

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

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

**REPLY COMMENTS OF
THE CITY OF MONTGOMERY ALABAMA**

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**REPLY COMMENTS OF
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These reply comments are submitted on behalf of the City of Montgomery Alabama (“City”) in response to the comments submitted by Knology, Inc. (“Knology”) in the Further Notice of Proposed Rulemaking released on March 5, 2007 by the Federal Communications Commission (“Commission”) in the above captioned proceeding (“FNPRM”).

The City is the capital city of the State of Alabama with over 200,000 residents, 86,787 households and a thriving city center which serves as the financial capital for the entire region. The City serves as the local franchising authority (LFA) for cable operators providing cable services in the City.

INTRODUCTION

Before turning to the issues raised in the FNPRM and those raised by Knology in its initial comments, the City must first register its strong disagreement with the findings and rulings

in the Order¹ accompanying the FNPRM. Those findings and rulings exceed the Commission's authority under the Cable Act, are unnecessary to promote competition, violate the Cable Act's goal of ensuring that a cable system is "responsive to the needs and interests of the local community,"² are in conflict with several other provisions of the Cable Act and other applicable law, and are arbitrary and capricious.³

The City opposes the FNPRM's tentative conclusion⁴ that the findings and rulings made in Order 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) apply to "additional competitive franchise[s]," not to incumbent cable operators. Incumbent 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 City strongly endorses the Commission's tentative conclusion⁵ 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.

¹ Implementation of Section 621(a)(I) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992, MB Docket No. 05-311, Report and Order, FCC 06-180 (rel. March 5, 2007) ("Order").

² 47 U.S.C. section 512 (2).

³ The City supports, adopts and incorporates by reference the April 20, 2007 comments filed in this docket by 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.

⁴ See paragraph 140 of the Order.

⁵ See paragraph 142 of the Order.

**KNOLOGY HAS SOUGHT TO UNREASONABLY EXTEND AND DELAY
FRANCHISE RENEWAL IN THE CITY.**

The City has granted separate franchises to both Charter Communications and Knology to operate cable systems and provide cable services in the City. The franchise now held by Knology was granted on March 6, 1990 (“Knology Franchise”)⁶ and included an initial franchise term of 15 years. The initial term of the Knology Franchise expired March 6, 2005. As noted in Knology’s Comments,⁷ Knology failed to comply with the renewal requirements of 47 U.S.C. section 546 (a) by missing the notification deadline which would trigger formal renewal protections under the Cable Act. Charter Communications did send a written notice to commence the formal renewal process.⁸ Without the benefit of the formal renewal process under the Cable Act, Knology has been seeking renewal of its franchise via informal renewal negotiations.⁹

Knology requested additional time to accomplish renewal of its franchise and the City granted an extension of the initial franchise for an additional one year term until March 6, 2006.¹⁰ Knology thereafter requested two additional extensions of the franchise term each of which were granted by the City.¹¹ Knology’s inability to obtain franchise renewal in the City relates entirely to Knology’s refusal to agree to comply with ordinance requirements that have

⁶ City of Montgomery Alabama Ordinance No. 16-90, adopted and approved March 6, 1990.

⁷ See Knology comments to the Commission at page 6.

⁸ Charter Communications sent a letter dated December 11, 2003 from Christina C. Mosca to the Honorable Bobby N. Bright requesting renewal under 47 U.S.C. section 546 (a-g).

⁹ Despite the fact that Knology failed to submit the required 626 renewal notification letter to the City, the City has provided Knology with the formal renewal protections and has processed Knology request for renewal consistent with the formal process triggered by Charter Communications. Thus, the City has given to Knology the very renewal protections it failed to take advantage of under the Cable Act.

¹⁰ City of Montgomery Alabama Resolution No. 84-2005, adopted and approved March 1, 2005.

¹¹ At the request of Knology, the City adopted resolutions extending the term of the Knology Franchise from March 6, 2006 until October 27, 2006 and from October 27, 2006 until December 19, 2006. No further extensions of the Knology Franchise term have been granted by the City.

been in place in the City for over 15 years. These are the very same requirements that Knology has been complying with under the Knology Franchise since it took over operation of the cable system.

