



# MAYOR AND COUNCIL AGENDA

NO. 12  
2005

DEPT.: Information and Technology /  
STAFF CONTACT: Doug Breisch

DATE PREPARED: October 18, 2005  
FOR MEETING OF: November 1,

**SUBJECT:** Resolution Opposing Federal Legislation on Cable Franchising

**RECOMMENDATION:** Staff recommends that the Mayor and Council adopt the resolution and direct staff to send copies to U.S. Representatives and Senators from Maryland, other members of Congress, and the City of Rockville's federal lobbyist.

**DISCUSSION:** Three bills have been introduced in Congress that would severely restrict or eliminate local government's ability to regulate its public rights-of-way through cable franchise agreements. They also would negatively impact the revenue cities receive from cable franchises, and they would limit the number of PEG stations. They also would remove enforcement of customer service standards from local government. They do not require a build-out of the entire community as existing franchises do.

Two of the bills would grant national cable/video franchises to telephone companies. The third bill would preempt all local cable franchises, including existing ones, and would limit local government zoning authority over siting of wireless communications facilities such as monopoles.

Several national local government organizations, of which Rockville is a member, are working to oppose the legislation. This resolution would support those efforts and add another individual municipal voice to that of the organizations.

A recently released bill drafted by House Staff is under review. An initial review indicates it has some improvements, but there are still matters of concern to local government.

**Options Considered:** Do nothing; allow national organizations to handle all communications related to the legislation.

**Fiscal Impact:** The worst case scenario, elimination of all local franchises, franchise fees, and PEG grants, would result in a loss of about \$3.1 million (2005 dollars) to the City over the next seven years, the remaining term of the Comcast franchise.

**Change in Law or Policy:** None. The resolution would reinforce the City's position on local franchising and rights-of-way management.

**Boards and Commissions Review:** N.A.

**Next Steps:** Send copies of resolution along with letters to the Maryland Congressional Delegation, other elected officials as appropriate, and the City's federal lobbyist.

**PREPARED BY:** Doug Breisch, Television and Telecommunications Manager

 10/24/05

**CONCUR:** Michael Q. Cannon, Director of Information and Technology



**APPROVED BY:**

**DATE:**

**LIST OF ATTACHMENTS:**

1. Resolution
2. Letter to Congressional Delegation
3. House and Senate Franchise Bills—Comparison of Four Bills (Miller & Van Eaton P.L.L.C.)
4. House and Senate Bills—Analysis and Comparison of Three Bills—Spiegel & McDiarmid
5. Local Government: Partner in Promoting Video Competition
6. NATOA Core Values Executive Summary
7. Local Cable Franchising is Good Public Policy—NATOA
8. Action Alert—S. 1504, NATOA

Resolution No. \_\_\_\_\_ RESOLUTION: To Express the Opposition of the Mayor and Council of Rockville to Proposed Federal Legislation Regarding Cable Television Franchising and Rights-of-Way Management

WHEREAS, on June 30, 2005, United states Representatives Marsha Blackburn and Albert Wynn introduced H.R. 3146, the “Video Choice Act of 2005”; and

WHEREAS, on June 30, 2005, United States Senators Gordon Smith and John Rockefeller introduced S. 1349, the “Video Choice Act of 2005”; and

WHEREAS, the Mayor and Council of Rockville opposes passage of H.R. 3146 and S. 1349 because the proposed legislation:

- Creates a national cable/video franchise for “Competitive Video Services Providers (CVSPs),” which essentially are telephone companies (or others) that have authority to use the public rights-of-way for other purposes, thereby treating cable and telephone companies (or others) unequally, a direct conflict with the principle of competitive neutrality;
- Prohibits local governments from requiring CVSPs to obtain a local cable franchise agreement, thereby eliminating the tool municipalities use to manage their rights-of-way, collect franchise fees, and impose and enforce customer service and PEG (Public, Education, Government) requirements;
- Provide local governments no mechanism to collect, audit and enforce franchise fees payments;
- Expose local governments to possible state prohibitions on collecting franchise fees;

- Provides no requirement for CVSPs to provide any monetary or in-kind support to PEG over and above the franchise fee;
- Remove local enforcement of prohibitions against economic redlining;
- Preempt local authority to require system buildout to a minimum density and/or cable service to the entire community; and
- Rather than promoting competition, gives one industry (telephone companies) an advantage over another (incumbent cable companies), thereby negating or mitigating benefits of competition; and

WHEREAS, on August 2, 2005, U.S. Senators John Ensign and John McCain introduced S. 1504, the “Broadband Investment and Consumer Choice Act of 2005; and

WHEREAS, the Mayor and Council of Rockville opposes passage of S. 1504 because:

- The bill would preempt all local authority over the provision of cable and video services within the community, including the ability of the local government to provide appropriate oversight to entities conducting business within their jurisdiction and in the local public rights-of-way;
- The City’s negotiated contract with its cable operator would be abrogated under the terms of the bill;
- The bill would substitute a new compensation methodology on the parties to the City’s existing franchise contract, depriving the City of the agreed-upon bargain by lowering the existing franchise fee and replacing it with a fee which must be justified as being “reasonable” in the eyes of the user, limited to management costs (which denies the rights of the property owner to obtain

fair and reasonable compensation for the use of public property for private gain), and not in excess of five percent;

