Promoting Competition in the Provision of Cable Television Service
A Discussion Paper
Submitted on behalf of FairPoint Communications
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In 2008, the Maine legislature passed LD 2133, *An Act To Amend the Cable Television Laws and Establish a Model Cable Franchise Agreement*, which charged Maine's Office of Information Technology ("OIT") with convening a stakeholder group to develop a model cable franchise agreement. In developing the model agreement, the legislation directed OIT to consider "[t]he disparate needs of the diverse municipalities in this State; and…[t]he policy goal of promoting competition in the delivery of cable television service."[1] This document, which addresses these issues from the perspective of a potential new entrant into cable television service, has been prepared to share with the OIT, the stakeholder group, and other interested parties

Background

Cable television has historically been regulated by a mixture of broad policy from the Federal Communications Commission and specific franchise requirements implemented in franchise agreements adopted by municipalities in their roles as Local Franchising Authorities ("LFAs"). In 1984, Congress passed the Cable Communications Policy Act of 1984.[2] The legislation inserted Title VI provisions into the federal Communications Act regarding cable, confirming the dual federal and local regulation of the cable industry. In 1992, Congress provided further clarification through the Cable Television Consumer protection and Competition Act ("the 1992 Act").[3] For the first time, Congress explicitly addressed restraints on LFAs, specifying that they could not grant exclusive franchises and could not "unreasonably refuse to award an additional competitive franchise."[4] In the 2008 case, Alliance for Community Media et al v. FCC, the Sixth Circuit reviewed the legislative history of the 1992 Act, noting that current local franchising requirements had failed to provide consumers with the opportunity to select between competitive cable providers.[5] The court also noted that Congress had concluded that exclusive franchises were contrary to the federal policy of promoting competition.

Over the next decade, the FCC and the Government Accounting Office conducted numerous studies of competition, competitive issues and subscriber rates in cable television service.[6] These studies bore out the contentions of many that competition both

[1] 30 MRSA §3008.7, E and F.
[2] Public Law No. 98-549, 98 Stat. 2779
[3] Public Law No. 102-385, 106 Stat. 1460
[4] 47 USC §541(a)(1)
[5] Alliance for Community Media et al v. F.C.C., 529 F.3d 763 (6th Cir., 2008)
[6] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming,* MB Docket No.05-255, Federal Communications Commission, 1994-2006 ("FCC Annual Assessments 1 through 12"); *Issues in Providing Cable and Satellite Television Services*, GAO-03-130, US General Accounting Office 2002 ("2002 GAO Report"); *Issues Related to Competition and Subscriber Rates in the Cable Television Industry*, GAO-04-8, US GAO 2003 ("2003 GAO Report"); and *Subscriber Rates and*

improves customer service and reduces subscriber rates.[7] In response to “indications that the current operation of the franchising process still serves as an unreasonable barrier to entry for potential new cable entrants” and after noting that most communities in the country lack competition, the FCC issued a *Notice of Proposed Rulemaking* in November 2005 to determine whether the existing franchising process was impeding the statutory goal of increasing competition.[8] The FCC released its report and order in the matter on March 5, 2007 after substantial proceedings and public comment. Both LFAs and incumbent cable providers sued over the Local Franchising Order, which was upheld by the Sixth Circuit in the ACM, et al v. FCC case.

FCC-recognized Barriers to Competition

The Local Franchising Order found that the lack of competition in cable television service is due, at least in part, to the local franchising process.[9] The FCC found that “[r]egulatory restrictions and conditions on entry shield incumbents from competition…”[10] The FCC identified several factors that have stood in the way of competition. These include: (a) delays in acting on franchise applications; (b) insistence on the same terms for new entrants as for incumbents; (c) unreasonable build-out requirements; (d) LFA demands unrelated to provision of cable television services; (e) excessive demands over franchise fees; (f) unreasonable Public, Education, Governmental (“PEG”) channel and Institutional Network (“I-Net”) requirements; and (h) existence of local “level playing field” provisions.[11]

The FCC concluded that its record in the Local Franchising Docket supported an estimate that the existing local franchising process delayed entry by 8-16 months, and in some cases “completely derailed” deployment of competitive cable services.[12] The FCC noted that “[t]hese delays are particularly unreasonable when, as is often the case, the applicant already has access to rights-of-way” and has already “demonstrated its legal, technical and financial fitness as a provider of telecommunications services” when facilities-based providers obtain certificate of public convenience and necessity from state utilities commissions. The FCC noted approvingly of some states which have recognized this

Competition in the Cable Television Industry, GAO-04-262T, US GAO 2004 (“2004 GAO Report”).

