

Before the
Federal Communications Commission
Washington, DC 20554

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

COMMENTS OF THE TEXAS MUNICIPAL LEAGUE AND THE TEXAS

CITY ATTORNEYS ASSOCIATION

IN RESPONSE TO THE FURTHER NOTICE OF

PROPOSED RULEMAKING

Submitted: April 30, 2007

Scott N. Houston
Texas Municipal League
Texas City Attorneys Association
1821 Rutherford Lane, Suite 400
Austin, Texas 78754
Telephone: (512) 231-7400
Facsimile: (512) 231-7490
E-mail: shouston@tml.org
ATTORNEY FOR TML and TCAA

Before the
Federal Communications Commission
Washington, DC 20554

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

**COMMENTS OF THE TEXAS MUNICIPAL LEAGUE AND THE TEXAS
CITY ATTORNEYS ASSOCIATION**

I. Introduction

The Texas Municipal League (TML) and the Texas City Attorneys Association (TCAA) respectfully submit these comments in the above-mentioned Further Notice of Proposed Rulemaking (FNPRM). TML is a nonprofit association of approximately 1,080 Texas cities that provides educational, legislative, and legal services to our members. TCAA, an affiliate of TML, is an organization of over 400 attorneys who represent Texas cities and city officials in the performance of their duties.

TML and TCAA advocate the common interests of Texas cities before legislative, judicial, and administrative bodies. We take action only when a legislative, administrative, or judicial body is considering matters of law or policy that will affect all or most Texas cities. We do not weigh in on matters

that are unique to one or a few cities, or are based on factual rather than legal or policy issues. TML and TCAA are submitting these comments because the issues in this FNPRM are of great importance to most Texas cities and, if not properly construed, may create unnecessary hardship for the citizens who rely on the terms of existing cable franchise agreements.

II. The Texas Legislature Has Acted to Promote Competition

For many years in Texas, cable companies were the sole provider of wire-based video programming to city residents. Until recently, a cable company that wanted to serve customers within a Texas city did so by obtaining a franchise agreement from that city pursuant to the 1984 Cable Act.

Cable services cannot be provided unless there is a cable franchise granted by the franchising authority.¹ “Franchising authority” is defined as “any governmental entity empowered . . . to grant a franchise.”² The designation of the “franchising authority,” whether it is a city or the state, is determined by state law. In Texas, until September 1, 2005, the local franchising authority was a city. Because of ever-growing technological capabilities, telecommunications companies now have the ability to provide

¹ 47 U.S.C. § 541(d).

² 47 U.S.C. § 522(10).

video programming, usually through the use of new technologies. Therefore, these companies wanted Texas' local franchise system reformed so that they would not have to obtain hundreds of franchises, which they felt would be an impediment to installing the infrastructure necessary to implement their new technology.

Texas cities were interested in reaching an agreement on a new compensation system that would provide cities with stable and predictable compensation for use of the public rights-of-way. Cities also wanted to ensure that all technologies and services, including cable and newer technologies, that use the public rights-of-way pay a fair and equitable fee for use of the public's land. In addition, cities wanted to ensure that they retained police-power authority over their rights-of-way and were still able to provide public, educational, and governmental programming to their citizens.

In 2005, the Texas legislature asked cities, cable providers, and telecommunications companies to reach a compromise on problems related to the current right-of-way compensation system for companies that provide cable services to city residents. The end result, after several failed bills, much negotiation, one regular legislative session, and two special legislative sessions, was Senate Bill 5. S.B. 5 does many things, including creating a new Chapter 66 of the Texas Utilities Code, and represents a compromise that was acceptable to cities.

The most important element of Chapter 66 for purposes of this discussion is that an incumbent provider is bound to its existing franchise until that franchise expires. Several cable providers have applied for, and received, a state-issued certificate of franchise authority. *See State-Issued Certificate of Franchise Authority Directory*, available at http://www.puc.state.tx.us/cable/directories/CFA/CFA_Directory.htm. The Federal Communications Commission (Commission) noted that the new Texas legislation was among “recent efforts at the state level [that would] ... facilitate entry by competitive cable providers.”³ The success of S.B. 5 continues to hinge upon the provision that allows cities to rely on their existing, negotiated cable franchises until they expire. It would be inequitable to release one party (the cable provider) from a negotiated contract to the detriment of the other party (the city).