One of the questions before the Commission in the FNPRM is whether to grant incumbent cable operators a shorter time period within which to accomplish franchise renewal. Knology failed to take advantage of the procedural protections offered by section 546 (a-g) of the Cable Act and now attempts to blame its missteps on the City in hopes of convincing the Commission that a shorter renewal time period should be mandated. The fact of the matter is that Knology could have exercised renewal rights under the Cable Act and should not now be rewarded with an expedited renewal proceeding to cure its self-created problems.¹²

Cable operators have long 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

¹² After protracted informal renewal negotiations with Knology produced no agreement, the City elected to issue a formal request for renewal proposal and allowed Knology to submit a proposal despite the fact that Knology failed to trigger the formal protections of section 546 of the Cable Act.

assessment” to properly document the future cable related community needs and interests.¹³

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 upgrades¹⁴ ; 3) financial reviews to verify the accuracy of past franchise fee payments¹⁵ ; 4) a review of the legal, technical and financial qualifications of the operator¹⁶ ; and 5) reviews of local public, educational and governmental programming needs regarding channel capacity, capital support and connectivity of schools and public facilities.¹⁷

Congress understood that a sufficient period of time would be required for LFAs to undertake a 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

¹³ .R. Rep. No. 98-934, 98th Cong. 2d Session, 73-74 (1984).

¹⁴ 47 U.S.C. § 552 (a) (2).

¹⁵ 47 U.S.C. § 542

¹⁶ 47 U.S.C. § 546 (c) (1) (C).

¹⁷ 47 U.S.C. § 531 and § 544.

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 City disagrees 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.

In the City of Montgomery, Knology could well have triggered the formal renewal protections of section 546 of the Cable Act but failed to do so and now hopes the Commission will grant relief by shortening the time period for the renewal proceeding. Knology can easily accomplish renewal in the City by agreeing to comply with ordinance requirements that have been in place for 15 years and by meeting the reasonable needs and interests of the City. Knology has so far chosen not to agree to those requirements and that is why its renewal negotiations have not been concluded. At the request of Knology, the City has granted three

separate extensions of the Knology Franchise to provide more time for renewal negotiations and still no agreement has been reached. The City has acted in a reasonable and prudent manner and has given Knology renewal protections contemplated under section 546 of the Cable Act even when the City was not required to do so. The City should not now be forced to accommodate an accelerated renewal process simply because of Knology's unreasonable actions.

**THE CITY'S REQUEST FOR FRANCHISE FEES AND PEG CAPITAL
SUPPORT ARE CONSISTENT WITH THE CABLE ACT**

The Cable Act at section 542 already provides ample clarification for LFAs and cable operators regarding the imposition of a franchise fee.¹⁸ 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. The City strongly disagrees with the findings of the Order and maintains that if the Order is applied to Knology's Franchise or Knology's franchise renewal, a substantial portion of the negotiated compensation contained in the City's local franchises may be adversely impacted.

In its comments, Knology asserts that the City has acted unreasonably by seeking to impose certain obligations during franchise renewal negotiations.¹⁹ First Knology argues that the City seeks \$0.25 -\$1.00 per subscriber, per month for educational and governmental access "capital support" that would not be attributable to the 5% franchise fee cap. The City in fact has created a detailed written record,²⁰ in accordance with the section 546 of the Cable Act, to document the City's cable related community needs and interests. The City engaged outside

¹⁸ 47 U.S.C. 542.

¹⁹ Knology comments at page 10.

²⁰ Formal Needs Assessment Report for the City of Montgomery, Alabama, March 8, 2007 ("Needs Assessment").

professional consultants to conduct the assessment and provide an objective list of “capital” needs related to educational and governmental access programming. The City has the right under section 542 (g)(2)(C) to pursue “capital costs which are required by the franchise to be incurred by the cable operator for public, educational, or governmental access facilities.”²¹ The Order does not preclude the City from pursuing reasonable capital costs related to educational and governmental access programming. These capital costs are not part of the 5% franchise fee cap but are subject to the exception provided at section 542 (g)(2)(C).

