

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

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

**COMMENTS OF
THE LEAGUE OF MINNESOTA CITIES,
THE MINNESOTA ASSOCIATION OF COMMUNITY
TELECOMMUNICATIONS ADMINISTRATORS, THE SOUTHWEST SUBURBAN
CABLE COMMISSION AND THE NORTHERN DAKOTA COUNTY CABLE
COMMUNICATIONS COMMISSION
IN RESPONSE TO THE FURTHER NOTICE
OF PROPOSED RULEMAKING**

These comments are submitted on behalf of the League of Minnesota Cities (“LMC”), the Minnesota Association of Community Telecommunications Administrators (“MACTA”), the Southwest Suburban Cable Commission (“SWSCC”) and Northern Dakota County Cable Communications Commission (“NDC4”) in response to the Further Notice of Proposal Rulemaking, released March 5, 2007, in the above-captioned rulemaking (“Further Notice”).

Introduction

The LMC is a statewide cooperative association representing 830 cities, 15 townships and 51 special districts. There are only 24 cities in Minnesota that are not LMC members (each of which has a population of less than 120). The LMC was established in 1913 within the school of public affairs at the University of Minnesota. It became an independent association

representing and serving cities in 1974. It is governed by a board of directors who are elected by the LMC membership.

MACTA is a non-profit association representing 105 cities and 9 townships in Minnesota. MACTA was formed in 1982 as a trade association supporting its member cities by providing educational, networking, and legislative/regulatory assistance in areas relating to cable television and telecommunications. MACTA members include cities, cable commissions, community cable TV facilities, and advisors working with these organizations.

The SWSCC is comprised of the cities of Eden Prairie, Edina, Hopkins, Minnetonka and Richfield, Minnesota with a combined population of approximately 200,000. The SWCCC was created in the early 1980s pursuant to Minn. Stat. § 238.081 Subd. 10 for the purpose of coordinating administration and enforcement of the individual franchises of each of the member municipalities and providing uniformity in administration and enforcement to ensure that cable systems are constructed, operated, maintained and upgraded in a manner that will be to the maximum benefit of the residents of each member municipality.

NDC4 is a municipal joint powers cooperative comprised of the cities of Inver Grove Heights, Lilydale, Mendota, Mendota Heights, South St. Paul, Sunfish Lake, and West St. Paul with a combined population of approximately 85,000. NDC4 is serviced by one franchised cable provider, Comcast. NDC4 has negotiated, administered and enforced cable franchises since 1985. The original franchisee was Continental Cablevision, which was later transferred to MediaOne, then to AT&T Broadband, and now the franchise is held by Comcast.

The LMC, MACTA, SWSCC and NDC4 (hereinafter "Minnesota Cities") support and adopt the comments of the National Association of Telecommunications Officers and Advisors,

the National League of Cities, the National Association of Counties, the U.S. Conference of Mayors, the Alliance for Community Media, and the Alliance for Communications Democracy, filed in response to the Further Notice.

The Minnesota Cities oppose the Further Notice's tentative conclusion (at ¶ 140 of the Order) that the findings made in the Commission's March 5, 2007, Order ("Order") in this proceeding should apply to incumbent cable operators, whether at the time of renewal of those operators' current franchises, or thereafter.

By its terms, the "unreasonable refusal" provisions of Section 621(a)(1)¹ apply to "additional competitive franchise[s]," not to incumbent cable operators. Those operators are by definition already in the market, and their future franchise terms and conditions are governed by the franchise renewal provisions of 47 U.S.C. § 546, and not Section 621(a)(1).

The Minnesota Cities strongly endorse the Commission's tentative conclusion (at ¶ 142 of the Order) that 47 U.S.C. § 552(d)(2) bars the Commission from "preempt[ing] state or local customer service laws that exceed the Commission's standards," and from "preventing LFAs and cable operators from agreeing to more stringent [customer service] standards" than the FCC standards.

I. Incumbent cable operators should comply with the franchise renewal requirements of 47 U.S.C. 546.

One of the six purposes for adoption of the 1984 Cable Act was to "establish an orderly process for franchise renewal which protects cable operators against unfair denials of renewal where the operator's past performance and proposal for future performance meet the standards

¹ (47 U.S.C. § 541)

established by this subchapter.”² To further that purpose Congress adopted specific procedures to be followed by LFAs and cable operators to address renewal of a cable franchise.³ The franchise renewal provisions of the Cable Act allow for a LFA to respond to an operator’s request for franchise renewal either via “informal” or “formal” renewal procedures. Over the past 20 years every cable operator in the country serving over 30,000 LFAs has complied with the § 546 Cable Act renewal requirements and only three cases have been reported where an operator’s request for renewal was denied.⁴