- These requirements and restrictions would result in the creation of a subsidy to the cable and telecommunications industries, at the expense of the City's taxpayers;
- The bill would further substantially reduce the revenues that are now includable in the definition of "Gross Revenues" so that even if the franchise fee did in fact remain at five percent, the City's revenues from the fee would be significantly less because of the smaller revenue base;
- The bill would substantially reduce the amount of capacity that may be required by local governments to meet their public, educational and government ("PEG") access needs, while stripping the City of the ability to obtain capital support for the use of PEG capacity—part of the bargain contained within the City's negotiated franchise agreement—with the result that the community's cable-related needs and interests would not be met;
- The bill would deprive local citizens of the ability to address local issues locally, by removing to the state all customer service issues, and further by denying consumers any form of recourse for any actions of a communications provider;
- The bill would eliminate any build-out requirements for any video service provider, thereby allowing providers to discriminate based on, for instance, the wealth of the local neighborhoods they choose to serve;

- The bill would preempt any state or local law that is not generally applicable to all businesses, thereby potentially preempting any law applicable to only certain classes of businesses, such as utilities and rights-of-way users (such as requiring undergrounding of facilities and ensuring electric code compliance);
- The bill would prohibit the City from imposing any fee for issuance of rights-of-way construction permits, yet it would require the City to act on requests for permits in a timely manner as determined by the FCC, thereby insinuating inappropriate federal government involvement in the basic day-to-day management of local rights-of-way;
- The bill would prohibit municipalities and their utilities from providing communications services without giving a right of first refusal to private industry, and would then grant industry unfettered access to all municipal facilities and financing in the event private industry chooses to provide services;
- The bill would deprive the City of the authority to establish and maintain government owned and operated networks, known as institutional networks, that may be utilized by first responders and other government officials in the day-to-day management of the City's business;
- The bill would permit broadened preemption of local zoning decisions relating to the placement of cell towers, depriving the City of the authority to ensure that such towers are safely and appropriately located in areas to provide the greatest degree of services without unnecessarily posing a hazard

to the public health, safety and welfare, and without minimizing the negative visual impact on the community;

- The bill would eliminate the protection the City currently has against liability for damages and attorneys fees in lawsuits brought by communication service providers against local governments, a type of litigation that the bill would seem to invite service providers to bring; and

WHEREAS, for these reasons, the Mayor and Council of Rockville finds that it should oppose S. 1504, S. 1349, and H.R. 3146 and urges the Maryland Congressional Delegation and other members of Congress to oppose these bills; and

WHEREAS, the Mayor and Council of Rockville finds that this Resolution should be forwarded to the Maryland Congressional Delegation, other members of Congress as deemed appropriate, and to the President of the United States.

NOW, THEREFORE, BE IT RESOLVED BY THE MAYOR AND COUNCIL OF ROCKVILLE, MARYLAND as follows:

1. For the reasons stated above, the Mayor and Council of Rockville, Maryland declares its opposition to S. 1504, S. 1349, and H.R. 3146 and urges the Maryland Congressional Delegation and all other members of Congress to oppose these bills.
2. The Mayor and Council of Rockville, Maryland hereby directs that this Resolution be forwarded immediately to the Maryland Congressional Delegation, other members of Congress as deemed appropriate, and to the President of the United States.
3. This Resolution shall become effective immediately upon its passage

Resolution No. \_\_\_\_\_

\* \* \* \* \*

I hereby certify that the foregoing is a true and correct copy  
of a resolution adopted by the Mayor and Council at its  
meeting of

\_\_\_\_\_  
Claire F. Funkhouser, CMC, City Clerk

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November 2, 2005

The Hon.

Dear Senator/Representative:

The Mayor and Council of Rockville welcome and encourage competition in the telecommunications and wired video industries, but not when the conditions under which it is provided harm consumers, taxpayers, or local governments. We believe that three bills introduced in Congress will result in harm to your constituents and ours, and that is why we have adopted the enclosed resolution opposing passage of S. 1349, H.R. 3146 ("Video Choice Act of 2005) and S.1504 ("Broadband Investment and Consumer Choice Act of 2005"). We respectfully request that you vote in opposition to these bills.

We believe that any changes in the law that may be enacted should, at a minimum:

- Provide a level playing field for all providers
- Require new entrants into the cable/video business to play by the same rules as the incumbent providers
- Maintain customer service enforcement at the local government level, where it is most effective and efficient
- Not abrogate or abridge the authority of local government to manage its property (including the public rights-of-way) and obtain reasonable compensation for its use by for-profit private industry.
- Not abrogate any existing contracts or agreements that local governments have with private parties
- Result in no financial harm to local governments, taxpayers, or other constituents.
- Not abrogate or abridge local government's land use and police powers authority in regard to communications facilities such as monopoles and antennas.

The three bills identified above fail to meet these minimum tests for protecting consumers, taxpayers, residents, and local government.

While the enclosed resolution details our concerns about the proposed legislation, there are three items we want to specifically address here.

First, in regards to S. 1349/H.R. 3146, you may hear telephone companies argue that these bills are necessary because the local franchising process is too long and cumbersome. This simply is not true. The City of Rockville has told Verizon all it has to do is agree to the same franchise agreement that Comcast has, change the names and dates, and the City would be ready to sign. Verizon has not accepted this proposal

The Hon.  
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November 2, 2005

Second, customer service protection works best at the local level. Montgomery County, which also handles customer service matters for the City of Rockville, has been both effective and efficient in resolving complaints about cable customer service. The County's staff often goes out to a customer's property to investigate complaints about physical problems with cable. In our experience, the County quickly addresses customer service problems—often the same day—and resolves them quickly, as well. What federal agency has the money, staff, and proximity to provide the same level of service? Are you willing to provide additional funding to a federal agency to provide the same level of service?

Third, if the City's existing franchise is abrogated and if no local franchises are required in the future, it will amount to local taxpayers subsidizing private industry. Among other things, the franchises provide reasonable compensation to the local government and taxpayers for the use of the public rights-of-way. Eliminating this compensation would be analogous to telling the companies they do not have to pay rent for offices in another person's building. In Rockville's case, cancellation of the current franchise agreement with Comcast would result in the loss of about \$3.1 million to Rockville over the remaining seven years of the franchise term. This includes not only franchise fees, but, also, operating and capital grants for the City's government access television station, a vital source of information about local government for the residents of Rockville.