Second, Knology argues that the City requests free basic service drops to schools and designated public facilities such as libraries, police and fire stations. It is important to note that Knology has had the obligation to provide these same services under its existing franchise since the day Knology began providing cable services in the City. In fact, the City’s cable regulatory ordinance²² at section 16 has required this same obligation of all cable operators in the City for the past 30 years. The City has not created any new burden on Knology but rather has simply requested that Knology continue to be governed by the terms of its existing franchise, the City Regulatory Ordinance and the needs and interests set forth in the City’s Needs Assessment. These are the exact same service requirements that all cable operators in the City, including Charter Communications, have been providing for the past three decades.

Third, Knology argues that the City requests cable modem service to public schools and libraries in the City. This is a service which other operators have routinely provided to Cities and schools via the cable drops already in place. To the extent Knology is not interested in providing such services, the City and schools will likely seek competitive bids from all available providers to ensure high speed broadband services are available to meet the communities’ needs.

²¹ 47 U.S.C. 542 (g) (2) (C).

²² Ordinance 50-76, An Ordinance of the City of Montgomery, Alabama, Providing for the Construction, Operation, Regulation and Control of Cable Television Systems, adopted June 22, 1976 (Regulatory Ordinance).

Finally, Knology argues that the City's Needs Assessment "encourages" Knology to provide over-lashing rights, dark fiber and two way services to connect educational and municipal facilities. What knology fails to include in its description of this request by the City is the fact that the City is not mandating a dark fiber obligation nor is there any suggestion in the Needs Assessment that this requirement would not be subject to compensation from the City. The City Needs Assessment was created to address the future cable related needs and interests in the City recognizing that the City is served by both Knology and Charter Communications. The Needs Assessment addresses a number of communications issues and seeks proposals from the operators to meets those needs and interests. However, the only specific obligations in the Needs Assessment related to two way communications relates to the need of the City to obtain return capacity to accommodate cable-casting of the programming to be carried on the local educational and governmental access channels. The City has the right under section 542 (g)(2)(C) to pursue this obligation at the time of renewal as it is considered a "capital cost" in support of educational or governmental access facilities.

**THE CITY HAS NOT IMPOSED ANY OTHER "UNREASONABLE" DEMANDS
UPON KNOLOGY**

Knology also argues in it comments²³ that the City is asking for too many PEG channels because it maintains that the City is not fully utilizing its current channels. It is not clear why Knology would raise this issue in this proceeding as it is clearly a fact issue to be resolved between the parties via the renewal process of section 546 of the Cable Act. As previously mentioned, the City prepared a Needs Assessment that fully supports the cable related needs and

²³ See Knology comments pages 11-12.

interests of the City. Since the date on which Knology submitted comments in this proceeding Knology has submitted to the City a formal written proposal for renewal of its franchise. The City is now in the process of determining whether Knology's proposal meets the needs and interests set forth in the Needs Assessment. The FNPRM is not the proper forum to resolve how many local PEG channels should be included in the City's franchise with Knology. That issue will be resolved via the renewal process set for in the Cable Act. The costs associated with the provision of PEG channel capacity is already addressed in the Cable Act²⁴ and the City will comply with all Cable Act requirements in granting or denying the Knology Franchise.

CONCLUSION

The City disagrees with the Commission's rulings in the Order related to local cable franchising for competitive video providers. The City maintains 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 the City could process a franchise renewal in compliance with Section 546 within 90 days as contemplated under the Order.

Knology has trampled on the procedural requirements of section 546 of the Cable Act and the City has granted numerous franchise extensions to allow every possible opportunity for Knology to reach mutually acceptable terms for franchise renewal in the City. Knology asks the

²⁴ 47 U.S.C. § 531 and § 544.

Commission to solve its renewal process in Montgomery despite the fact that other cable operators serving over 30,000 LFAs across the country have been able to successfully complete renewal over the last 20 years. For all of the above reasons the City respectfully requests that the Commission not apply the findings and rulings of the Order to incumbent operators.

Respectfully submitted,

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