Position Statement on Cable Television Regulation in Maine

Submitted by New England Cable and Telecommunications Association (“NECTA”)

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NECTA is a nonprofit corporation and trade association that represents the interests of most cable television operators in the six-state New England region. NECTA has participated actively in the stakeholder process convened by the Office of Information Technology (“OIT”) pursuant to the 2008 enactment of LD 2133 (“An Act to Amend the Cable Television Laws and Establish a Model Cable Franchise Agreement”). NECTA has reviewed the May 2009 Discussion Paper circulated by stakeholder participant FairPoint Communications (“FairPoint” and “FairPoint Paper”) and offers the following statement to assist participants in the stakeholder process in considering possible changes to Maine’s cable television regulatory scheme based on bilateral franchise negotiations between cable operators and local franchising authorities (“LFAs”).

Position Statement

The FairPoint Paper provides an oversimplified summary of cable television laws, a more detailed summary of certain portions of the Federal Communications Commission’s (“FCC’s”) March 2007 Local Franchising Order,[1] and some self-serving observations about the cable television industry from the perspective of FairPoint as “a potential new entrant into cable television service.”[2] This position paper seeks to offer facts relevant to the franchising process and the cable television industry that are not addressed in the FairPoint Paper.

I. Competition is Expanding With Level Playing Field and Buildout Requirements in Many Franchise Agreements.

The FairPoint Paper discusses the growth of competition only in terms of “state level reforms” to cable franchising statutes. The experience of competitive cable operators in New England, however, has been replete with significant successes even where level playing field or buildout requirements remain incorporated in applicable franchise terms. Massachusetts, Rhode Island, Connecticut and Vermont are all expressly exempted from the limitations imposed on cable franchising requirements in the Local Franchising Order;[3] yet competition has blossomed with remarkable speed in those jurisdictions. Among other key developments:

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1 Report and Order, Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984, as amended, MB Docket 05-311 (rel. March 5, 2007).

2 FairPoint Paper at 1.

3 Local Franchising Order at ¶1 (at note 2) (exempting states with a full or partial state-level regulatory scheme).

Massachusetts: Since its initial launch in late 2005 under the longstanding municipal franchising scheme, Verizon has secured more than 90 cable franchises in Eastern and Central Massachusetts, has more than a dozen additional franchise agreements in the works, and has built its advanced FiOS network in more than 115 communities. RCN has competing systems in nearly 20 communities and competing cable systems have been launched by municipal electric plants in two additional communities. This level of competitive success has occurred despite the fact that many local franchising agreements contain level playing field and buildout provisions. Based on this marketplace success, the Massachusetts Department of Telecommunications and Cable and the General Court have declined to act on repeated Verizon requests to create new or streamlined cable franchising regulations and laws favoring new entrants.

Rhode Island: Just as in Massachusetts, Verizon has moved swiftly to secure multiple cable television franchises across Rhode Island despite the presence of significant level playing field and public access comparability requirements. To date, Verizon has obtained franchises covering 22 of 39 Rhode Island towns, including most of the major population centers, and is building additional broadband facilities.

Connecticut: In 2007, franchising legislation was enacted that created a "cable-lite" regulatory scheme for new entrants but, importantly, also allowed existing operators to opt into a substantially similar scheme following entry of a competitor – thereby allowing competition to occur on a level playing field, as required by Connecticut law. AT&T secured a state-wide franchise and to date has launched service in more than 90 communities. Furthermore, the Groton Electric Light Department has established a competing cable provider that is serving customers in six communities in Southeastern Connecticut.

Vermont: Burlington Telecom has been serving the City of Burlington since it obtained its certificate of public good from the Public Service Board in 2005. A "ValleyNet" cable system that would serve 20-plus communities in Central and Eastern Vermont is awaiting a certificate of public good ruling from the Public Service Board and determinations of whether financing will be available for network construction.

II. Claims of Competitive Barriers Should Be Verified Before They Are Used to Justify Changes to Regulatory Requirements.

The FairPoint Paper devotes much of its length to discussing concerns expressed in the FCC's Local Franchising Order with unreasonable level playing, buildout and other franchise requirements as a potential justification for regulatory changes. Nevertheless, participants in the OIT process should be aware that LFAs, cable operators and public interest groups have expressed serious concerns with the bases for the conclusions reached in the FCC's Local Franchising Order, including (1) the absence of documented facts offered to support the FCC's conclusions concerning alleged barriers to competition in the local franchising process; (2) the FCC's failure to acknowledge any countervailing public harms from sharply reducing time periods for public input into franchise applications; and (3) the absence of affirmative obligations on new entrants to expedite their efforts during the newly curtailed negotiation windows. More granular examinations of new entrant franchising efforts have failed to identify proof that the franchising process is a true barrier to competitive entry. As early as 2006, Verizon's Chairman told investors that the franchising process did not pose "any impediment to our rolling out of FiOS…."[4] As one might expect with Verizon getting more than 90 individual franchises in Massachusetts over a three year period, most have been routinely obtained within a few months.