We respectfully request that you take the time to read the enclosed resolution and vote to oppose the S.1349/H.R. 3146 and S.1504. We also respectfully request that you urge your colleagues to vote in opposition, and in so requesting, we add our voice to those of local governments and elected officials across the country that are represented by the National League of Cities, the U. S. Conference of Mayors, the National Association of Counties, and the National Association of Telecommunications Officers and Advisors.

Our initial review of the House Staff Draft Bill released on September 15, indicates there are some improvements over the bills mentioned above. However, there are parts of the bill that appear to fail the tests outlined above. We respectfully request and urge you to apply these tests to any proposed legislation on this matter.

We would be happy to meet with you if you would like to discuss these matters further.

Thank you for your time and consideration.

Sincerely,

Larry Giammo, Mayor  
On Behalf of the Mayor and Council of Rockville

Enclosure: Resolution

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**House and Senate  
Franchising Bills  
(9/21/2005)**

H.R. 3146	S. 1349	S. 1504	House Staff Draft Bill "BITS" BILL	TeleCommunity Position
<p><b>Sponsors:</b> Marsha Blackburn (R-TN) Albert Russell Wynn (D-MD)</p> <p><b>35 current co-sponsors.</b></p> <p><b>Summary</b> Bill creates a new Title VIII of the Act to provide a franchise fast-track for telco provision of cable services.</p>	<p><b>Sponsors:</b> Gordon H. Smith (R-OR) John D. Rockefeller IV (D-WV)</p> <p><b>Summary</b> Bill amends Title VI of the Act to provide a franchise fast-track for telco provision of cable services.</p>	<p><b>Sponsors:</b> John Ensign (R-NV) John McCain (R-AZ)</p> <p><b>Summary</b> 72 page bill which repeals Title II, III and VI of the Act and creates a franchise-free world for voice and video services and severely limits the ability of local gov't provisioning of telecommunications services.</p>	<p><b>Summary</b> 77 page bill which creates a exclusive federal regulatory environment for "Broadband Internet transmission services." Bill retains all current law, but exempts BIT providers from any existing laws at the federal state or local level. BITs services include broadband voice, video and data services. Creates federal franchise terms in exchange for BIT video certificate. Protects municipal provisioning and addresses social obligation issues with respect to VoIP services.</p>	<p><b>UNACCEPTABLE.</b> B/W and S/R have smaller scope than Ensign bill, but eliminate local franchise by telephone company and substitutes national alternative. Ensign bill eliminates need for any franchises and repeals local gov't zoning of wireless facilities, while imposing unreasonable requirements on government providing its constituents telecommunications services. BITS bill as drafted grants unilateral access to local government property as is unacceptable as drafted. Staff will work to address issues. BITS bill is an improvement over current law on municipal provisioning, but improvements are possible.</p>

Miller & Van Eaton PLLC

9/21/2005 12:02 PM

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H.R. 3146	S. 1349	S. 1504	BITS Bill	TeleCommunity Position
<p><b>LOCAL GOVERNMENT PROVISIONING OF SERVICES</b></p> <p>Silent</p>	<p><b>LOCAL GOVERNMENT PROVISIONING OF SERVICES</b></p> <p>Silent</p>	<p><b>LOCAL GOVERNMENT PROVISIONING OF SERVICES</b></p> <p>Local government required to compete for right to serve its constituents. Must employ a neutral third-party to conduct an open bidding process having made public a detailed description of the project, including: costs, services to be provided, coverage area, and architecture.</p> <p>Existing government projects to provide these types of services would be grandfathered, but not if they are "substantially expanded."</p>	<p><b>LOCAL GOVERNMENT PROVISIONING OF SERVICES</b></p> <p>Provides that municipal BIT provider must apply its ordinances, rules, and policies, including those relating to the use of the PROW in a non-discriminatory way.</p> <p>There is a place holder for a cross-subsidization ban, which has been an area in which the industry has sought to create chaos in the past.</p>	<p><u>UNACCEPTABLE.</u></p> <p><u>BITS ACCEPTABLE?</u></p> <p>BITS bill is an improvement over current law and could be acceptable if there are not unbearable terms included in the "cross subsidization section," for which there is a placeholder.</p>
<p><b>Redundant Franchises Prohibited.</b></p> <p>No CVSP provider may be required, whether under Federal, State, or local law, to obtain a</p>	<p><b>Redundant Franchises Prohibited</b></p> <p>No CVSP provider may be required, whether under Federal, State, or local law, to obtain a franchise in order to provide any video programming, interactive on-demand services, other</p>	<p><b>No Franchise Required</b></p> <p>Franchising bill voids the need for a franchise for video or video service, with all existing franchises voided on date of enactment.</p> <p>The bill specifically says that</p>	<p><b>No Franchise but Registration and Certain Traditional terms Required.</b></p> <p>BITS bill provides that a broadband video provider need not obtain a local franchise but that they be "registered" with the FCC, state PUC and local franchising authority (LFA).</p> <p>Registration process is to be defined by the</p> <p>FCC to include:</p>	<p><u>UNACCEPTABLE.</u></p> <p>Franchising bill voids needs for any franchise thereby rendering local gov't powerless to enforce franchise fees, impose PUC and customer service requirements, and manage their PROW, except for specific reserved rights outlined in Franchising bill.</p> <p><b>BW &amp; S/R</b> fail to acknowledge that a</p>

