been enhanced through local governments' thoughtful use of institutional networks, local

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[336] According to the FCC, 91% of homes passed by cable have access to cable modem service, while 76% of homes served by incumbent phone companies had access to Digital Subscriber Line ("DSL") service. FCC Press Release, *Federal Communications Commission Releases Data on High Speed Services for Internet Access*, April 3, 2006 at 2.

[337] National Association of Telecommunications Officers and Advisors Press Release, Survey Indicates Local Governments Resolve Large Number of Customer Service Complaints Each Year, April 26, 2006.

[338] *See, e.g.*, 47 U.S.C. §531.

emergency alert systems, and franchise fees required in franchise negotiations.[339]

◘ *A System Capable of Such Achievements Wasn't Easily Developed*

Importantly, however, the development of a regulatory structure capable of such noteworthy accomplishments wasn't easy. To pass the 1984 Cable Act, "Congress had to balance the public's right to free flowing information, the local government's interest in franchising and regulating cable operators, the cable industry's desire for growth and stability, and the potential of satellite to offer valuable competition."[340]

The delicate balance of interests found in our nation's current video franchising system wasn't easily accomplished

The significant similarities between the challenge faced by Congress in 1984 and the one now faced by state and federal legislators should not be overlooked. As in 1984, the public still has a right and interest in "free flowing information," perhaps now more than ever. As in 1984, local governments remain interested in "franchising and regulating cable operators." As in 1984, one active participant in this debate – the phone industry – has a "desire for growth and stability" in the video market. Finally, just as Congress in 1984 had to balance the "potential of satellite to offer valuable competition," that same consideration must be balanced again – only this time, potential video competition from telephone companies needs to be considered.

Given all this, it is reasonable to believe that a policy that has been codified and successful over the course of decades can continue to flourish well into the future. Local video franchising was not the death knell to cable companies as that the industry had feared in 1972.[341] Nor will the elimination of traditional video franchising be the key to the rapid construction of broadband systems, as telephone company advocates have claimed.[342] The proof is before us: Phone companies are already building broadband systems as fast as they

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[339] *See, e.g.*, fn. 14.
[340] *Centel Cable Television* v. *Admiral's Cove Associates*, 835 F.2d 1159 (11th Cir. 1998), *citing* 130 Cong. Rec. H10, 435 (daily ed. Oct. 1, 1984) (statement of Rep. Wirth).
[341] *See, e.g., supra*, page 23.
[342] *See supra*, pages 33 – 52.

possibly can,[343] and traditional video franchises are being secured by the telcos at a record pace.[344] Now that the telephone companies are pursuing traditional video franchises with increased commitment, there is no reason to believe that their momentum and success will not continue to grow.[345]

With such similarities, great caution and reluctance should be exercised before dramatic changes, like those supported by the telephone company advocates, are made to our country's traditional system of video franchising.

■ *The Unintended Consequences of Change*

A substantial track record of success will be at risk if dramatic changes are made to our traditional video franchising system. Even so, those who advocate an alternate approach assure lawmakers that neither local governments nor their residents will suffer any harm if the existing system were simply "streamlined." According to these advocates, the "legitimate interests" of local governments in the management of rights-of-way are already protected, and things like franchise fee payments and the right to enforce customer service standards will be maintained. Put differently, dramatic changes can be made to the way video franchising has occurred for the last 60 years – but nothing, allegedly, will be lost in the process. There is reason to be skeptical.

» Risk #1: The System of Checks and Balances Carefully Crafted in the 1984 Cable Act Would Be Lost.

Claims that the traditional franchising system would simply be "streamlined" shroud the real issue: In each forced franchising proposal, the discretion and oversight that a local government can exercise on

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[343] *See*, telephone executive quotes, *supra* at pages 2 and 44 - 46, and charts, *supra* at pages 47 - 48 and 51.
[344] *See* chart, *supra* at page 47.
[345] This qualification is made in light of the fear that the telephone companies' franchising efforts are intended to support their lobbying campaigns as much as they are actually designed to secure video franchises. *See* generally, pages 89 - 90 (phone companies' franchising efforts may be designed to support larger lobbying efforts, rather than to actually secure franchises as quickly as possible).

behalf of its residents is severely restricted. A video franchise would no longer be negotiated locally. Instead, the act of issuing a video franchise would be reduced to an administrative task compelled by state or federal law. As part of the transformation, local governments would be stripped of their discretion to protect the needs and interests of their residents. Some proposals would even compel local governments to assume new responsibilities that they have had no hand in creating.[346] From local governments' perspective, the new franchising plans advocated by telephone company lobbyists are appropriately described as "forced franchising," "compulsory franchising," or "shall issue franchising," because the limited discretion and oversight that local governments still possess in the video franchising process[347] would be lost.

