

MAR 17 1999

RECEIVED
OFFICE OF
COMMISSIONER
SUSAN NESS

MAR 15 1 50 PM '99

FEDERAL COMMUNICATIONS COMMISSION
LOCAL AND STATE GOVERNMENT ADVISORY COMMITTEE
Federal Communications Commission
KIM M Secretary
Docket
CS 96-85

Reply to: Kenneth S. Fellman, Esq.
Kissinger & Fellman, P.C.
3773 Cherry Creek North Drive, Suite 900
Denver, Colorado 80209
(303) 320-6100 Telephone; (303) 320-6613 Facsimile

March 11, 1999

Ken Fellman, Chair
City Council Member at Large
Arvada, Colorado

Marilyn Praisner, Vice-Chair
Montgomery County Council
Rockville, Maryland

Tom Armstrong, State Representative
Marietta, Pennsylvania

Michael Brasher, City Councillor
Albuquerque, New Mexico

Bill Campbell, Mayor
Atlanta, Georgia

Kay Chapman, State Representative
Cedar Rapids, Iowa

Michael Guido, Mayor
Dearborn, Michigan

Randy Johnson, Commissioner
Hennepin County
Minneapolis, Minnesota

Thomas Menino, Mayor
Boston, Massachusetts

Darryl T. Owens, Commissioner
Jefferson County
Louisville, Kentucky

Mary Poss, Mayor Pro Tem
City Council Member, District 9
Dallas, Texas

Louise H. Renne, City Attorney
San Francisco, California

Patrick Spears, President
Intertribal Council on Utility Policy
Fort Pierre, South Dakota

David A. Svanda, Commissioner
Public Service Commission
Lansing, Michigan

Fran Ulmer, Lieutenant Governor
Juneau, Alaska

Honorable William E. Kennard
Chairman
Federal Communications Commission
445 12th Street, S.W.
Room 8-B201
Washington, D.C. 20554

Honorable Harold Furchtgott-Roth
Commissioner
Federal Communications Commission
445 12th Street, S.W.
Room 8-A302
Washington, D.C. 20554

The Honorable Gloria Tristani
Commissioner
Federal Communications Commission
445 12th Street, N.W.
Room 8-C302
Washington, D.C. 20554

Honorable Susan Ness
Commissioner
Federal Communications Commission
445 12th Street, S.W.
Room 8-B201
Washington, D.C. 20554

Honorable Michael Powell
Commissioner
Federal Communications Commission
445 12th Street, S.W.
Room 8-A204
Washington, D.C. 20554

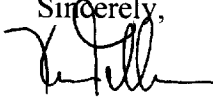
Dear Chairman Kennard and Members of the Commission:

On behalf of the Local and State Government Advisory Committee (the "LSGAC"), I would like to express my appreciation for the assistance and cooperation of the Commission staff during last week's meeting of the LSGAC. We met with Commissioners Furchtgott-Roth and Tristani, and with the staff of the other three Commissioners, and we are grateful for their attentiveness to our concerns. As you know, one of the principal items on our agenda was discussion of the Cable Act Reform proceeding, CS Docket No. 96-85. I would like to take this opportunity to provide you with a copy of the LSGAC's recommendations regarding that proceeding.

No. of Copies rec'd _____
List A B C D E _____

March 11, 1999
Page 2

Please let me know if you have any questions or if we can provide you with any additional information.

Sincerely,

Ken Fellman
Chairman

cc: LSGAC Members and Staff

[Word97 Version]

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of
Implementation of Cable Act
Reform Provisions of the
Telecommunications Act of 1996

)
)
)
)
)

CS Docket No.96-85

To the Commission:

**FCC LOCAL AND STATE GOVERNMENT ADVISORY COMMITTEE:
ADVISORY COMMITTEE RECOMMENDATION NUMBER 13**

At its meeting on November 20, 1998, the Local and State Government Advisory Committee ("LSGAC") considered the issues presented by the proposed rules in the above-referenced docket. Comments and Reply Comments were received in June 1996 and, subsequently thereto, have not been the subject of any public debate. The LSGAC, created and convened after the date of Comments and Replies, has not previously had the opportunity to consider the issues therein presented. The LSGAC is appreciative of the Commission's willingness to delay formal consideration of the recommendation of the Cable Services Bureau.