<p>franchise in order to provide any video programming, interactive on-demand or other programming services, where the CVSP already has, under Federal, State, or local law, any right, permission, or authority to establish lines in or across PRROW in such geographic area, which right, permission or authority does not rely on, and is independent of, any cable franchise obtained</p>	<p>programming services, or any other video services in any area where such provider has any right, permission, or authority to access PRROW independent of any cable franchise obtained pursuant to any other Federal, State, or local law.</p>	<p>any existing franchise term that is inconsistent with the bill is preempted.</p>	<ul style="list-style-type: none"> <li>• Filing of bond payments</li> <li>• Agreement to PEG capacity reservation.</li> <li>• Designation of a local agent</li> <li>• Up to 5% franchise fee for broadband video services provides in LITV.</li> <li>• Disclosure basis for fee - but no audit functions.</li> <li>• Compliance ROW management programs to ensure safety standards and costs to be born by BITS provider, including the posting of a bond</li> </ul> <p>ICC to serve as arbiter of all disputes.</p>	<p>telephone company's certificate of public convenience (CPCN) does not always provide access to local rights-of-way and never provides a legal grant to provide cable services.</p> <p><b>BITS bill must be amended to provide:</b></p> <ul style="list-style-type: none"> <li>• Enforcement authority for customer service and fee;</li> <li>• L-Net PEG capitol support;</li> <li>• Companies cannot unilaterally conclude what provisions are adequate to protect public safety/PRROW management;</li> <li>• FCC is not arbiter of all disputes</li> <li>• Economic redlining provision should be strengthened</li> </ul> <p>Bill should also add:</p> <ul style="list-style-type: none"> <li>• Tax savings clause to clarify federalization of BITS does not preclude taxation</li> <li>• Savings clause for local zoning ordinances</li> <li>• Liability limitations found in existing Cable Act</li> <li>• Opportunity to revise PEG obligations in the future.</li> </ul> <p><b>UNACCEPTABLE</b></p>
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<p><b>CVSP Defined:</b> Cable video service providers ("CVSP") means any provider of programming, interactive</p>	<p><b>CVSP Defined:</b> Cable video service providers ("CVSP") means any provider of video programming, interactive</p>	<p><b>VSP Defined:</b> Video service provider (VSP) means any provider of video service that uses the rights of way.</p>	<p><b>BITS Defined</b> "BITS" means the transmission of information in a packet-based protocol, including TCP/IP or a successor protocol, regardless of facility uses (Yes wireless services are covered.)</p>	<p><b>B/W &amp; S/R</b> definitions are too loose so as to permit incumbent cable operator with state</p>
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video programming, interactive on-demand service or other programming service that has a right, permission or authority to use PROW independent of a cable franchise.	on-demand service or other programming service that has a right, permission or authority to use PROW independent of a cable franchise.	VSPs that do not touch the right-of-way such as satellite providers are not subject to federal franchise terms.			PCC certificate as a CLEC to avoid need for cable franchise to use PROW.
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<b>FRANCHISE FEES</b> Preserves gross revenue requirement and cap on revenue that are attributable to services that would be considered in calculating fees under the Cable Act if the CVSP were considered a cable operator.	<b>FRANCHISE FEES</b> Preserves gross revenue requirement and cap on services that would qualify over a cable system within such provider's service area	<b>FRANCHISE FEES --</b> Preserves gross revenue requirement and cap on VSP services but: 1) Limits basis for requiring fee to recover the cost of managing the rights-of-way (litigation sure to follow); and 2) Provides numerous exceptions to is to be included in the gross revenue costs. Many of the exceptions in the bill are currently included in gross revenues with an estimated loss of 15% of what would be captured under current franchises	<b>VIDEO FRANCHISE FEES</b> Preserves ability to require up to 5% of gross revenues and provides a favorable definition of gross revenues.	<b>EXACCEPIABLE</b> All three bills preserve SBC's argument that it should not be subject to franchise fees because its Internet-based TV service is not a "cable service" and thus it is not a "cable operator". The "video service" definition in the just passed Texas legislation is better at least to the extent that it unambiguously answers the question whether IP video programming over wireline is a "video service".	
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The bill also empowers the

All three bills allow local government the authority to collect franchise fees but have no actual mechanisms to audit and enforce the fee because the bills do not permit franchise agreements with CVSPs

H.R. 3146	S. 1349	S. 1504	BITS Bill	TeleCommunity Position
<p><b>PEG</b> <b>Obligations And Duties</b></p> <p>1. Match local cable franchise operators channel obligations.</p> <p>2. Establish minimum requirement of reasonable PEG channels.</p>	<p><b>PEG</b> <b>Obligations And Duties</b></p> <p>1. Match local cable franchise operators channel obligations.</p> <p>2. Establish minimum requirement of reasonable PEG channels.</p>	<p><b>PEG</b> <b>Obligations And Duties</b></p> <p>1. FCC to reduce the franchise fee in the name of fairness. See note above about fee being based on cost of managing rights-of-way</p>	<p><b>PEG</b> <b>Obligations And Duties</b></p> <p>1. VSPs required to offer only 4 PEG channels. (remember this would also apply to cable operators with a greater than 4 channel obligation today.)</p>	<p><b>PEG</b> <b>Obligations And Duties</b></p> <p>BIT provider must agree to any public, educational, and government use designated by the PA</p>
<p style="text-align: center;"><u>UNACCEPTABLE</u></p>				
<p>Legislator's bill means New York City as having same PEG needs as same community in other country.</p> <p>BIT, BW &amp; SR require C/S/PS or BITS to carry same PEG channels as incumbent cable operator. Still, without a local franchise, it is not clear that there are enforcement rights, or that those rights would be exercised by local govt and not FCC</p>				
<p>One might argue BITS is preferable in that it says agree to any PEG use, not identical PEG use</p>				