Forced franchising proposals change the very nature of the video franchising process from a negotiation to an administrative task

The relative interests of video providers and local governments were carefully balanced in the 1984 Cable Act, an accomplishment not easily achieved. In 1996, that balance was extended to telephone companies when Congress permitted the industry to offer video services. If local governments' remaining discretion is removed from the process, as it would be under proposals advanced by the telcos, this delicate balance will be lost. A carefully crafted system of checks and balances tested over the course of more than 50,000 franchise renewals would also be cast aside.[348]

When the underlying nature of the franchising process is changed, the delicate balance of interests changes, too

When fundamental changes to the underlying philosophy of a system are made, many unintended consequences can result. In this case, some of the most important policy considerations will be affected.

[346] For example, under traditional franchising, a local government has the option of enforcing the FCC's customer service standards. Under some forced franchising schemes, however, local governments would be compelled to enforce customer service standards. *See, e.g.*, HR 5252 (dated Aug. 4, 2006), as reported out of the U.S. Senate's Committee on Commerce, Science and Transportation at §642.
[347] *See supra*, fn. 75 and accompanying text.
[348] *See supra*, pages 98 - 99.

» Risk #2: The Ability to Prevent Discrimination Will Be Lost.

Unfortunately, some evidence already suggests that telephone companies have focused their broadband efforts on communities with incomes above the national average.[349] Fears have also been voiced that telephone companies will "cherry pick" the more affluent neighborhoods in a community, and bypass those with lower income levels.

There is a significant risk that the "digital divide" will deepen if community-wide buildout decisions are not correctly made

In response, telephone companies assert that their broadband buildout plans are driven by considerations other than average income. For example, the telcos claim that it would be economically imprudent for them to provide broadband video services to neighborhoods that aren't already in their telephone service areas -- even if that means that some areas of a community get a full menu of competitive broadband services and other areas don't. The telephone companies also assert that their industry is less likely to invest in communities where large, "low density" areas exist (*i.e.*, those with fewer households per mile) – even if the incumbent cable operator has been required to provide service to such areas.

Consequently, a natural tension exists between the need to prevent discrimination and the desire to encourage investment and competitive alternatives. On one hand, discrimination *can't* occur (at least within a community's own boundaries) if a video provider is required to offer service to every resident in that community. On the other hand, if a telco is required to serve every area in a community -- even those that are less dense or those where no telephone plant currently exists -- the telco might decide to take its investment to a neighboring community instead.

A one-size-fits-all, forced franchising system provides no opportunity to weigh these competing

[349] *See, e.g.*, Steve Donohue, *Wealthy Targets*, MULTICHANNEL NEWS, April 18, 2005 ("Some of the wealthiest neighborhoods in Verizon Communication Inc.'s footprint have been the first to receive its fiber-delivered FiOS Internet Service, and they may eventually be the first communities to get the telco's upcoming video product.")

issues. State and federal committees have struggled with the question of whether "community-wide buildouts" should be required in forced franchising bills. These struggles will continue for one simple reason: neither the state nor the federal level of government is in the best position to consider such matters. Only the *local* level of government can effectively address these competing considerations because these issues can only be fairly weighed on a case-by-case, community-by-community basis. For example, if the telephone company reports that it can serve only some areas of a community because its existing phone network does not reach everyone in the community, local officials are in the best position to determine whether the claim is fact or fiction. If the telephone company proposes to serve a prosperous neighborhood in the community but not others, local officials are in the best position to determine whether the proposal is being made on the basis of income or because of other economic considerations, such as the density of housing or the availability of existing telephone plant.

The simultaneous need to prevent discrimination and to encourage investment is best balanced on a case-by-case basis by local officials

Local officials also know which neighboring communities are demographically similar to their own, and they compare notes. This permits local governments to adapt "on the fly." For example, if no pattern of cherry picking seems to be emerging in similarly situated communities, a community then-negotiating with a telco might choose to place a greater relative emphasis on securing the telco's investment. The converse, of course, would also be true: If suspicions of discrimination are surfacing, a community in negotiation with a telco might prevent discrimination through a community-wide buildout requirement – even if that means that the telco might move on to the next community. On this issue there can be no doubt: local officials are in the best position to weigh these matters, and they will respond quickly and appropriately.