There are undoubtedly numerous issues addressing the many local franchising authorities throughout the country. The following recommendations address the five major categories that the LSGAC has identified in the time it has had to consider these issues.

As its recommendations to the Commission on Cable Act Reform, the LSGAC forwards the following five Resolutions, adopted this 20th Day of November, 1998.

LOCAL AND STATE GOVERNMENT
ADVISORY COMMITTEE

By: _____
Kenneth S. Fellman, Chairman

FCC LOCAL AND STATE GOVERNMENT ADVISORY COMMITTEE

**Implementation of Cable Act Reform Provisions
of the Telecommunications Act of 1996
Notice of Proposed Rulemaking
CS Docket No. 96-85**

**RECOMMENDATION 13(A):
RESOLUTION ON TECHNICAL STANDARDS AMENDMENT**

In enacting the 1996 Telecommunications Act ("the Act") Congress did not intend to limit local franchising authorities' ability to negotiate, require, and ultimately enforce standards for the equipment and facilities used by their franchisees. This is demonstrated by analysis of both statutory construction and legislative history.

The primary grant of authority to local franchising authorities to require certain technologies of their franchisees is found in Section 624(b). Congress retained the pre-existing "facilities and equipment" language of Section 624(b) which explicitly preserves a local franchising authority's power to require cable system "facilities and equipment." This essential authority was neither repealed nor amended by the 1996 Act.

However, Congress did place one minor technology limitation on the authority of local franchising authorities. Section 624(e) of the Cable Act, which addresses signal protocols, was amended to read "No State or franchising authority may prohibit, condition, or restrict a cable system's use of the type of subscriber equipment or any transmission technology." This was a response to concern over whether local franchising authorities could require or preclude specific converter boxes or scrambler devices, an issue raging during

Congressional hearings on the Act. In fact, while Congress denied this specific power to local franchising authorities, it expanded its prior grant of authority to the Commission to address equipment compatibility standards. 47 U.S.C. Section 544a.

Retaining the power of local franchising authorities to regulate the equipment and facilities used by its cable franchisees also best effectuates the public policy of Congress and the Commission. Local franchising authorities can advance federal policy by negotiating franchise agreements that require construction and performance by advanced, high speed, high capacity networks throughout communities. Local franchising authorities are in the best position to determine their own standards for Institutional Networks and PEG access channels.

If local franchising authorities are denied the power to negotiate detailed equipment and facility specifications, such as system capacity, extent of use of fiber optic cable, homes per node, band width for digital carriage, or amplifiers per cascade, it is difficult to see how system upgrades will occur in a timely fashion in many communities, if at all.

If local franchising authorities are denied this power, it is likely that there will continue to be spotty customer service and signal reliability, particularly in those areas where the companies do not see any short-term economic advantage in upgrading to fiber optic or other potential for enhanced services. Without this authority there is a diminished likelihood of achieving equality of service in rural areas and center city residential areas. Similarly, there will be a likelihood of lesser platforms upon which institutional networks can be overlaid.

Many, if not all, major franchises renewed since the adoption of the Act have included provisions for specific equipment and facilities to be provided as upgrades. To issue a rule denying the ability of local franchising authorities to negotiate, include, and enforce such provisions will, at a minimum, upset and imbalance literally hundreds of arms-length agreements. At the worst, such action would cause significant and expensive litigation to the detriment of the franchise authorities, the cable companies, and ultimately, the subscribers.

RECOMMENDATIONS: For the reasons discussed above, the LSGAC recommends that the Commission:

1. Impose no restriction upon the ability of local franchising authorities to further the public interest by negotiating, including, and enforcing provisions for specific cable system equipment and facilities in the franchise process.
2. Limit the term "transmission technology," as used in Section 624(e) of the Cable Act to converter boxes, scrambler and unscrambler devices, and similar customer reception equipment.
3. Protect the integrity of existing contracts between cable operators and local franchising authorities.