III. Texas Cable and Telecommunications Association v. P.U.C.

Commissioners

In *Texas Cable and Telecommunications Association v. P.U.C. Commissioners*, 458 F.Supp.2d 309 (W.D. Tex., 2006), the Texas Cable and Telecommunications Association (TCTA) challenged the “grandfathering” provision in S.B. 5 that requires incumbent cable providers to fulfill

³ NPRM, para. 9.

obligations under existing franchise agreements until those agreements expire. TCTA asked for relief in the form of: (1) the invalidation of the entire state franchise system; or (2) the ability of incumbent providers to get out of existing franchises and seek a state franchise.

The cable industry made several different legal arguments in the case, but the short version of the arguments is that TCTA claims that its members (incumbent cable providers) are being discriminated against because they can't unilaterally opt-out of existing franchises. The counter-argument (and TML's and TCAA's position) is that nothing in the U.S. Constitution or federal law requires providers to be treated exactly the same. In fact, the federal Telecommunications Act grandfathered existing agreements when it was adopted in 1996.

The lawsuit was filed on September 8, 2005 (the day after S.B. 5 was enacted), and a hearing on motions for summary judgment was held in Austin, Texas, in May of 2006. In September of 2006, the court concluded that the case is not "ripe" for litigation because the TCTA failed to show an example of how being bound to existing franchise agreements would cause economic harm. On January 25, 2007, TCTA appealed the dismissal to the Fifth Circuit Court of Appeals. The success of S.B. 5, which has been cited as a model for state-level franchising around the country, depends on the ability of Texas cities to rely on the provision of existing cable franchises until their

expiration. As such, Texas cities continue to litigate the issue in federal court, and oppose the Commission's authority to undermine existing franchises.

IV. Application of the Order to Existing Franchises

TML and TCAA oppose the tentative conclusion in the FNPRM (at ¶ 140) that the findings made in the Commission's Order in this proceeding should apply to incumbent cable operators. This proceeding is based on Section 621(a)(1) of the Communications Act, 47 U.S.C. § 541(a)(1), and the rulings adopted in the Order are specifically directed at "facilitat[ing] and expedit[ing] entry of new cable competitors into the market for the delivery of video programming, and accelerat[ing] broadband deployment" (Order at ¶ 1).

The application of the Order to incumbent providers in Texas is unnecessary to promote competition, and would violate the Cable Act's goal of ensuring that a cable system is "responsive to the needs and interests of the local community," 47 U.S.C. § 521(2). The "unreasonable refusal" provisions of Section 621(a)(1) apply to "additional competitive franchise[s]," and not to incumbent cable operators. Incumbent providers are by definition already in the market. Their future franchise terms and conditions are governed by the franchise renewal provisions of Section 626 (47 U.S.C. § 546), and not Section

621(a)(1). In Texas, S.B. 5 has remedied the issues that the Order seeks to address, and the compromise it entails should not be preempted.

V. Conclusion

TML and TCAA recognize 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 FNPRM, and Texas cities ask the Commission to avoid changes that would negatively affect the provisions of S.B. 5. The Texas legislature has streamlined the cable franchising process in Texas, and provides for an almost immediate grant of authority to provide service. If the Commission intends to establish new standards or requirements for incumbent cable franchises, we request that those changes do not undercut or diminish the standards set out in Texas' hard-fought S.B. 5.

Respectfully Submitted,

Scott N. Houston
Texas Municipal League
Texas City Attorneys Association
1821 Rutherford Lane, Suite 400
Austin, Texas 78754
Telephone: (512) 231-7400
Facsimile: (512) 231-7490

E-mail: shouston@tml.org
ATTORNEY FOR TML and TCAA