Most franchise renewals are completed using the “informal” renewal process⁵ whereby a LFA and cable operator undertake negotiations and ultimately arrive at mutual agreement on the terms for a renewed franchise. In cases where a LFA and cable operator are unable to reach agreement, the “formal” renewal process sets forth procedures and standards to ensure completion of the renewal process requested by the operator.⁶

In the formal renewal process Congress recognized that a LFA would need time to: 1) identify its future cable-related community needs and interests; and 2) review the performance of the cable operator under the current franchise. Therefore, Congress provided for a renewal process that begins during the 6-month period which begins with the 36th month before the

² 47 U.S.C. § 521 (5). *See also*, *Rolla Cable System, Inc. v. City of Rolla*, 761 F.Supp 1398, 1400 (E.D. Mo. 1991).

³ See 47 U.S.C. § 546.

⁴ *Cablevision of the Midwest, Inc. v. City of Brunswick, Ohio*, No. 199CV1442 (N.D. OH Dec. 18, 2000); *Union CATV, Inc. v. City of Sturgis, Kentucky*, 107 F.3d 434 (6th Circuit 1999) (see also *Union CATV, Inc. v. City of Sturgis, Kentucky*, 107 F.3d 434 (6th Cir. 1997)); *Rolla Cable Systems, Inc. v. City of Rolla*, 761 F. Supp. 1398 (E.D.Mo. 1991) (See also *Rolla Cable Systems, Inc. v. City of Rolla*, 745 F. Supp. 574 (E.D.Mo. 1990))

⁵ 47 U.S.C. § 546 (h): *Notwithstanding the provisions of subsections (a) through (g) of this section, a cable operator may submit a proposal for the renewal of a franchise pursuant to this subsection at any time, and a franchising authority may, after affording the public adequate notice and opportunity for comment, grant or deny such proposal at any time (including after proceedings pursuant to this section have commenced). The provisions of subsections (a) through (g) of this section shall not apply to a decision to grant or deny a proposal under this subsection. The denial of a renewal pursuant to this subsection shall not affect action on a renewal proposal that is submitted in accordance with subsections (a) through (g) of this section.*

⁶ 47 U.S.C. § 546 (a) – (g).

franchise expires.⁷ Cable operators have recognized the importance of the procedural protections provided under the formal process and have undertaken considerable efforts to verify that proper written notice is sent to LFAs three years prior to franchise expiration to ensure the formal renewal procedures have been triggered. The Commission's proposal to shorten the renewal process from 36 months to 90 days (as proposed under the Order) would render 47 U.S.C. § 546 moot and would create problems for both LFAs and operators where none exist today.

While 3 years may seem to be a long time to address franchise renewal, Congress understood that most franchises extend for a term of 15 years and LFAs would be required to verify franchise compliance over an extended time period. If franchise violations were discovered, the LFA would need time to provide the cable operator with notice and an opportunity to cure a franchise violation. Moreover, section 546 of the Cable Act, as well as the legislative history of the Cable Act, recommends that a LFA conduct a detailed "needs assessment" to properly document the future cable related community needs and interests.⁸ This needs assessment may include: 1) subscriber surveys to gauge subscriber satisfaction; 2) technical reviews to ensure compliance with electrical safety codes, applicable technical standards and recommended system upgrades⁹; 3) financial reviews to verify the accuracy of past franchise fee payments¹⁰; 4) a review of the legal, technical and financial qualifications of the operator¹¹; and 5) reviews of local public, educational and governmental programming needs regarding channel capacity, capital support and connectivity of schools and public facilities.¹² Congress understood that a sufficient period of time would be required for LFAs to undertake a

⁷ 47 U.S.C. § 546 (a).

⁸ H.R. Rep. No. 98-934, 98th Cong. 2d Session, 73-74 (1984).

⁹ 47 U.S.C. § 552 (a) (2).

¹⁰ 47 U.S.C. § 542

¹¹ 47 U.S.C. § 546 (c) (1) (C).

¹² 47 U.S.C. § 531 and § 544.

thorough review of these issues and complete a comprehensive needs assessment so the cable operator would have the benefit of objective standards on which to base its proposal for renewal.