Approved by the LSGAC on November 20, 1998.

Kenneth S. Fellman
Chairman, LSGAC

FCC Local and State Government Advisory Committee

**Implementation of Cable Act Reform Provisions
of the Telecommunications Act of 1996
Notice of Proposed Rulemaking
CS Docket No. 96-85**

**RECOMMENDATION NUMBER 13(B)
RESOLUTION ON STANDARDS ENFORCEMENT**

In its Notice of Proposed Rulemaking in CS Docket No. 96-85, released April 9, 1996, the Commission asked for comment on the effects of the 1996 amendments to Section 624(e) of the Cable Act, which now limits local franchising control over "a cable system's use of any type of subscriber equipment or any transmission technology."

In 1992, Section 624(e) was amended to direct the Commission to adopt technical standards, which the Commission did. At the same time, Congress added language expressly stating that franchising authorities may include provisions for enforcing the Commission's standards in their franchises, and they may also ask the Commission for waivers to impose more stringent standards. This language was removed by the 1996 Act. Although the Commission's public notice did not raise this issue, some cable operators argued that the new language prevents local franchising authorities from enforcing the Commission's technical standards.

Standards are meaningless if not enforced. Preventing local franchising authorities from enforcing the Commission's standards makes no sense as a matter of policy. The Commission is not equipped to police every franchise in the country, and it has no mechanism in place to deal with complaints regarding compliance with its standards. On the other hand, allowing local franchising authorities to

continue to enforce standards set by the Commission is entirely in keeping with the traditional division of responsibilities between the FCC and franchising authorities. Where national standards are necessary and appropriate, the Commission is responsible for determining the standards, but franchising authorities are responsible for day-to-day supervision of compliance by their franchisees.

In addition, the law does not prevent local enforcement. Nothing in the Cable Act states that local franchising authorities are preempted from enforcing the FCC's standards; they are merely preempted from developing their own standards. The language added by the 1996 Act, referring to subscriber equipment and transmission technology simply has no bearing on enforcing technical standards. It is important to remember that Section 624(b) gives franchising authorities broad authority to establish requirements for facilities and equipment. Unless another provision restricts that broad authority, a franchising authority can regulate an operator's facilities and equipment – this naturally included setting technical standards, before Congress directed the FCC to perform that task. But the authority to *enforce* technical standards remains intact. The prior language stating that a local franchising authority could require enforcement as a condition of a franchise was a useful clarification, but its deletion did not detract from the fundamental authority to establish requirements for facilities and equipment. Indeed, as noted earlier, the Commission's public notice gave no indication that the amendment altered local authority. If anything, the Commission's public notice indicated that local authority was not altered, since it noted that Section 626 permits franchising authorities to require upgrades and consider signal quality in the course of renewal, and that Section 621 states that franchising authorities may require adequate assurance that the operator has the technical qualifications to provide cable service. It is difficult to see how these provisions can have any practical effect if local authorities cannot enforce the FCC's technical standards.

RECOMMENDATION: For the reasons discussed above, the LSGAC recommends that the Commission reject any interpretation of Section 624(e) that would prevent local franchising authorities from enforcing the Commission's technical standards.

Approved by the LSGAC on November 20, 1998.

Kenneth S. Fellman
Chairman, LSGAC

FCC Local and State Government Advisory Committee

Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996 Notice of Proposed Rulemaking CS Docket No. 96-85

RECOMMENDATION 13(C) RESOLUTION ON EFFECTIVE COMPETITION

In its Notice of Proposed Rulemaking in CS Docket No. 96-85, released April 9, 1996, the Commission asked for comment on the effects of the amendment to the definition of "effective competition" in Section 623(l) of the Cable Act. Section 301(b)(3) of the Telecommunications Act of 1996 ("the Act") added new subsection 623(l)(D) to define effective competition when a local exchange carrier is providing video programming services in a cable operator's franchise area. The definition of effective competition is important to local franchising authorities and cable subscribers because cable rates in areas subject to effective competition are unregulated.