The issue of preventing discrimination is critical to local governments and their residents. Importantly, ICMA survey results underscore the fact that issues

surrounding "community-wide buildouts" cannot be effectively addressed at the state or federal level. Of those survey respondents that had already issued a competitive video franchise to a telco, nearly 43 percent reported that the progress of the negotiation was slowed because "the telephone company didn't want to provide cable service throughout the entire community." If this issue is left to be addressed in new state or federal franchising laws, forced franchising laws have to choose between the alternatives: Either community-wide buildouts would be required, or they would not.[350] Because this issue arises in nearly 1 out of every 2 communities, however, the risk of making the wrong choice on the buildout issue in state or federal legislation is significant.

In a substantial number of cases, telcos don't want to provide competitive video services throughout an entire community

Importantly, local officials already understand that discrimination has to be prevented but that economic investment also has to be encouraged. Consequently, 80 percent of ICMA survey respondents report that they would require a full community buildout of a telephone company's video system -- but a full 20 percent of respondents said they would not require such a buildout, or that they would need to consider the matter further.[351] Consequently, local government managers are predisposed to require community-wide buildouts; these results also reveal, however, that many local officials will give further consideration to the matter if it becomes an issue during a negotiation.

Local officials are in the best position to prevent discrimination in their communities

A final, practical consideration related to the potential for discrimination is this: If some areas of a community enjoy full video competition while others do not, many calls will come from upset residents who live in areas where no choice between competitive video providers exists. Local officials – not state or federal legislators – will be the first to field these calls. If local officials have no

[350] As currently drafted, HR 5252, for example, does not require community-wide buildouts; instead, it includes a provision that generally prohibits redlining on the basis of income, race or religion. HR 5252 (dated Aug. 4, 2006), as reported out of the U.S. Senate's committee on Commerce, Science and Transportation at §642.
[351] Broad Survey, Q. 11.

ownership in the decision that created the result, it is unlikely that the situation will be defended. Instead, criticism will be deflected to legislators who passed a bill that permitted wireline video competition for some but not for all.

Local governments are in the best position to prevent potential discrimination from occurring, to balance potentially competing interests, and to explain their decision to residents once it has been made.

If questions of community-wide buildouts are not left to local officials, then state and federal forced franchising legislation must require competitors to serve all areas in each community – only then will discrimination be prevented

» Risk #3: Forced Franchising Legislation Will Likely Lead to an Increase in Taxes and Assessments.

Telephone company lobbyists claim that "shall issue" video franchising schemes will quickly result in the explosion in competitive, wireline video services and a rapid decrease in the prices consumers pay for their cable.

Certainly, this would be a welcomed development for local officials. Over the course of the past several years, local governments' ability to regulate the prices charged by cable operators has been eroded by federal legislation.[352] Since that time, cable prices have regularly increased faster than inflation.[353] Sustained, wireline competition may help to stabilize those price increases, and may even result in lower cable prices than those now charged.[354]

Widespread wireline competition is still years away.[355] Some legislatures, however, are *already* considering regulatory accommodations for phone companies – even before the promise of competition really comes to pass. One

[352] While local governments are still permitted to regulate the "basic service tier," the regulation of all higher "cable programming service" tiers sunset in 1998 as a result of the 1996 Telecommunications Act. Consequently, most cable operators have simply created "skinny basic" service tiers and moved the most desirable programming to higher service tiers which are no longer rate-regulated.
[353] *See, e.g.,* studies, *supra* at fn. 12.
[354] Id.
[355] *See, supra* pages 33 – 43, and telco executive quotes at page 45.

accommodation regularly found in forced franchising bills relates to the amount that local governments can collect from video providers as rent for the providers' use of local rights-of-way. Under current law, local governments can charge cable providers up to 5 percent of the operator's "gross revenue derived in such [12 month] period from the operation of the cable system to provide cable services."[356] Most state and federal compulsory franchising bills don't change the 5 percent limitation on franchise fees – most bills do, however, limit the revenue base against which the 5 percent fee is calculated.

