

SUMMARY OF MARCH 27, 2006 DRAFT FRANCHISING REFORM LEGISLATION

I. National Franchising in General:

Eligible providers of cable service may choose to operate in a community either pursuant to a national franchise (obtained by filing a simple certification with the FCC) or pursuant to a local franchise (obtained under the existing Section 621 local franchising process).

A national franchise takes effect 30 days after filing (or, in the case of a cable operator with an existing franchise, the date on which that franchise expires).

If cable operator obtains a national franchise, it may subsequently elect to enter into a local franchise, in which case the local franchise supercedes the national franchise.

II. Eligibility for national franchise:

New cable operators: any entity that commences the provision of cable service in a franchise area on or after the date of enactment of the new law may obtain a national franchise.

Existing cable operators in areas served by a "new cable operator": any entity that is providing cable service in a franchise area on the date of enactment may elect instead to operate under a national franchise once a "new operator" with a national franchise begins providing service in the franchise area.

Existing cable operators in areas served by another existing operator: certain entities that are providing cable service in a franchise area on the date of enactment may obtain a national franchise once their local franchise expires, provided that:

If the existing cable operator is an ILEC, it can obtain a national franchise upon expiration of its local franchise only if another cable operator was serving the franchise area on the date of enactment.

If the existing cable operator is NOT an ILEC, it can obtain a national franchise upon expiration of its local franchise only if an ILEC was serving the franchise area on the date of enactment.

If an existing cable operator is competing head-to-head with a non-ILEC overbuilder, neither can obtain a national franchise and must continue to operate pursuant to local franchising even after their franchises expire

(unless a new entrant begins serving the area pursuant to a national franchise).

III. Procedure for obtaining national franchise:

To obtain a national franchise, an eligible entity must file a simple certification form with the FCC and serve a copy on each franchising authority for each franchise area covered by the certification.

Contents of the certification: (i) name under operator does business; (ii) names and business addresses of directors and principal executive officers; (iii) location of principal business office; (iv) name, address, e-mail address, telephone and fax number of local agent; (v) a declaration that the entity is eligible for a national franchise; (vi) a description of the service to be provided, including a description of the franchise area(s) to be served; and (vii) a declaration of service of the certification on the franchising authority of each area covered.

Updating and public availability: the information contained in the certification must be kept up-to-date and the FCC must provide public access to the certifications on its website.

IV. Term of national franchise:

The national franchise will have a term of ten years, subject to automatic renewal.

V. Revocation and reinstatement of national franchise:

The FCC may revoke a national franchise for a particular franchise area for the following reasons: (i) willful or repeated violation of federal or state law or FCC regulation relating to provision of cable service in the franchise area; (ii) false statements or material omissions knowingly made in any filing with the FCC relating to the provision of cable service in the franchise area; (iii) willful or repeated violation of rights-of-way management laws or regulations of the local franchising authority relating to the provision of cable service in the franchise area; and (iv) willful or repeated violation of the prohibition on redlining (see below).

If an entity's national franchise has been revoked for a particular franchise area, the FCC may refuse to accept a new certification from that entity for that same franchise area until the FCC finds that the basis for revocation has been remedied.

VI. Return to local franchising if competition ceases:

A local franchising authority may petition the FCC to terminate a national franchise awarded to a cable operator that previously operated pursuant to a local franchise. Such petition will become effective one year after filing if no other cable operator provides service in the franchise area during that year. A cable operator whose franchise is terminated under this provision must obtain a new local franchise under Section 621 in order to continue to provide service.

VII. Substantive obligations imposed on cable operator with national franchise:

Franchise fee requirements:

Limit: 5 percent of gross revenues (as defined below).

Gross revenues:

Includes: all consideration of any kind received by cable operator from the provision of cable service in the franchise area, including (i) subscriber fees (including portion of fees from packages that include cable services and services other than cable service); (ii) franchise fee (i.e., fee on fee applies); (iii) fees from home shopping channels; (iv) carriage fees received from programmers (but not reimbursable promotional fees); (v) advertising revenues attributable to local area and commissions paid to affiliated third party for advertising.

Excludes: (i) bad debts; (ii) refunds, rebates, discounts attributable to cable service; (iii) non-cable service revenue; (iv) directory or Internet advertising revenue (including banner ads and electronic publishing); (v) payments for bonds, letters of credit, insurance, etc. relating to managing public rights-of-way; (vi) taxes, fees, assessments of general applicability, including sales and utility user taxes; (vii) foregone revenue from provision of service at no charge; (viii) receipts from sale of capital assets and surplus equipment; (ix) reimbursement of marketing costs incurred in launch of new programming; (x) sale of cable services for resale if purchaser certifies that it will pay franchise fee.