Section 623(l)(D) states that there is effective competition in a cable operator's franchise area if a local exchange carrier ("LEC") offers video programming services to subscribers in the franchise area (whether directly or through an affiliate, or by making its facilities available to another video programming distributor), *and* if services offered in that area are comparable to the cable operator's services. The Commission's public notice asked for comments on what it means for a LEC to "offer" service in a franchise area, and what it means for that service to be "comparable."

We begin with the proposition that "effective competition" means just that: the status of competing that truly has the effects of competition. The statute does not define "nominal competition" or "inconsequential competition." Accordingly, the Commission's rules must interpret the term in a manner that gives it real meaning.

The Commission has continued to apply the definition of "offer" that was in effect under its rules when the Act was adopted. 47 C.F.R. § 76.905(e). This definition does not clearly address the scope of the geographic area in which competition exists. For example, cable industry proposals would have the Commission find effective competition when a LEC offers service in a tiny fraction of a cable operator's franchise area, regardless of whether the vast majority of the incumbent's subscribers could actually obtain service from the LEC.

Whether a service is "offered" should depend on whether it is available throughout a franchise area. Conversely, effective competition should exist only in the area in which a LEC is actually making service available. Otherwise, a cable operator would be relieved of rate

regulation throughout its franchise area, even though most of its subscribers would not have a choice of provider or benefit from competitive rates. Similarly, effective competition cannot be deemed to exist in geographic areas larger than a franchise area merely because there is competition in some percentage of the individual franchises within the area. Such a broad definition would lift rate regulation even in areas with no competition whatsoever.

The Commission's public notice also asks what is meant by "comparable programming." The Commission's current rules define "comparable" as a service that includes at least 12 channels of programming, at least one of which is "non-broadcast service programming." 47 C.F.R. § 76.905(g). The Conference Report refers to 12 channels, "at least some of which are television broadcasting signals."

Neither of these definitions results in truly "comparable" programming. One of the distinguishing characteristics of cable programming is the presence of PEG access channels. Congress recognized this when it extended PEG programming requirements to open video systems. The same standard should apply to a LEC if its programming is to be viewed as comparable and, therefore, capable of presenting effective competition.

The Commission's public notice also proposed that MMDS operators be deemed to provide comparable programming if they provide an A/B switch to allow subscribers to receive broadcast channels using a separate over-the-air antenna. Requiring subscribers to switch antennas because a service provider cannot deliver broadcast programming over the air is not comparable to receiving cable programming where no such switch is necessary. If the MMDS provider is incapable of delivering the broadcast signal itself, it falls outside of both the Commission's definition and the definition in the Conference Report.

RECOMMENDATIONS: For the reasons discussed above, the LSGAC recommends that the Commission:

1. Define the term "offer" in a manner that acknowledges that the geographic area in which services are actually available is critical to whether effective competition actually exists; and
2. Define the term "comparable" to encompass all the types of programming, including PEG, that cable operators actually deliver to subscribers.

Approved by the LSGAC on November 20, 1998.

Kenneth S. Fellman
Chairman, LSGAC

FCC LOCAL AND STATE GOVERNMENT ADVISORY COMMITTEE

Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996 Notice of Proposed Rulemaking CS Docket No. 96-85

RECOMMENDATION 13(D) RESOLUTION ON SUBSCRIBER NOTICE

Section 301(g) of the Telecommunications Act of 1996 ("the Act") allows cable operators to give notice to subscribers of rate and service changes using "any reasonable means." In its interim rule, the Commission provides that written notification in newspapers and on the cable system is sufficient for purposes of Section 301(g). This does not insure reasonable notice.