The Commission's proposal to extend the findings of the Order to incumbent operators at the time of renewal creates a problem where none exists today. If the Commission extends the timing requirements contained within the Order to incumbent cable operators and mandates a 90 day time period for responding to request for renewals, the requirements of 47 U.S.C. § 546 will be largely rendered moot. A 90 day time period would virtually preclude any assessment of past performance and future needs by the LFA and would make it impossible to create a written record on which a renewal proposal would be based. In most communities a minimum of 30 days is required just to handle the procedural requirements of providing notice of a public hearing and completing the required two readings before a city council can grant a franchise. If only 90 days were permitted for the entire renewal process, a LFA would actually have fewer than 60 days to prepare a needs assessment and negotiate a new franchise and thereafter spend the final 30 days taking the franchise before the elected officials for action. Given that Congress determined that it would take up to 36 months to complete the renewal process, it would be irresponsible to force completion of the entire procedure in just three months as suggested in the Further Notice.

The Minnesota Cities disagree with the Commission's findings in the Order regarding the process to award competitive cable franchises. The Order is not only in conflict with the Cable Act but the Commission lacks authority to issue the findings set forth in the Order. However, assuming for argument's sake the Order is upheld and deemed necessary to speed the award of franchises for competitive video providers; no such need exists regarding franchise renewals for incumbent operators. An incumbent cable operator already has authority to provide cable

service. Once the provisions of section 546 are triggered the burden shifts to the LFA to either grant or deny the operator's request for renewal. If a LFA does nothing to respond to a renewal request, the incumbent franchisee is entitled to continue operating under the terms of its existing franchise until renewal is granted or denied, consistent with the requirements of section 546. During the renewal process no subscribers are denied service; competition is not slowed; and the incumbent operator has continued access to the rights of way to provide cable services and generate a profit.

Reviewing the key findings of the Order makes it clear that the Cable Act already addresses each issue with respect to incumbent operators.

A. Time limit for franchise negotiations.

As previously explained, section 546 of the Cable Act already prescribes the relevant time period for renewal negotiations, 36 months. This same 36 month time period will apply to competitive operators when their franchise comes up for renewal. Unless Congress changes the procedure for franchise renewal, the Commission not only lacks authority to change the relevant time period for the renewal process, but has sufficient information on hand that demonstrates that there is no compelling need to change the timing for the renewal process.

B. Build-out

The Order does not limit a LFA from imposing "reasonable" build-out mandates on a competitive operator. The Order offers guidance to LFAs by providing examples of reasonable and unreasonable build-out mandates; however, nothing in the Order precludes a LFA from mandating universal service so long as reasonable accommodations are offered regarding timing for construction, economic factors, density and related issues raised by the Commission. In Minnesota, state law requires that:

*No municipality shall grant an additional franchise for cable service for an area included in an existing franchise on terms and conditions more favorable or less burdensome than those in the existing franchise pertaining to: (1) **the area served**; (2) public, educational, or governmental access requirements; or (3) franchise fees. The provisions of this paragraph shall not apply when the area in which the additional franchise is being sought is not actually being served by any existing cable communications system holding a franchise for the area. Nothing in this paragraph prevents a municipality from imposing additional terms and conditions on any additional franchises.¹³ (emphasis added)*

Given that most incumbent operators in Minnesota have substantially built-out their service areas as required by an existing franchise, the main issue is whether a LFA should continue to have authority to mandate the extension of existing cable systems to newly developed areas. In practice, most Minnesota Cities have included provisions in their franchises that mandate service extensions where a certain density of homes exist, usually 20-40 homes per mile of cable plant. The density requirements vary from community to community based on residential lot sizes, zoning requirements, natural obstructions such as lakes and rivers and related factors. Minnesota Cities are in the best position to address build-out issues as they are the experts regarding development in their community and the needs of their constituents. For these reasons, the build-out guidance set forth in the Order need not be applied to incumbent operators.

C. Franchise Fees

The Cable Act at section 542 already provides ample clarification for LFAs and cable

¹³ Minn. Stat. § 238.08(b).

operators regarding the imposition of a franchise fee.¹⁴ In the Order the Commission attempts to rewrite a portion of section 542 by setting forth certain limitations on the franchise fee authorized by Congress under the Cable Act. Minnesota cities strongly disagree with the findings of the Order and maintain that if the Order is applied to existing franchises or franchise renewals a substantial portion of the negotiated compensation contained in local franchises may be adversely impacted.

By way of example, in 1997, the five member cities of the SWSCC negotiated franchise renewal with Time Warner Cable. The renewal was accomplished informally after preparation of an extensive needs assessment. The existing franchise requires that the operator (the franchise was recently transferred from Time Warner Cable to Comcast) maintain a single local public access programming studio for use by all five member cities. Comcast pays for the space, pays the employees, and covers all other costs associated with maintenance and operation of the studio. Total local programming costs associated with the studio of approximately \$300,000 per year are divided proportionately among the five cities and the costs are then passed through to Comcast subscribers. This agreement for local programming now contained in the current franchise was reached based upon extensive negotiations between the parties with concessions made by both parties in order to address this local need.