HR. 3146	S. 1349	S. 1504	BITS Bill	TeleCommUnity Position
<p><b>PEG SS SUPPORT<sup>1</sup></b></p> <p>Bill is ambiguous as to whether a CVSP must provide support. Authors claim intent is to require, but text does not match intent in clarity of text</p> <p><b>E-NET</b></p>	<p><b>PEG SS SUPPORT</b></p> <p>Bill is less ambiguous as to whether a telco cable provider must provide support than the House bill, but could be improved.</p> <p><b>E-NET</b></p>	<p><b>PEG SS SUPPORT</b></p> <p>Bill appears to be clear that PEG financial support is not to be required.</p> <p><b>E-NET</b></p>	<p><b>PEG SS SUPPORT</b></p> <p>Bill does not require PEG financial support.</p> <p><b>E-NET</b></p>	<p><b>ENACCEPTABLE</b></p> <p>Need texts of all three bills to match intent that PEG financial support is required of CVSP/BITs</p>
<p>Bill is ambiguous as to whether a CVSP must provide capacity and/or financial support for E-Nets</p> <p><b>E-NET</b></p>	<p>Bill is ambiguous as to whether a CVSP must provide capacity and/or financial support for E-Nets.</p> <p><b>E-NET</b></p>	<p>Bill appears to be clear that E-Net financial support is not to be required.</p> <p><b>E-NET</b></p>	<p>Bill provides that a BIT provider may be required to make capacity available for E-Net purposes, but that neither IFA's or FCC may require BIT's provider to require the construction of an E-Nets.</p> <p><b>E-NET</b></p>	<p><b>BITS, B/W &amp; S/R</b> must clarify that E-Net capacity or financial support is required of BIT or CVSP, including comparable construction or in lieu thereof, financial support.</p>
<p><b>REDLINING</b></p> <p>There is no build out requirement, as found in most cable franchises, but bill does ban</p> <p><b>REDLINING</b></p>	<p>There is no build out requirement as found in most cable franchises, but bill does ban CVSPs staff</p> <p><b>REDLINING</b></p>	<p>There is neither a build out requirement, as found in most cable franchises, nor a ban on economic redlining</p> <p><b>REDLINING</b></p>	<p>There is a phorbolier section in the draft for a build out requirement and a directive to the FCC to prevent economic redlining</p> <p><b>REDLINING</b></p>	<p>BIT's bill could be acceptable in this area if proper build out language is added</p> <p>Other bills must be amended to preserve local gov't's ability to require systems to build out to</p>

<sup>1</sup> In establishing what fees may be imposed, the Senate and House both use the term "as determined to be a charge with section 672(a) and not to exceed" (emphasis added). The problem with the House version is that the sentence begins "Franchise fees" while the Senate version uses the term "fees". We think the Senate version is preferable as PEG and E-Net support are specifically exempted. See, for C-77 from which constitutes a franchise fee and the House version might be used against us in not providing such support.



H.R. 3146	S. 1349	S. 1504	BITS Bill	TeleCommunity Position
<p>economic redlining, i.e. C/VSPs shall not deny services to any group of potential residential subscribers because of the income of the residents of the local area in which such group resides.</p>	<p>not deny services to any group of potential residential subscribers because of the income of the local area in which such group resides.</p>	<p>provision of basic telephone service to all residents.</p>		<p>a minimum density. Ensign must continue current law against redlining.</p>

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**ANALYSIS AND COMPARISON OF  
HOUSE AND SENATE  
VIDEO FRANCHISING PREEMPTION BILLS**

Comparison Analysis of House and Senate  
Video Franchising Bills

H.R.	S.	Analysis
<p><b>Sponsors:</b>  <b>Marsha Blackburn (R-TN)</b>  <b>Albert Russell Wynn (D-MD)</b></p>	<p><b>Sponsors:</b>  <b>Gordon H. Smith (R-OR)</b>  <b>John D. Rockefeller IV (D-WV)</b></p>	
<p><b>CVSP Defined:</b>  CVSP means any provider of video programming, interactive on-demand service or other programming service that has a right, permission or authority to use PROW independent of a cable franchise.</p>	<p><b>CVSP Defined:</b>  CVSP means any provider of video programming, interactive on-demand service or other programming service that has a right, permission or authority to use PROW independent of a cable franchise.</p>	<ul style="list-style-type: none"> <li>• Could literally be construed to include an incumbent cable operator where that operator has state PUC certificate as a CLEC or other non-cable franchise to use PROW.</li> </ul>
<p><b>Regulatory Relief: Redundant Franchises Prohibited.</b>  No CVSP provider may be required, whether under Federal, State, or local law, to obtain a franchise in order to provide any video programming, interactive on-demand or other programming services, where the CVSP already has, under Federal, State, or local law, any right, permission, or authority to establish lines in or across PROW in such geographic area, which right, permission or authority does not rely on, and is independent of, any cable franchise obtained.</p>	<p><b>Regulatory Framework: Redundant Franchises Prohibited</b>  No CVSP provider may be required, whether under Federal, State, or local law, to obtain a franchise in order to provide any video programming, interactive on-demand services, other programming services, or any other video services in any area where such provider has any right, permission, or authority to access PROW independent of any cable franchise obtained pursuant to any other Federal, State, or local law.</p>	<ul style="list-style-type: none"> <li>• Ignores the fact that a telephone company's certificate of public convenience (CPCN) is not a cable franchise, nor a legal grant to provide cable services.</li> <li>• Prohibits local governments from requiring CVSPs to obtain cable franchise agreements, thereby eliminating the tool cities use to collect franchise fees, impose PEG and customer service requirements, and manage their PROW, and to enforce each of these obligations.</li> </ul>
<p><b>Fees Permitted</b> – Any CVSP provider may be subject to the payment of fees to a local franchising authority, based on</p>	<p><b>Fees</b> – Any CVSP provider who provides a service that otherwise would qualify as a cable service provided over a</p>	<ul style="list-style-type: none"> <li>• Both bills duck (in different ways, and especially the Senate bill) SBC's argument</li> </ul>