The FCC interim rule does not define "written notification in newspapers." Consequently compliance could consist of a mere small print notice lost among little read pages of advertisements. Furthermore, many newspapers carry pages of legal notices, from sheriff's sales to bid solicitations. It is not reasonable to assume that large numbers of subscribers, or even a few, will occasion upon a notice of a cable company announcing a rate increase, a change in tiers, or the termination of any service. And a "tombstone" notice is particularly inappropriate when the cable operator knows the actual addresses of all subscribers that will be affected by a rate increase.

Similarly, many cable system announcements are crawled across the bottom of a screen: on major channels, and on lesser-viewed or "barker" channels. It is not reasonable to assume that many subscribers will see, recognize, or understand a description of a rate increase injected digitally between announcements of a thunderstorm watch and high school football scores.

In addition, every subscriber receives regular written communications from cable companies: bills for past or future service, magazine or newsletter formats of program schedules, announcements of special opportunities for subscribers. Quality customer service includes giving the subscriber "bad news" with the same mode and timeliness that "good news" is delivered. Subscriber bills are a tried and true "reasonable" form of communication. Various communities have different billing procedures. Practice indicates that the form of notice

that best serves the community should be left to local community decision.

Many states and home rule local franchising authorities have strict laws protecting notice rights of customers, particularly those in ongoing relationships like subscriptions. Commission rule notice ought not preempt broad-based state or local laws, or franchise provisions relative to notice.

RECOMMENDATION: For the reasons discussed above, the LSGAC recommends that the Commission:

1. Recognize that any blanket federal rule defining "reasonable means" should not allow newspaper notice or digitally mastered announcements crawled over cable channels as adequate, given an operator's extensive contacts with individual customers; and a federal standard may not be adequate under all circumstances to provide "reasonable" notice to all subscribers.
2. Recognize that local jurisdictions may define additional "reasonable written means" for notice within their community; and
3. Not preempt any additional state and local requirements of notice defining "reasonable written notice."

Approved by the LSGAC on November 20, 1998.

Kenneth S. Fellman
Chairman, LSGAC

FCC Local and State Government Advisory Committee

**Implementation of Cable Act Reform Provisions
of the Telecommunications Act of 1996
Notice of Proposed Rulemaking
CS Docket No. 96-85**

**RECOMMENDATION NUMBER 13(E)
RESOLUTION ON SMALL CABLE SYSTEM EXEMPTION**

In its Notice of Proposed Rulemaking in CS Docket No. 96-85, released April 9, 1996, the Commission asked for comment on the effects of the 1996 amendments to the Cable Act, which provides regulatory relief to small cable system operators.

The Commission's notice recognized that Congress instituted the exemption for a limited purpose, to wit, to protect truly small cable operators who, by virtue of their size, cannot meet normal regulatory requirements and who should, by nature of their size, should not be subject to rate regulation.

The regulatory relief provided to small cable operators should be limited to truly small operators. Therefore the Commission should recognize three distinct circumstances that should do not qualify as "small systems". First, MSO's frequently create shell corporations to hold a particular franchise. These shell companies that may hold a franchise are true corporate extensions of the parent MSO and should not, without more, be qualified as a "small system operator". Second, many MSO's aggregate multiple small franchise territories into single system operations. These single systems should be measured in the aggregate, and not franchise territory by franchise territory, to determine eligibility for the deregulation permission. Finally, an MSO that owns multiple properties should count all of its affiliated properties to determine eligibility for exemption. The measure of system size should be based on the total holdings of the MSO. "Affiliates" should be measured broadly to limit the exemption to true small operators, not larger MSO's that choose to operate multiple properties.

If MSO's are permitted to ignore the true extent of their holdings through artificial affiliate structures, the small operator exception could exclude a large percentage of cable subscribers from necessary regulatory protections.

RECOMMENDATION: For the reasons discussed above, the LSGAC recommends that the Commission adopt a broad definition of "affiliate" that will prevent MSOs from evading appropriate regulation. Specifically, the Commission should count all franchise territories operated as a single system and should count all systems operated by a single MSO and its subsidiaries in calculating whether a particular operator qualifies as a "small operator".