If the Commission were to impose the findings of the Order on incumbent operators immediately, as the cable industry is likely to argue, franchise requirements such as the one specified above may well be called into question. This could result, in turn, in reduced services to subscribers. Likewise, if the Order were to apply at the time of renewal, the local studio may also be in jeopardy, with the probable result of the loss of local programming for local cable

¹⁴ 47 U.S.C. 542.

subscribers. Moreover, Minn. Stat. Section 238.084 mandates that cable franchisees provide access channels for local use and minimum equipment for use by the public.¹⁵ Extending the application of the findings of the Order to incumbent franchisees would raise a conflict with Minnesota state law and lead to further questions regarding the obligations which incumbent operators must meet.

For these reasons, the Commission should not extend the findings of the Order to incumbent cable operators either immediately or at the time of renewal.

II. Impact of Order on most favored nation clauses in existing franchises.

Over the past decade, incumbent cable operators in Minnesota have been very aggressive in mandating that cities include a “most favored nations” (“MFN”) clause in any renewed franchise. Incumbent cable operators have argued that with the threat of competition, they need assurance that no competing cable operator will be granted a franchise that places the competitor at a competitive advantage in the marketplace. Some of these MFN clauses unilaterally permit the incumbent cable operator to amend the existing franchises if a more favorable franchise be granted to a competitive provider. Other MFN clauses allow the incumbent franchisee to “opt-in” to the competitive franchise on the same terms and conditions as the competitive franchisee. Still other provisions require that the LFA consider appropriate amendments to the incumbent franchise to assure a level playing field is maintained.

Minnesota also has a state level playing field statute which provides that a LFA cannot grant a franchise to a competitive operator on terms and conditions that are more favorable or

¹⁵ Minn. Stat Section 238.084(z) and (aa).

less burdensome than those in the existing franchise pertaining to: (1) the area served; (2) public, educational or governmental access requirements; or (3) franchise fees.¹⁶ To retain consistency, many LFAs have incorporated this state statutory level playing field requirement into their local franchises.

Generally, Minnesota cities support the concept that competing cable television operators should be regulated in a consistent manner so that no operator is granted an unfair competitive advantage over the other. Minnesota cities have generally found MFN clauses acceptable because the cities understood that the cities, as LFAs, would control the franchises granted to competitive operators. Therefore, cities were confident that they would not grant franchises to competitors that were more favorable or less burdensome. Even if a LFA chose to grant a less burdensome franchise to a competitor, the LFA understood that it might result in a reduction in franchise obligations for the incumbent operator.

However, this model has changed under the Order since a LFA may now be forced to grant more favorable terms to a competitive operator even if the LFA does not agree that such terms are in the best interests of the community. If such an award also permits the incumbent operator to opt out of its contractual obligations under the franchise, then local cable subscribers will be the losers.

As previously mentioned, given that a level playing field requirement is included in Chapter 238 of Minnesota Statutes and the FCC's Order does not preempt "state" level playing field requirements, the direct impact on MFN clauses in Minnesota may or may not be significant; however, if state law were to be modified by eliminating the level playing

¹⁶ Minn. Stat. § 238.08(b).

field requirement, enforcement of the MFN clauses by incumbent operators could result in significant harm to the Minnesota cities and local cable subscribers. Potentially, such harm could result in the loss of substantial revenue under existing incumbent cable franchises; loss of services to public schools and other public facilities; reduced authority to mandate compliance with local PEG and I-Net requirements and related matters as well as restrictions on or elimination of local PEG services.

Minnesota cities encourage the Commission to adopt policies that strengthen local authority to adopt cable television franchises which meet the local community needs and interests by taking into consideration the obligations already imposed on existing cable operators. If LFAs are stripped of this discretion, the adverse impact on the Minnesota cities and their residents, businesses, and institutions could be significant.

III. Consistent with 47 U.S.C. § 552 LFAs should be permitted to continue to have authority to adopt customer service standards that exceed the Commission's standards.

The Cable Act provides LFAs specific authority to establish and enforce customer service requirements of the cable franchisee.¹⁷ In addition, the Cable Act provides LFAs specific authority to require consumer protection laws and/or to reach agreement with cable operators regarding customer service requirements that exceed standards established by the Commission. The Cable Act provides:

¹⁷ 47 U.S.C. Section 552(a).