[7] *See* 2002 GAO Report (noting that where there is another provider, rates are approximately 17% lower); 2004 GAO Report (noting that interviews with cable operators both lower rates and/or better customer service); and FCC Annual Assessment 12, paragraph 5 (competition provides “…increased choice, better picture quality and greater technological innovation”).

[8] *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by Cable Television Consumer Protection and Competition Act of 1992*, MB Docket 05-311, 20 FCC Rcd 18581 (“Local Franchising NPRM”)

[9] Report and Order in the Matter of *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by Cable Television Consumer Protection and Competition Act of 1992*, MB Docket 05-311, (“Local Franchising Order”), Paragraph 20.

[10] Ibid.

[11] Local Franchising Order, Paragraph 21.

[12] Local Franchising Order, Paragraph 22

distinction.[13]

The FCC found that it was unreasonable to expect new entrants to agree to the same terms as incumbent cable franchises, noting that incumbents had negotiated for a monopoly position, while new entrants were challenged by trying to compete with that same monopoly. The FCC found convincing evidence that imposing such same terms "may thwart entry entirely or may threaten new entrants' chances of success once in the market."[14]

With regard to system build-out requirements, the Antitrust Division of the U.S. Justice Department joined consumer groups and potential new entrants in urging the FCC to address the issue in order to support competition. The FCC agreed, noting that the record contained "numerous examples of build-out requirements at the local level that resulted in delayed entry, no entry, or failed entry."[15] The FCC noted that level-playing field provisions in local laws or existing franchise agreements were being used by incumbent providers to compel LFAs to impose the same build-out requirements on new entrants. The FCC also noted that in addition to burdening new entrants with unrealistic capital requirements, these requirements harmed consumer welfare by preventing consumers from enjoying provider choice and lower rates.[16] Finally, the FCC concluded that such requirements may have the effect of creating a de facto exclusive franchise, which violates federal law.[17]

The FCC referenced numerous examples in the record of LFAs making demands unrelated to the provision of cable services, such as purchase of street lights, provision of free broadband service, installation of telecommunications towers, funding of scholarships and even construction of a pool. Such requirements, concluded the FCC, were unreasonable per se.[18]

Even the assessment of franchise fees contributed to impeding competition in the FCC's judgment. Demands by LFAs for additional financial payments and uncertainty about which revenues are appropriately used to calculate the statutory franchise fee (capped at 5%) were cited from the record as delaying or frustrating entry.[19] In a similar manner, LFA demands regarding PEG and I-Net support were identified as another area in which excessive or inappropriate requirements were being imposed that had the effect of impeding competitive entry.[20]

In its analysis of the issue, the FCC returned to the role that level-playing field provisions play in impeding competition. The FCC's concern over such local requirements included

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[13] Local Franchising Order, Paragraph 23 and Footnote 72
[14] Local Franchising Order, Paragraph 26
[15] Local Franchising Order, Paragraph 33
[16] Local Franchising Order, Paragraph 36
[17] Local Franchising Order, Paragraph 40
[18] Local Franchising Order, Paragraph 43
[19] Local Franchising Order, Paragraph 44,45
[20] Local Franchising Order, Paragraph 46

the threatened or actual enforcement of such conditions by incumbent providers. The FCC noted yet again that while incumbents had negotiated for a monopoly position, level-playing field requirements require new entrants to meet monopoly terms for a competitive (and junior) position.[21]

Requirements of the Local Franchising Order

(a) **Maximum Times for Franchise Negotiation.** The FCC imposed a maximum 90 day deadline on franchise negotiations with new entrants who already have access to public rights of ways, such as local exchange carriers. It also imposed a 6 month deadline for new entrants without such pre-existing access. The clock starts upon submission of a complete application by the new entrant. It may be tolled if the LFA requests additional information, but resumes automatically when the information is provided. The FCC determined that failure to provide a final decision on a franchise application by a new entrant within these time periods constitutes an unreasonable refusal to award a franchise under federal law and the remedy is that an interim franchise is granted under the terms proposed by the applicant until final action is taken by the LFA.[22]

(b) **Limitation on Build-out Requirements.** The FCC determined that "it is unlawful for LFAs to refuse to grant a competitive franchise on the basis of unreasonable build-out requirements. The FCC gave some examples of requirements that were unreasonable, such as (i) requirements to serve everyone in a franchise area before serving anyone; (ii) requirements to build out beyond an existing footprint before beginning service; (iii) requiring the new entrant to build-out and serve in a shorter time or in a broader manner than incumbents were allowed originally; (iv) requiring build-out using non-standard technical solutions; or (v) requiring build-out to areas which the competitive applicant cannot obtain access on reasonable terms. The FCC did note that LFAs can negotiate reasonable benchmarks for buildout depending on the entrant's market success.[23]

