

**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 HANCE HANEY
SENIOR FELLOW & DIRECTOR OF THE TECHNOLOGY & DEMOCRACY PROJECT
DISCOVERY INSTITUTE**

By adopting pro-competitive, pro-consumer restraints on local franchise authorities with respect to new entrants in the market for multichannel video programming, the Commission has taken an important step in promoting the deployment of broadband capability. But pro-competition, pro-consumer policies can have anti-competition, anti-consumer results if not applied evenly.

Some of the comments filed in response to the Commission’s Further Notice of Proposed Rulemaking¹ urge the Commission to preserve local authority even though local taxation and regulation hinders rather than promotes investment in broadband.

Deregulatory parity is an important Commission objective, as this proceeding demonstrates. Aside from the need to apply the Commission’s findings to incumbent cable operators without delay, comments point to the fact the Commission also has an opportunity reduce unnecessary regulation in other pending proceedings to bring incumbents into parity with new entrants.

¹ *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, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd. 5101 (2007).

DISCUSSION

Local franchising was appropriate in the earliest days of cable television when small monopoly cable systems were being constructed on a local basis. Now that the monopoly era is over, local franchising is duplicative, inefficient and survives mainly as an opportunity for local government to collect tax revenue (or goods and services at no cost) through means other than property and sales taxes. If there were more popular support for explicit tax increases, local officials wouldn't care about local franchising. Why is the Commission, which is responsible for promoting the deployment of broadband, instead working to facilitate the desire of local officials to impose a multiplicity of less-visible taxes? The proliferation of taxes on "this and that" is inefficient and obscures the true cost of government. But for purposes of this proceeding, the Commission should understand that taxes on multichannel video programming also tend to reduce what cable and telephone companies can invest in their networks.

In the Telecommunications Act of 1996, Congress expressed its determination to promote competition, reduce regulation and encourage the rapid deployment of new telecommunications technologies. In Section 602(a) of the Act, Congress exempted direct-to-home satellite service from the collection or remittance of any tax or fee imposed by any local taxing jurisdiction. This exemption undoubtedly spurred the deployment of direct broadcast satellite services, which, in turn allowed the cable industry to invest \$100 billion over ten years to build a two-way interactive network comprising fiber optic technology.

Unfortunately, Congress has codified the right of LFAs to collect franchise fees and to regulate customer service – decisions that it ought to reconsider. Ironically, the only reason Congress addressed these matters in the first place is because certain LFAs abused their authority and federal intervention was necessary to protect consumers. Congress set the cap on franchise fees and enshrined the right of LFAs to regulate customer service before anyone grasped the significance or the global nature of the Internet as we know it today.

Among other things, in this proceeding the Commission – with respect to new entrants – has eliminated *unreasonable* requests for “in-kind” payments – and with respect to public, educational and government access (or “PEG”) – that attempt to subvert the five percent cap on franchise fees. The benefits of eliminating the possibility that *unreasonable* taxes and fees could strangle investment by eager new entrants can already be seen in the marketplace. Cable rate increases planned for 2007, according to the *Wall Street Journal*, “are going to be the most moderate in years,” thanks to competition from telephone companies.²

In the FNPRM, the Commission correctly recognizes that these pro-competitive and pro-consumer actions are germane to existing franchisees, and it concludes that its findings should apply to existing franchisees at the time of their next franchise renewal process. Parties such as NATOA et al. propose to limit the findings to initial franchise applications only, leaving LFAs free to conduct renewal proceedings as they choose. According to NATOA et al., applying the Commission’s findings to incumbent cable operators would “wreak immediate havoc” on existing local government budgets and PEG center budgets.³ NATOA et al. also argue that without asymmetric regulation of incumbent cable operators, the incumbents might never have to expand their current cable service footprint or they might even be able to withdraw from areas they currently serve.⁴ Both of these objections are misplaced.

1. THE FINDINGS SHOULD BE APPLIED TO INCUMBENT FRANCHISEES IMMEDIATELY.

No market participant should be subject to requests from LFAs which the Commission has concluded are “unreasonable.” The Commission should not allow LFAs to force incumbent cable operators to unreasonable “in-kind” payments or subject them to unreasonable requests for PEG for any length of time. To do so would be to consciously perpetuate asymmetric regulation, which is a form of industrial policy. The proposal of NATOA et al. to limit the applicability of the Commission’s findings

² “Cable Rate Increases Are Smallest in Years: Heightened Competition Offers Consumers Chance To Play One Provider off Another; When to Bundle,” by Sarmad Ali, *Wall Street Journal*, Dec. 7, 2006.

³ Comments of NATOA et al. (Apr. 20, 2007) at 15.

⁴ *Id.*, at 14.

to new applications only is a clear attempt to eviscerate the pro-competitive, pro-consumer benefits of the findings. It would allow LFAs to ignore the findings entirely, if they choose. Therefore, their proposal should be rejected.