Most forced franchising bills don't change the 5% level of franchise fees that can be collected from a video provider; instead, the bills reduce the revenue base against which the fees are calculated

While not as immediately noticeable, such efforts have the effect of reducing the amount of franchise fees collected from video providers by local officials. In one case, the Congressional Budget Office estimated that such reductions could amount to between $100 million and $350 million annually by the year 2011. These reductions would be particularly harmful to residents. First, there would be no reason to believe that a reduction in franchise fees collected from video providers would wind up as reduced prices for consumers; instead, providers have a tendency to treat such reductions as their own windfall.[357] Second, most local officials devote franchise fees to critical public issues like police and fire protection, right-of-way maintenance, and city-wide lighting.[358] A reduction in franchise fees may mean bigger bottom lines for the industry – but a reduction in such revenues would also mean that many local governments would be faced with another increasingly difficult choice between reducing services or increasing revenue from other sources.

One bill being considered by federal legislators would reduce franchise fee payments to local governments by $100 - $350 million annually

Many forced franchising proposals also shift the responsibility for regulatory oversight of the

[356] 47 U.S.C. §542(b).
[357] Ted Hearn, *Verizon Drops DSL Fee Under Duress*, MULTICHANNEL NEWS, Sept. 4, 2006 at 27 (reporting that Verizon dropped a digital subscriber line surcharge that had taken effect at about the same time when the company stopped collecting Universal Service Funds for the government).
[358] *See supra*, at page 62.

industry from local officials to state or federal staffs. In many cases, however, new demands placed on those levels of government are left without funding. But local governments, for example, already field and resolve hundreds of thousands of cable-related questions annually.[359] If oversight functions are shifted to state or federal agencies, new staffs would have to be created or existing staffs expanded. New taxes and assessments would be expected well before residents would likely experience any benefit from new wireline video competition.

Many forced franchising bills shift the responsibility for regulatory oversight from local officials to the state or federal levels of government. New agencies will have to be created or existing staffs expanded to deal with new regulatory responsibilities

» Risk #4: The Ability to Quickly Adapt to the Rapidly Changing Communications Industry Will Be Lost.

The need to prevent discrimination while encouraging economic investment is best balanced by local governments on a community-by-community basis. In addition to this critical role, however, local video franchising is much more adaptable and responsive than any state or national "shall issue" franchising system could be.

At the state and federal levels, major re-writes involving complicated issues typically occur only once every five or ten years – and sometimes less frequently. In the rapidly changing telecommunications industry, however, five or ten years can be an eternity. Recent history proves the point. In just the five years after the 1996 Telecommunications Act was passed, telephone companies aggressively entered the cable business – spending more than $110 billion in the process -- and then abandoned the business just as quickly.[360] Keeping ahead with that sort of sea change is an impossible task for any state or federal law.

No state or federal "shall issue" franchising scheme can keep pace with the rapid changes in the cable communications industry

When discretion is exercised at the local level of government, though, the system is much more flexible and adaptable. It's true that most local video franchises run for a 10 – 15 year term, much

[359] *See supra*, fn. 29.
[360] *See, e.g.*, chart, *supra* at page 56.

like the period that might exist between major re-writes of state or federal statutes. With local franchising, however, there is one important difference: There is a constant turnover of franchises in any given geographical area at any point in time. In fact, about 7.5 percent of all traditional video franchises expire in any one year.[361] Consequently, new provisions can be introduced during local franchise negotiations as federal regulations change or other considerations warrant. As with the introduction of new concepts, the impact of those provisions can also be determined on a rolling basis.

One important characteristic of traditional video franchising is its adaptability: A small percentage of franchises are renewed each year, so new concepts can be incorporated and tested on a rolling basis

Traditional video franchising has another advantage: A community confronted with a franchise renewal or initial franchise request can consider the market factors and other issues that exist at that very point in time – discretion is not limited by a law or standardized franchise that may have seemed appropriate five years ago, but which no longer reflects current market conditions or industry developments.

Traditional video franchising established itself as a valuable and adaptable system in the late 1990s, when the telcos first demonstrated an interest in the wireline video business

Here's an example that reflects the adaptability of our traditional video franchising system. Following passage of the 1996 Telecommunications Act, Ameritech was anxious to get into the cable business. Because the idea of wireline video competition was new, though, neither Ameritech nor the local governments got off the blocks quickly. It was clear that Ameritech New Media could offer video services as a result of the 1996 Telecommunications Act, but no one knew exactly where to start.