<p>the gross revenues of the provider within the jurisdiction of such franchising authority <u>that are attributable to services that would be considered in calculating fees under the Cable Act if the CVSP were considered a cable operator.</u></p>	<p><u>cable system shall be subject to the payment of fees</u> to a local franchise authority based on the gross revenues of such provider that are attributable to the provision of such service within such provider's service area.</p>	<p>that it should not be subject to franchise fees because its Internet-based TV service is not a "cable service" and thus it is not a "cable operator."</p> <ul style="list-style-type: none"> <li>• Both bills allow local government the authority to collect franchise fees but have no actual mechanisms to audit and enforce the fee because the bills do not permit franchise agreements with CSVPs.</li> <li>• Both bills (but especially the House bill) leave local governments exposed to state law arguments that if no cable franchise is allowed, local government has no state law authority to impose such a fee or "tax," or that any such fee or "tax" is subject to referendum requirements.</li> </ul>
<p><b>Limits On Fees</b> – The rate at which fees are imposed shall not exceed the rate at which franchise fees are imposed on any cable operator providing cable service in the jurisdiction of the franchising authority.</p> <p>In any jurisdiction in which no cable operator provides services, no more than the rate at which franchise fees could be</p>	<p><b>Limits On Fees</b> – The rate at which fees are imposed shall not exceed the rate at which franchise fees are imposed on any cable operator providing cable service in the franchise area.</p> <p>In any jurisdiction in which no cable operator provides service, the rate at which franchise fees are imposed shall not exceed the</p>	<ul style="list-style-type: none"> <li>• Fees can be charged on CSVP up to 5% like cable. But how fee is imposed, and on what terms it is paid, are unknown.</li> <li>• In areas where there is no franchised operator, the House bill recognizes that fees can be charged up to 5%</li> </ul>

<p>imposed rate on a cable operator.</p>	<p>statewide average.</p>	<p>unless limited by law.</p> <ul style="list-style-type: none"> <li>• In areas where there is no franchised operator, the Senate bill would establish that the fee cannot exceed the statewide average, which could be lower than 5%.</li> <li>• Permissible revenue base is ambiguous.</li> </ul>
<p><b>PEG Obligations And Duties</b>          – Any CVSP provider shall carry, within each local franchise area, any public, education, or government use channels that are carried by cable operators within such franchise area, and, in any franchise area not served by a cable operator, provide reasonable public, educational or governmental access facilities.</p> <p>Carry the signals of local commercial television stations.</p> <p>Carry the signals of local noncommercial educational television stations.</p>	<p><b>PEG Obligations And Duties</b> –          CVSP providers shall carry, within each local franchise area, any public, educational, or governmental use channels that are carried by cable operators within such franchise area.</p> <p>Provide in any jurisdiction in which no cable operator provides service, reasonable public educational and government access facilities.</p> <p>Must-carry provisions (signals of local commercial television stations.)</p> <p>Carry noncommercial, educational channels.</p>	<ul style="list-style-type: none"> <li>• Both bills require CVSPs to carry same PEG channels as incumbent cable operator, but again, without a local franchise requirement, how is this enforced? And who enforces? The FCC?</li> <li>• No requirement for CVSP to make any monetary or in-kind PEG capital grants over and above the fee.</li> <li>• Leaves open the question of whether new PEG capacity requirements may be negotiated with incumbent and then extended to CVSP, but even if that’s possible, incumbent will no longer be willing to provide <u>any</u> PEG grant in any renewal franchise because CVSP doesn’t have to.</li> </ul>
<p><b>Economic Redlining</b> – CVSPs shall not deny services to any</p>	<p><b>Economic Redlining</b> – CVSPs shall not deny services to any</p>	<ul style="list-style-type: none"> <li>• Both bills prohibit economic redlining (just</li> </ul>

<p>group of potential residential subscribers because of the income of the residents of the local area in which such group resides.</p>	<p>group of potential residential subscribers because of the income of residents of the local area in which such group resides.</p>	<p>like the Cable Act) but remove local enforcement by prohibiting local franchise authority over CVSPs. Enforcement is presumably left to the FCC, which means no effective enforcement at all.</p> <ul style="list-style-type: none"> <li>• Both bills preempt local franchising authorities' current ability under the Cable Act to require system buildout to a minimum density and/or cable "universal service."</li> </ul>
<p><b>Deregulatory Preemption:</b> Except to the extent expressly permitted by the Act, neither the FCC, the states nor locals may regulate rates, charges, terms or conditions for entry, exit or deployment of services by a CVSP.</p>	<p><b>Deregulatory Preemption:</b> Except to the extent expressly permitted by the Act, neither the FCC, the states nor locals may regulate rates, charges, terms or conditions for entry, exit or deployment of services by a CVSP.</p>	<ul style="list-style-type: none"> <li>• Clearly preempts all classic rate and service regulation, and could be construed to preempt fee and/or taxation authority and most, if not all, consumer protection authority.</li> <li>• A tax savings clause is needed.</li> </ul>
<p><b>State And Local Government Authority</b> – Except prohibiting franchising of CVSPs, nothing in this section affects the authority of a State or local government to manage PROW.</p>	<p><b>State And Local Government Authority</b> – Except prohibiting franchising of CVSPs, nothing in this bill affects the authority of a State or local government to manage PROW, or to enact or enforce any consumer protection law that is consistent with customer service or consumer protection requirements adopted by the FCC.</p>	<ul style="list-style-type: none"> <li>• Both bills suggest recognition of local authority over their PROW while prohibiting local franchising authority.</li> <li>• Senate bill gives State and local governments the right to "enact or enforce any consumer protection law," but apparently only to the extent that law is</li> </ul>

		consistent with FCC standards.
	<p><b>Existing Franchise Agreements</b> – Any franchise agreement entered into by a franchising authority and a CVSP provider for the provision of video service prior to the date of enactment of this Act shall be exempt from the provisions of this Act for the term of such agreement.</p>	<ul style="list-style-type: none"> <li>• Senate bill only.</li> <li>• If, as noted above, the incumbent can be viewed as a CVSP, then this would allow incumbent to “opt out” at end of its franchise term, leaving no PEG or franchise fee yardstick at all.</li> </ul>