The tax-and-spend aspirations of mayors and city councils should be a matter for local taxpayers, not this Commission. And, in any event, local authorities are in an ideal position to align its future conduct to what the Commission has concluded is reasonable, because local revenues have been surging. According to the *Wall Street Journal*, “local government spending doubled between 2000 and 2006.”⁵ NATOA et al.’s alarmist speculation to the effect that incumbents might freeze or even reduce their service footprints ignores the availability of competitive video service from DBS providers and telephone companies as well as the increasing availability of video content over the Internet.

A level playing field between incumbents and new entrants is necessary for competition, as NATOA itself recognized when it said:

to the extent that opponents of level playing field requirements mean to suggest that the FCC can or should untether the terms of competitive franchises from those of the incumbent’s cable franchise, or that competitive franchises should not have to be comparable to the incumbent’s franchise, they are simply wrong.⁶

2. REASONABLE LOCAL CUSTOMER SERVICE REGULATION SHOULD BE DEFINED.

Local regulation, even for the limited purpose of ensuring customer service, should be limited to the maximum extent possible. Patchwork regulation of interconnected networks that comprise the global Internet is highly inefficient and leads to balkanization, which inhibits innovation and investment. It’s also wasteful to require any business, merely because it has a local presence, to pay the salary and benefits of a public employee to receive customer service inquiries and forward them to the business for reply. Since there are more than 30,000 local franchise jurisdictions, we are talking about a lot of public employees. This arrangement made sense at one time, when cable companies were locally-owned

⁵ “Homeowners Rebellion,” (editorial) *Wall Street Journal* (May 1, 2007).

⁶ Reply Comments of NATOA et al. (Mar. 28, 2007) at 44.

monopolies, but it is now anachronistic as a result of consolidation and market competition. Finally, since there is a long history of over-reaching by local franchising authorities and since in reality it is possible to characterize virtually any regulation as a “customer service” rule, the Commission should make detailed findings as to what may or may not be a “reasonable” customer service rule. The Commission should also clarify the precise extent to which it can be counted on to preempt unreasonable local customer service regulation.

3. SERVICE QUALITY REPORTING REQUIREMENTS SHOULD BE SIMPLIFIED.

AT&T points out that its network is not designed to “collect, track and report data isolated to a particular municipality.”⁷ It would be more efficient for everyone to collect, report and track data at a higher level of aggregation than what is currently required of incumbent cable companies. The goal ought to be to minimize inefficient regulation and reporting requirements where possible to ensure that free markets flourish – not merely to preserve obsolete units of local authority.

4. THE COMMISSION SHOULD ATTACH A HIGHER PRIORITY TO OTHER PROCEEDINGS IN WHICH INCUMBENT TELEPHONE CARRIERS HAVE SOUGHT REGULATORY RELIEF TO BRING THEM INTO PARITY WITH NEW ENTRANTS

AT&T also has identified a number of unrelated proceedings which are languishing at the FCC for no good reason, and it suggests that the Commission should attach at least the same sense of urgency to completing action in these proceedings.⁸ The point is well-taken. For example, AT&T cites the Equal Access NOI, WC Docket No. 02-39; 272 Sunset Proceeding; AT&T’s Long-Distance Forbearance Petition, WC Docket No. 06-120; AT&T’s Broadband Forbearance Petition, WC Docket No. 06-125; 2006 Biennial Review Proceeding, WC Docket No. 06-157; and Separations FNPRM, CC Docket No. 80-286. Incumbent carriers have sought in these proceedings regulatory relief to bring them into parity with new entrants into the voice, data and broadband markets. The Commission should apply the principle of deregulatory parity with even-handedness.

⁷ Comments of AT&T (Apr. 20, 2007) at 5.

⁸ *Id.*, at 1-2.

CONCLUSION

The Commission is responsible for promoting the deployment of broadband, not preserving the ability of local governments to raise local tax revenues from obscure sources nor protecting the offices of local regulators even if they have outlived their usefulness.

The Commission has correctly and responsibly eliminated *unreasonable* requests of LFAs that attempt to subvert the five percent cap on franchise fees, among other things, and this set of actions has served to moderate cable rate increases and will allow telephone companies to continue to invest billions in broadband facilities.

Since it is axiomatic that a level playing field between incumbents and new entrants is necessary for competition, the Commission should apply its findings to incumbent franchisees without delay, define what constitutes “reasonable” local customer service regulation, simply service quality reporting requirements and attach a higher propriety to other proceedings in which incumbent telephone carriers have sought regulatory relief to bring them into parity with new entrants.

Respectfully submitted,

/ s /

Hance Haney
Senior Fellow
Director - Technology & Democracy Project
Discovery Institute

1015 15th Street, NW
Suite 900
Washington, D.C. 20005

May 4, 2007