To its credit, Ameritech chose the communities that it first approached carefully and well. Those communities were prosperous.[362] Even so, the

[361] *See, e.g.*, Broad Survey Q. 2.

[362] Ameritech New Media's first franchises were sought in the Michigan communities of Northville (median household income of $83,961), Canton Township (median household income of $72,495), Plymouth (median household income of $51,535), and Plymouth Township (median household income of $74,738). Nationwide, median household income, according to the 2000 Census, was $41,994.

incumbent operator had not kept the cable system up to date. The communities approached by Ameritech were also in renewal negotiations with the existing cable operator, but the renewal had not been going well. Ameritech chose a very receptive audience for its first proposals, and the company quickly won its first video franchises.

After getting a couple more franchises under its belt, Ameritech learned that it didn't have to offer as much to the communities as it had at first: Communities were seeing the benefits of direct, wireline competition, and more local governments wanted the same for their residents. Soon, there was so much demand for Ameritech's video service that the company was able to negotiate franchises quickly and on very consistent terms.[363] In fact, those terms were often less expensive than those that bound the incumbent operator.

Fascinating strategies began to develop. One incumbent cable operator confronted by this new competitor brought its own franchise renewal activities to a near halt. That incumbent operator believed that it could do better if the community would first issue a competitive franchise to Ameritech – Ameritech's franchise would then be matched by the incumbent. This approach often accomplished its intended result: Both the incumbent and the competitor received nearly identical franchises in many cases. A different incumbent operator providing service in the same region, however, took a very different approach. That operator accelerated its franchise renewals. In return, that incumbent sought "level playing field" language from local governments in order to ensure that any subsequent competitor would not be treated more favorably. Regardless of the strategies employed by the video providers, the traditional video franchising system adapted. Negotiations occurred, and each party believed that it was

[363] *See infra*, pages 75 – 76.

securing a franchise agreement that was in its best interest.

Later, Ameritech was purchased by SBC, and rumors started to spread that Ameritech would no longer be permitted to remain in the video business. Again, the traditional video franchising system adapted: Communities that had been waiting for Ameritech to knock on their door instead sought out the company, and promised to issue a competitive franchise before Ameritech's video effort was halted.

Ameritech secured its first Michigan franchise after the 1996 Telecommunications Act had been passed, and SBC halted Ameritech's video franchising effort shortly after its acquisition of Ameritech in the fall of 1999. In that short period, the relative bargaining positions of Ameritech New Media had changed (it learned that it could offer less for franchises), the position of the incumbent cable operators had changed (they learned that they could reduce their renewal costs, if they cared to, by waiting for the competitive franchise to be issued – or increase their goodwill with local governments by accelerating their renewals), and the interests of the local governments had changed (the impact of competition was attractive enough that less was generally sought from the providers). These relative positions were constantly changing during these three years, and the manner in which franchise negotiations were pursued was immediately adapting. Traditional video franchising proved to be a worthy system, and one that could keep pace with the rapidly changing market. As we now know, however, a rewrite of the federal Cable Act wouldn't even be considered for several more years.

Today's telecommunications industry is just as unpredictable as it was 5 – 10 years ago. Still uncertain is whether the telephone industry will remain committed to the capital-intensive

broadband networks they are currently building.[364] "Disintermediation," *i.e.*, the potential for a new technology to disrupt all underlying assumptions, also poses risks to both the cable and telephone industries. For example, as speeds over wireless networks increase, so does the potential for video to be delivered over those systems. One thing, however, is certain: Change will continue to occur in this industry. The current local franchising system – time tested over six decades – is able to adapt to those changes on a rolling basis and at a controlled pace. Forced franchising concepts, however, are unproven and pose a substantial risk of being perceived as the right idea for today's market but the wrong idea for tomorrow's developments.