(1) *CONSUMER PROTECTION LAWS* — *Nothing in this title shall be construed to prohibit any State or franchising authority from enacting or enforcing any consumer protection law, to the extent not specifically preempted by this title.*

(2) *CUSTOMER SERVICE REQUIREMENT* — *Nothing in this section shall be construed to preclude a franchising authority and a cable operator from agreeing to customer service requirements that exceed the standards established by the Commission under Subsection (b). Nothing in this title shall be construed to prevent the establishment or enforcement of any municipal law or regulation, or State law, concerning customer service that imposes customer service requirements that exceed the standard set by the Commission under this section, or that addresses matters not addressed by the standards set by the Commission under this section.*¹⁸

Minnesota cities concur with the Commission's tentative conclusion that the Commission lacks legal authority to preempt LFAs from enacting and enforcing any consumer protection law. The Cable Act provides LFAs with clear authority to protect the interests of their residents and cable/video service subscribers. Local enforcement of such customer service obligations has greatly improved the cable industry's responsiveness to consumer complaints. Without question, local officials are best situated to respond to consumer complaints because of their unique knowledge of the community and the needs of their constituents. If consumers have complaints regarding the failure of an operator to bury a cable drop or repair facilities placed in a right-of-way easement, these are questions which should be directed to the LFA and are properly regulated by the LFA. Moreover, to the extent consumer complaints address issues regarding telephone responsiveness, installations,

¹⁸ 47 U.S.C. Section 552(d).

local office hours, outages and related issues, the LFA is in the best position to provide direct assistance to the consumer and to protect the consumer's interest in dealing with the cable operator. No other entity at the state or federal level is better equipped to address these customer service issues than LFAs such as the Minnesota Cities.

With respect to the provision of information services which the FCC has made clear is regulated only at the federal level, customer complaints regarding this service are still made to LFAs. It is impossible for the FCC to have sufficient staff available to handle the volume of complaints logged nationwide regarding the provision of broadband services by cable and telephone companies. Inevitably, these complaints end up being handled by LFAs, which are in the best position to provide assistance to their constituents and interact with the appropriate local operator to obtain resolution. With respect to information services, this customer service function carried out by LFAs regarding information services occurs despite the fact that that the FCC has eliminated local regulatory authority over information services. Should the Commission seek to further limit LFA authority over customer service standards regarding the provision of cable services, it would only further serve the purpose of reducing and/or eliminating the last best resource for subscribers when addressing problems with their cable operator.

For all of the above reasons, the Minnesota Cities strongly support the Commission's tentative conclusion at Paragraph 142 of the Order that the Commission lacks authority to preempt state and local customer service laws that exceed Commission standards.

IV. Conclusion

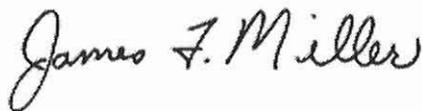
Minnesota cities disagree with the Commission's rulings in the Order related to local cable franchising for competitive video providers. Minnesota cities have acted in a reasonable

manner when processing applications for competitive cable franchises consistent with applicable state and federal law. Minnesota cities maintain that the Commission not only lacks authority to adopt the findings within the Order but that such findings violate the requirements of the Cable Act. However, to the extent the Order is upheld with respect to competitive cable operators, the Cable Act already contemplates a specific procedure to address the renewal of franchises held by incumbent cable operators at 47 U.S.C. § 546. The Commission has no authority to preempt or modify the Cable Act's renewal requirements nor is it feasible to expect that a LFA could process a franchise renewal in compliance with Section 546 within 90 days as contemplated under the Order.

Finally, Minnesota cities agree with the Commission's tentative conclusion that the Commission lacks authority to preempt state or local customer service laws that exceed the Commission's customer service standards.

Respectfully submitted,

LEAGUE OF MINNESOTA CITIES



By: _____
James F. Miller, Executive Director

**MINNESOTA ASSOCIATION OF COMMUNITY
TELECOMMUNICATIONS ADMINISTRATORS**



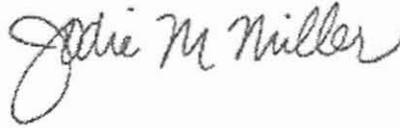
By: _____
Jeff Lueders, President

SOUTHWEST SUBURBAN CABLE COMMISSION



By: _____
Jim A. Genellie, Secretary/treasurer SWSCC

**NORTHERN DAKOTA COUNTY CABLE
COMMUNICATIONS COMMISSION**



By: _____
Jodie Miller, Executive Director

Dated: April 20, 2007

cc: Holly Saurer (Holly.saurer@fcc.gov)
Brendan Murray (Brendan.murray@fcc.gov)
NATOA (info@natoa.org)