## Local Government: Partner in Promoting Video Competition

Local government strongly endorses promoting competition for all consumers and treating like services alike. The elected leaders of our nation's cities and counties stand ready and willing to welcome video competition in their communities. Nationalizing franchising, however, would limit the benefits of head-to-head video competition to a chosen few, and would cause chaos in streets across the country.

### Before Congress acts, it should consider:

- States where statewide or simplified franchising is currently in place do not see greater or faster video competition deployment.
- Franchises do not just provide permission to offer video services, they are the core tool local government uses to manage streets and sidewalks, provide for public safety, enhance competition, and to collect compensation for private use of public land. Eliminating franchises will cause chaos and deprive local government of the power to perform its basic functions.
- Competition is for everyone. Current national policy implemented through franchises encourages competition throughout the country, not just in urban or suburban areas and not just for the wealthy. In less than 10 years, under the current system, broadband service has been made available to 91% of all homes passed by cable.
- Congress should not try to manage local streets and sidewalks from Washington; national franchising would abrogate a basic tenet of federalism by granting companies access to locally owned property.
- Content deals, not local government, stands in the way of new video service offerings. Companies have not yet seriously dedicated resources to negotiate franchises in most markets. Potential video competitors require relatively few franchises to implement their announced business plans (for SBC 1,500-2,000 franchises, for Verizon 100-200 franchises).

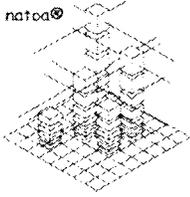
### **Concerns with Current Bills**

#### Video Choice Act -- S. 1349 (Smith/Rockefeller) and H.R. 3146 (Blackburn/Wynn)

- Without a franchise agreement, many of the important mechanisms that local government uses to manage their rights of way, ensure competition for everyone, and collect franchise fees are eliminated.
- The bills do not allow local government to obtain support funding for public educational and governmental (PEG) channels or to obtain Institutional networks for local government needs such as fire, police, or other government workers.
- While the bills prohibit economic redlining against poorer citizens, they remove any enforcement of the provision.

#### Broadband Investment and Consumer Choice Act -- S. 1504 (Ensign/McCain)

- The bill would immediately abrogate all existing local franchise agreements. The new provisions would be applicable to all video service providers, both existing cable companies and new entrants.
- Although the bill retains the current five percent gross revenue cap on franchise fees, it limits the revenues from these fees in two ways: 1) by limiting these fees to the cost of managing the rights-of-way; and 2) providing four-and-a-half pages of exceptions to what can be included in the gross revenue costs, gutting existing contractual agreements.
- The bill prohibits municipalities from charging fees for issuing construction permits needed to install or upgrade facilities.
- Under the bill, video providers would be required to offer only four public educational and governmental (PEG) channels, far below what many communities utilize today.
- The municipal broadband provisions would impose additional layers of useless bureaucracy and procedure on local government and hamper broadband deployment. Existing municipal deployments would be frozen.
- The bill would remove the law that ensures cell phone towers, like all other towers, are subject to local zoning laws.



# National Association of Telecommunications Officers and Advisors

*25 Years of Communications Leadership*

## Core Values Executive Summary

In anticipation of state and federal legislation that may impact local government's telecommunications authority in a variety of areas, the National Association of Telecommunications Officers and Advisors developed a set of "Core Values" which were adopted by NATOA's Board of Directors in January 2005.

NATOA and the National League of Cities have coordinated their efforts in this regard and NATOA will continue to work closely with its other sister associations, the United States Conference of Mayors, the National Association of Counties and the Alliance for Community Media, providing them with this material and encouraging the use of these Values in their own educational and advocacy activities.

### NATOA's Core Values

(In Alphabetical Order)

- Competition and Access to Products and Services
- Economic Development
- Homeland Security and Emergency Communications
- Localism Achieved Through Diverse Media and Telecommunications Ownership and Content
- Municipal Authority to Provide Telecommunications
- Police Powers
- Preservation of Local Government Taxing Authority
- Rights-of-Way Authority
- Universal Service

### Call to Action

Any new national or state communications policy should **respect** the principles of federalism and preserve local government's authority to ensure public health, safety and welfare; allow local governments to **support** important policy goals; and enable local government to **serve** its community's communications needs.

Respect federalism and preserve Local Government's authority to ensure the health, safety and welfare of its citizenry:

- Police Powers
- Rights-of-Way Authority
- Authority to Tax

Allow Local Government to **Support** important local policy goals:

- Economic Development
- Competition and Access to Products and Services
- Universal Service

Enable Local Government to **Serve** its Community's Communications needs:

- Localism through Diverse Media Ownership and Content
- Homeland Security and Emergency Communications
- Municipal Authority to Provide Telecommunications

From NATOA

### **Local Cable Franchising is Good Public Policy**

Local government welcomes the long-awaited entry of the traditional telephone company into the video marketplace, albeit almost ten years after Congress passed landmark legislation to ease their competitive entry. Still, absent obtaining a local franchise for service within their service territory, as first required by the Congress in 1984 and affirmed in 1992 and 1996, telco-cable competition will not be fair, nor will consumers be the beneficiaries of this new potential for competitive choice and service choice.