Bundled services: In order to exclude a portion of revenues from bundled services, operator must be able to reasonably identify the division or exclusion of such revenue from its books and records kept in the ordinary course of business.

Affiliate revenue: Affiliate revenue must be included in gross revenues to the extent necessary to avoid the intentional or unintentional evasion of payment of franchise fees.

PEG/I-Net requirements:

Channel capacity: An entity operating pursuant to a national franchise must provide at least as much PEG capacity as the amount required by the cable operator with the most subscribers in the franchise area as of the date of the national franchise. The FCC is directed to adopt a rule specifying the amount of PEG capacity an operator is to provide if there is no other operator serving the franchise area. At the time a national franchise is renewed (ten years), the local franchising authority may require the operator to increase PEG and I-Net channel capacity by one channel or 10 percent, whichever is greater.

Financial support: 1% of the operator's gross revenues.

Interconnection and cost sharing: Where two cable operators provide service in a community, they must either agree to interconnection and cost sharing or comply with rules that the FCC is directed to adopt providing for a reasonable allocation of the costs of interconnection.

Program guide: Information regarding PEG programming must be provided in any print or electronic program guide, navigational device, or menu in the same manner as other video programming.

I-Net: A cable operator must continue to provide any I-Net that it was required to provide under its previous Section 621 local franchise; however, a cable operator with a national franchise cannot be required to construct a new I-Net.

Rights-of-way regulation:

The cable operator with a national franchise must ensure that the convenience and safety of other persons not be adversely affected by the installation or construction of facilities necessary for a cable system and that the cost of installing, constructing, operating, and removing facilities will be borne by the operator and/or subscriber.

The cable operator is responsible for compensating the owner of any property damaged caused by the installation, construction, operation, or removal of facilities.

State and local governments may, on a reasonable, competitively neutral, and non-discriminatory basis, impose charges for managing public rights-of-way and easements dedicated for compatible use and require compliance with the other specified rights-of-way provisions.

Consumer protection and customer service:

National standards. Cable operators will be subject to national customer standards (to be updated by the FCC within 120 days). State and local governments may impose additional customer service or consumer protection requirements of general applicability but may not otherwise exceed the national standards.

Enforcement: Any person may file a customer service complaint either with the local franchising authority or with the FCC. A local franchising authority may conduct a proceeding and issue an order requiring compliance with the FCC-mandated standards but may not create new standards or expand or modify the FCC's standards. The FCC may enforce a local order and, in the event an appeal of the order is filed with the FCC, the appeal must be resolved within 30 days. Local franchising authorities may charge a cable service provider a "nominal" fee to cover the cost of issuing orders.

Access to records: In a complaint proceeding, the local franchising authority may order the filing of any contract, agreement, or arrangement between the subscriber and the service provider or any other documentation directly related to the alleged violation.

Red-lining:

A cable operator with a national franchise may not deny access to any group of potential residential subscribers because of the income of that group. This provision is enforceable by the FCC (details of enforcement procedure not yet drafted).

Leased Access:

Existing provisions of law apply, including provision permitting cable operator to use leased access capacity for carriage of programming from a qualified minority programming or educational programming source apply to entities with national franchises.

VIII. Other obligations that still apply to operators with a national franchise:

Rate regulation, must carry and retransmission consent, program access, regulation of carriage agreements and privacy rules.

Rules governing use of excess PEG capacity.

Rules relating to blocking of indecent programming.

Home wiring rules, navigation device and set top box compatibility rules.

IX. Existing laws no longer applicable to operators with a national franchise:

Build-out obligations/construction timetable. [Note: while the draft legislation is not without ambiguity on the point, it arguably would allow an applicant for a national franchise to define the franchise area that they want to serve without regard to actual political subdivision boundaries].

Cable/MMDS and cable/SMATV cross-ownership restrictions and provisions requiring approval of franchise transfer within 120 day (presumably because national franchises would be freely transferable without local approval).

Except as described above, rules authorizing local government to establish and enforce various obligations on cable operator as part of franchise, including PEG access requirements, informational tariff filing requirements, and requirements for facilities and equipment.

X. Network neutrality regulation:

The FCC is given authority to enforce its “broadband policy statement.” That statement focuses on preventing broadband providers from blocking access to websites or use of certain applications; it does not necessarily prevent broadband providers from “prioritizing” traffic.

XI. Municipal provision of services:

The bill would guarantee the authority of cities to provide telecommunications service, cable service, or information service (including municipal wi-fi service), provided such service is not granted any preference or advantage over competing services unaffiliated with the city.

XII. VoIP 911/E911 and VoIP Interconnection:

The FCC is directed to adopt rules relating to the obligations and rights of VoIP providers with respect to 911/E911 service, including access to telco databases.

VoIP providers are guaranteed the same rights, duties, and obligations as wireline telephone companies with respect to interconnection.