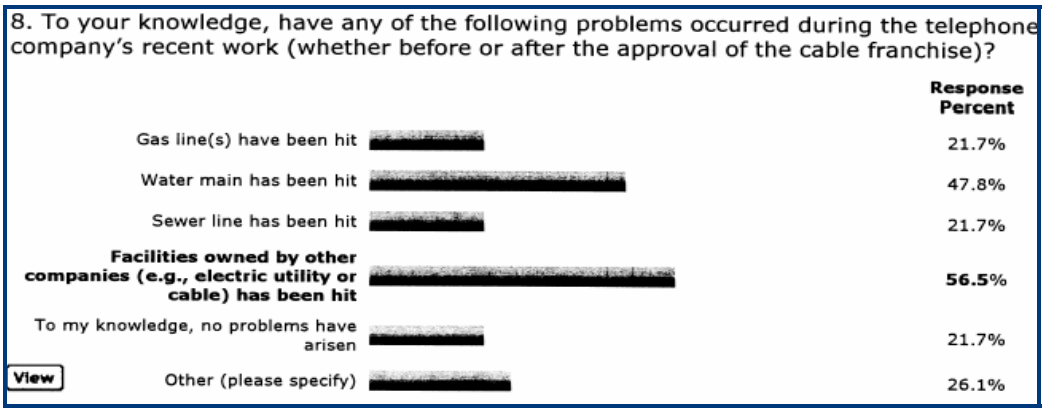
Today's telecommunications market remains unpredictable; what seems to be the right idea for today's market may well be the wrong idea for tomorrow's developments

» Risk #5: Problems Affecting the Health, Safety and Welfare of Residents Will Not Be Resolved As Quickly.

Local officials are already running into a number of challenges related to the telephone companies' broadband projects. Some issues are significant, like gas lines being hit, water mains being struck, or sewer lines being broken.[365] Other issues don't pose the same risk to the health and welfare of citizens – but they are important to residents nonetheless. In many cases, for example, private driveways have been damaged by telephone companies' construction projects but left without repair. Construction workers have entered backyards unannounced. Trees have been badly pruned and fences damaged. With respect to the health, safety and welfare of residents, consider the responses to the following ICMA survey question about problems that have been encountered as a result of new telco construction:

Local officials are in the best position to respond to the needs of their residents, whether a significant danger exists or an issue is simply a nuisance to a resident

[364] *See supra*, at pages 58 – 60.
[365] *See supra*, fn. 120.



To be fair, these issues haven't been limited to the telephone companies' new efforts. The cable industry caused many of the same problems when they upgraded their networks over the course of the last decade. In the case of cable operators, though, these types of matters were easily resolved. Franchises often include requirements as to when work can occur, whether workers have to provide prior notice of entry onto private property, whether picture identification has to be worn, and how quickly repairs to damaged property have to be made. Additionally, most local video franchises also include enforcement mechanisms like liquidated damages, which will be triggered if a chronic problem arises. In extreme cases, the operator's cable franchise – something now considered a "valuable asset"[366] by the operator – might even be placed at risk.

In "shall issue" franchising schemes, however, the video franchise no longer remains a "valuable asset." Instead, a franchise can be attained as a matter of right by any competent provider. In such a case, the local government's influence over the operator will necessarily be diluted. Consequently, no matter how enforcement rights are purportedly preserved in a forced franchising world, the local government's ability to ensure that the operator is responsive to such issues will be diluted.

[366] In re: Adelphia Communications Corp., *et al.*, Southern District of New York Bankruptcy Case No. 02-41729, Debtors' Omnibus Response to the Contract and Plan Objections of Local Franchising Authorities (Filed May 26, 2006) (emphasis supplied).

» Risk #6: A New, Forced Franchising System Would Create Uncertainty and Discourage Investment.

New forced franchising proposals advocated by the industry would dramatically change the underlying concepts and philosophies that have formed the foundation for video franchising for the last six decades: Video franchises, as seen in such schemes, would no longer be agreements that are negotiated with the local government. Instead, video franchising would be reduced to an administrative task. Put differently, a video franchise would no longer be a *privilege* – it would essentially become a *right*.

A new system of video franchising will likely lead to litigation and uncertainty - the very things that can cripple the development of a more competitive broadband services market

When such a dramatic change in policy occurs, winners and losers are created. The 1984 Cable Act carefully balanced the interests and concerns of the parties. Despite that care, certain provisions of the Cable Act have required interpretation by the courts – but certainty has been created through each such test. New efforts are now underway to develop greater certainty around the Cable Act's provision that prevents local franchising authorities from unreasonably refusing to issue a competitive franchise. The Federal Communications Commission, for example, has a rulemaking proceeding open on the matter,[367] and a handful of lawsuits have been filed by AT&T and Verizon which seek a court's ruling that a local franchising authority has acted "unreasonably" in response to a request for a video franchise or in response to a request for a permit to place fixtures in local rights-of-way.[368] Importantly, these lawsuits underscore the fact that telephone companies can seek judicial relief under traditional video franchising laws if they believe they have been treated unfairly.