#### **Local Government Supports Broadband Deployment, Competition, and Fairness.**

- In less than 10 years, cable broadband service, with a Title VI franchise, has been made available to 91% of all homes passed by cable. Over 60% of all broadband subscribers today receive their service via a Title VI franchised network.
- The nation's cities, counties and towns welcome competitive choice in video, voice and data on broadband networks that is fair and which is a benefit to all consumers.
- Local government believes like-services should be treated alike.

**All Cable providers need a Cable Franchise, which is a license to use the PROW. A telephone certificate of public convenience (CPCN) does not confer the right to provide cable services, nor does a cable franchise confer the right to provide telecommunications services.**

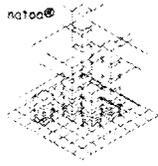
- Public rights-of-way (PROW) are constitutionally protected tangible, limited, and valuable real estate to which the federal government cannot grant access.
- Private entities using public property for private profit must pay fair and reasonable rents, in the form chosen by the owners of the property, including PEG and I-Net services.

**A cable franchise serves as an enforcement mechanism for: consumer protection and privacy rights; the requirement to serve; the obligation to comply with public safety rules; the obligation to preserve property rights, and the designation of capacity set-asides for public, education, governmental channels.**

**Congress already protects telcos, which fear build-out requirements. 47 U.S.C. § 541 (4) (A) mandates a "franchising authority... shall allow the applicant's cable system a reasonable period of time to become capable of providing cable service to all households in the franchise area..."**

#### **Local permission is not difficult to acquire and will not require years of negotiations.**

- The franchising process is open and quick for those companies that do not seek to use the process to cherry pick or seek to obtain an advantage over their competitors.
- An RBOC could achieve 25% penetration of cabled homes within their service area by obtaining approximately a dozen franchises, not the 10,000 quoted. New York City alone provides access to more cable homes than Verizon seeks to serve in its first year.
- Although the local franchising system protects important goals, this does not mean it cannot be streamlined. Local government stands ready to engage with Congress as it considers changes and reforms to the existing system consistent with our mutual goals of promoting competition for all our citizens.



## **ACTION ALERT – S. 1504**

### Broadband Investment and Consumer Choice Act

- **Contact your congressional leaders today – tell them to oppose S.1504**
- Provide them with the real facts.
- Tell them about the real impact – the real harm – that this legislation would cause to local governments and to local residents.
- Inform them of the real benefits that local franchising provides to and within your community today!

Senators Ensign and McCain have introduced the Broadband Investment and Consumer Choice Act (S. 1504). This legislation is a blatant attempt to eviscerate the lawful power of state and local elected leaders, to undermine the principles of federalism, and to create an unnecessary and unwarranted subsidy – out of the budgets of local governments -- for an already healthy and wealthy private telecommunications sector. It has been estimated by one NATOA member that the bill would immediately cost local governments on the order of \$ 300 million per year in lost franchise fees alone, and much more in the future.

Your action is required NOW!!! The telephone and cable industry incumbents are telling members of Congress that local governments are not harmed by this legislation. There are some who claim that local government will be able to retain its franchise fee, PEG channels and PEG support, and that the bill even provides consumer protections. The bill does NOT protect local government revenue, it provides less than adequate capacity for PEG, eliminates PEG capital support and I-Nets, and turns what little consumer protection it permits over to the FCC for development and the states for enforcement.

Here's a little more about what this legislation will really do.

- All current cable franchising authority is eliminated.
- All current cable franchise agreements are preempted.
- Eliminates the 5% cable franchise fee and replaces it with a fee that must be both "reasonable" and limited to rights-of-way management costs and also not exceed 5%, and then allows industry to petition the FCC to reduce the fee still further -- this results in a huge subsidy to industry, paid for out of local government budgets.
- Substantially reduces the revenues that are includable in the definition of "Gross Revenues" so that, even if the 5% franchise fee were left untouched, local

governments' fee revenues would decline significantly due to the much smaller revenue base.

- Restricts PEG to a maximum of 4 channels, and specifies that the local government has the responsibility for determining, in cases where the number of channels must be reduced, which PEG users will no longer be provided access (*i.e.*, what categories of access users must bear the burden of the PEG channel capacity that the bill would eliminate).
- Eliminates all PEG support – capital and operating grants for PEG are eliminated, which will greatly threaten the continued viability of much of PEG programming.
- Moves all customer service issues to the FCC, to be enforced only by the State PUC.
- Eliminates any build-out requirements for any video service provider, thereby permitting providers to engage in any form of discriminatory redlining of neighborhoods they wish.
- Preempts any state or local law that is not generally applicable to all businesses, therefore threatening electric code and other safety obligations specifically pertaining to only certain classes of businesses (*e.g.*, utilities or rights-of-way users).
- Prohibits the imposition of any fee for issuance of rights-of-way construction permits.
- Requires local governments to act on construction permits in a timely manner as determined by the FCC or federal courts.
- Prohibits municipal provisioning of communications services without giving a right of first refusal to private industry and gives industry unfettered access to all municipal facilities and financing in the event private industry chooses to provide services.
- Eliminates local governments' ability to obtain I-Nets.
- Removes current federal law protections against preemption of local zoning decisions relating to cell towers.

**Contact your congressional leaders today – tell them to oppose S.1504**

Provide them with the real facts. Tell them about the real impact – the real harm – that this legislation would cause to local governments and to local residents, and the real benefits that local franchising provides to and within your community today.