If stakeholders are contemplating changes to the current Maine cable regulatory scheme based on the analysis done by the FCC in Washington, NECTA suggests at a minimum that proponents be asked to substantiate claims of entry barriers using actual names, dates and supporting documents before considering any such proposals. If municipalities are frustrating franchising efforts in Maine by making demands unrelated to cable services such as "purchase of street lights, provision of free broadband services, installation of telecommunications towers, funding of scholarships and even construction of a pool" (FairPoint Paper at 3 (citing Local Competition Order at ¶ 43)), OIT and the other participants should confirm the truth of these allegations before undertaking a reform of existing laws based on an unverified assumption that such barriers actually exist.

Moreover, to the extent that a particular form of local regulation is determined to be excessive, it should be reduced or eliminated for <u>all</u> providers rather than in selective and discriminatory fashion only for new entrants.[5] While NECTA does not support unilateral changes that favor new entrants, it can and does support efforts, such as in Connecticut, where all providers benefit from reduced cable regulatory obligations.

III. Additional FairPoint Observations Regarding the Cable Industry Require Clarification.

A. Cable Operators are not a "Monopoly"

The FairPoint Paper and the Local Competition Order use the word "monopoly" with respect to cable operators. This is not an accurate or fair description. As is well known in Maine, a largely rural state, cable operators have battled in the marketplace for years with two significant satellite providers, DirecTV and Dish Networks, which have a national video market share in excess of 30%. Cable operators have not had the ability to monopolize anything for many years, if ever. Moreover, unlike a true monopoly provider, cable operators are not guaranteed a rate of return on the network investments

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4 Conference Call Transcript, Verizon 2005-Q4 Earnings Conference Call, Jan. 26, 2006.

5 The FCC subsequently extended many the municipal franchising limitations in the Local Competition order to incumbent cable companies. <u>Second Report and Order</u>, Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984, as amended, MB Docket 05-311 (rel. November 6, 2007).

they make. Spurred by competition from satellite providers and from the incumbent telephone companies, a decade ago cable operators invested more than $100 billion with no federal assistance or assurance of return to create a new fiber optic broadband platform which now delivers high-speed Internet access, digital video, digital telephone service and an array of interactive service.

B. Cable Companies Embrace Competition and Less Regulation.

The FairPoint Paper (at 3) implies that existing cable operators were using level playing field provisions and other protections in their franchise agreements to burden new entrants and create de facto exclusive franchises in violation of federal law. To the contrary, cable companies have been facing robust competitive marketplaces for communications services and, as such, have commonly supported efforts to minimize regulatory burdens on cable and its competitors. For example, the cable industry supported the 1999 changes to federal law which authorized satellite providers to offer local broadcast signals, the 1996 elimination of rules prohibiting telephone companies from offering video services, and the recent efforts of telephone companies to deregulate their high-speed Internet services so that they could complete with all broadband providers on a level playing field.

In the core video area, the cable industry's primary interest in cable franchise reform is to ensure that all competitors in the video marketplace compete under the same set of rules, rules that can undoubtedly be streamlined in a more deregulatory manner. Thus, an incumbent should have the right to opt into any new franchise agreement that has better terms and conditions. The government should not pick winners and losers in the broadband industry by establishing a different set of rules that favor one provider over another. Local governments certainly should retain a role in oversight with respect to rights-of-way management, meeting community needs and interests (including equitable sharing among providers of public access and institutional network responsibilities) and the enforcement of nondiscrimination requirements.

C. Video Competition Typically Does Not Reduce Prices.

The FairPoint Paper (at 1-2) references General Accounting Office ("GAO") and FCC studies that allegedly "bore out the contentions of many that competition both improves customer service and reduces subscriber rates." National experience suggests that rate reductions typically do not occur upon competitive entry. In Maine and other markets, cable companies already face two powerful satellite competitors and price their services accordingly. The GAO and FCC studies provide little basis for concluding that, in this already competitive environment, telephone company entry into cable television will result in lower prices for consumers. Both studies were based on a small sampling of overbuild systems (six for the GAO, 66 for the FCC). Larger studies, such as one provided to Congress by the National Cable and Telecommunications Association, found that where new entrant prices were lower it was because: (1) they had purchased failed overbuild systems at a deeply discounted price, (2) they were municipally-owned systems that were subsidized by taxpayers, or (3) the initial lower rates were found to be unsustainable and were either quickly raised to prices comparable to incumbents or the companies went out of business.

Competition certainly gives all providers incentives to improve service and expand service offerings, but it should not be expected to lead to longterm reductions in subscriber rates.

IV. Recommendations for Maine.

The FairPoint Paper concludes by requesting a follow up study that would examine “the implications of the FCC’s Local Franchising Order” and “the experiences in other states who have reformed the local franchising process” and involve a broad range of stakeholders. NECTA welcomes such an effort but notes that such follow up study should include, at minimum, (1) all pertinent FCC and State experience with franchising reform, including the Second Report and Order that extended Local Competition Order protections to incumbents, (2) the experience of State legislators and regulators that have adopted evenhanded approaches to cable reform and rejected proposals for changes that only benefited new entrants, and (3) the marketplace experience of new entrants that have rolled out services without apparent adverse impacts from the franchising process.