(c) **Limitation on Franchise Fees and other Charges.** The FCC clarified that the statutorily allowed franchise fee is to be based on revenues from cable services only and may not include Internet access service fee revenue or other non-cable revenues.[24] While federal law allows LFAs to assess the franchise fee and incidental charges associated with the awarding or enforcement of the agreement, the FCC determined that non-incidental charges or fees must be counted against the statutory maximum of 5% of gross cable service revenues. The FCC relied on a series of court cases in determining whether certain fees or charges are incidental or non-incidental. As a result, while payments for bonds, insurance, indemnification, or penalties are considered incidental;

[21] Local Franchising Order, Paragraph 48
[22] Local Franchising Order, Paragraphs 67, 75, 77
[23] Local Franchising Order, Paragraphs 89, 90
[24] Local Franchising Order, Paragraph 98

"processing fees", attorney or consultant fees, "acceptance fees", costs of free or discounted services, and in-kind payments unrelated to cable service, are non-incidental and are subject to the 5% fee cap.[25]

(d) Limitation on PEG/I-Net Support Requirements. Capital costs required by the LFA for PEG access facilities are also excluded from the statutory definition of the franchise fee.[26] However, the FCC noted that such capital costs are different than payments in support of the use of PEG access facilities, and that payments made in support of such facilities are considered franchise fees and must be counted against the statutory cap for any franchise granted after 1984.[27] The FCC clarified that the statutory language allowing requirements for "adequate" PEG/I-Net support does not mean "significant" support but rather "sufficient" support.[28] The FCC also determined that "completely duplicative" PEG/I-Net requirements are per se unreasonable, as are payments made for facilities which are never built.[29]

(e) Pre-emption of Level Playing Field Requirements. In adopting the Local Franchising Order, the FCC preempted all local laws, regulations, and franchise or other agreements to the extent that such conflict with the provisions of the Local Franchising Order. The FCC specifically preempted all local "level-playing field" requirements, whether in local law, regulation or existing franchise agreements that are in conflict with "the rules, guidance, and findings adopted in this *Order.*"[30]

Competition in Other States

State level reforms of the cable franchising process have generally taken two forms: (1) imposition of a state-issued franchise system or (2) targeted reforms of the existing LFA system through state-imposed process requirements, deadlines, and build-out requirements.

More than one dozen states in the last 4 years have adopted statewide franchise arrangements, including California, Connecticut, Georgia, Illinois, Indiana, Kansas, Missouri, New Jersey, North Carolina, Ohio, South Carolina, Tennessee, Texas, and Wisconsin. At least seven other states have considered such arrangements, including Florida, Massachusetts, Minnesota, and New York. The stakes are seemingly high, since the Tennessee lobbying disclosure revealed that the pro-statewide advocates spent about $5 MM in lobbying and advertising and the anti-statewide advocates spent about $6 MM, just in 2007.

Several states, such as Arizona, Virginia and Michigan, have pursued incremental

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[25] Local Franchising Order, Paragraphs 104, 108
[26] 47 U.S.C. §542(g)(2)(C)
[27] Local Franchising Order, Paragraph 109
[28] Local Franchising Order, Paragraph 112
[29] Local Franchising Order, Paragraph 119
[30] Local Franchising Order, Paragraphs 137-138

improvements to the local franchising process with the implementation of uniform processes, deadlines and build-out requirements.

Recommendations for Maine

The stakeholder group did not fully discuss the issue of promotion of competition. The group did tangentially touch on competition-related issues during its discussions on certain topics (such as PEG, buildout, etc) for the model agreement. As a result, the stakeholder group did not develop recommendations on promotion of competition for consideration by the Legislature. However, FairPoint recommends that, at a minimum, the Legislature should fully consider the principles set out by the FCC in its recent actions, whenever the legislature considers issues concerning cable services.

FairPoint further recommends that the legislature commission a follow up study to specifically consider how best to promote competition in cable services by:

(1) Reviewing the implications of the FCC's Local Franchising Order;

(2) Examining the experiences of other states who have reformed the local franchising process; and

(3) Involving a broad range of stakeholders including consumer advocates, local franchising authorities, existing providers and current or potential new entrants. Such a study should be completed prior to the beginning of the 125th Legislature.

FairPoint believes that Maine consumers will see similar benefits to those noted by the FCC if the Maine Legislature takes concrete steps to promote competition in the provision of cable services. FairPoint looks forward to discussing this issue further with the Legislature and all interested parties.