[367] *In the Matter of Implementation of Section 621(a) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, FCC MB Docket No. 05-311.

[368] *See, e.g., Ill. Bell Tele. Co.* v. *Geneva, Ill.*, U.S. District Court Case No: 06CV2436 (N.D. Ill. Filed May 2, 2006).

When fundamental changes to underlying concepts and philosophies occur, however, a much broader scope of potential litigation results. In the case of the proposals advocated by phone company lobbyists, the relative bargaining position of each of the participants will change dramatically from that which exists today. Anticipating all potential areas of disputes is beyond the scope of this paper – but they will likely involve many core Constitutional claims related to free speech, taking without just compensation, equal protection, unfunded mandates, and issues related to federal/state rights. Such claims have the potential to disrupt the intended operation of any new video franchising scheme, and offer the possibility of creating more uncertainty. Lawyers will see opportunities; most others could be left wondering why the video competition promised by some lawmakers never seemed to develop.

» Risk #7: Ongoing Policy Debates Will Adversely Affect the Efficiency of Traditional Video Franchising.

New franchising systems, if adopted, would create more uncertainty -- rather than less -- while new legal challenges are being resolved by the courts. This risk isn't speculative; in fact, it's already being experienced.

The Cable Act contains a provision that prohibits the unreasonable denial of competitive franchises.[369] A well-established system also exists for franchise renewals.[370] The efficient operation of these provisions has suffered, however, as debates over new franchising systems continue.

Unfortunately, ongoing debates on this topic have reduced the telcos' interests in securing traditional video franchises, and have slowed franchise renewals with some incumbent providers

With respect to initial video franchises, some phone companies have made only marginal efforts to work within the parameters of traditional franchising. Many comments made in response to ICMA's surveys formed a theme: One ICMA member commented that "AT&T firmly believes that they

[369] 47 U.S.C. §541(a)(1).
[370] 47 U.S.C. §546.

are [sic] not required to have a 'cable' franchise agreement because their method of transmission is not like the cable company." Another noted that the telco was "waiting for federal legislative changes." Still another reported that delays in the franchise negotiation with a phone company "were due to work being done in Washington regarding national franchising."

Similarly, anecdotes from local governments reflect concern that cable companies have slowed their current franchise renewal efforts because legislative and regulatory outcomes remain uncertain.[371]

Consequently, instead of creating efficiency through certainty, ongoing policy debates have actually had the opposite effect. Until legislative outcomes are established, many activities that would otherwise be occurring under the traditional franchising system have slowed considerably. This unintended consequence is particularly damaging at a time when greater deployment of broadband systems is a national priority.

■ Conclusion: With Traditional Video Franchising, the Whole Is Greater Than the Sum of Its Parts

When it passed the Communications Policy Act of 1984, Congress created a delicate balance between many competing interests. The public's right to free flowing information, the local government's interest in franchising and regulating cable systems, and the industry's desire for growth and stability were all considered. Over the course of the two decades that have followed, certainty has been created through a body of court rulings and interpretive regulations. Traditional video franchising has also proven to be

[371] For example, with respect to the FCC's open Notice of Proposed Rulemaking on the matter, one commenter said that "[t]he FCC need [sic] to fully appreciate that this NPRM threw a monkey-wrench into all pending cable television franchise renewals, regardless of whatever the U.S. Congress might do." Reply Comments of Southeast Michigan Municipalities, *In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984*, at 60 (Feb. 28, 2006).

an adaptable system responsive to the local needs and interests of residents.

Because the traditional franchising system strikes a delicate balance between competing interests, potential changes to that system must be considered in the context of how each change will affect the whole of the system – a change should not be considered based solely on how particular parts of the existing system would be impacted. Taken individually, each change may appear to be a fair adjustment for the provision that may be replaced. When taken together, however, such changes can disrupt the delicate balance that currently exists.

Viewed in this light, compulsory franchising schemes change this balance. Many unintended consequences – several of them potentially destructive to the intended goal – are likely to surface as a result. With only 100 or so of the nation's 33,000 communities currently having wireline video competition provided by a phone company it's much too early to assume that wireline video competition will serve as an adequate substitute for traditional video franchising and local oversight. The premature adoption of compulsory franchising schemes poses the real potential to cause more harm than good.

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