



CITY OF CLEVELAND
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Opposition to Senate Bill 117

Ohio S.B. 117 purports to maintain many of the public benefits associated with the historic ability of the City of Cleveland and other local franchise authorities to negotiate with cable television providers for appropriate community investments in return for the operator's use of the public rights-of-way within a community — but in reality, it strips away virtually all such public benefits. While the City of Cleveland would extend a warm welcome to a wireline competitor in the provision of cable television/video service, there is no rational basis for the Ohio Legislature to grant cable television/video providers special rights at the expense of the residents of the City of Cleveland and the State of Ohio. The City's primary concerns with the provisions of S.B. 117 are outlined below.

1. Build-Out/Redlining

One of the most significant aspects of the traditional local franchising system is the right of a community to impose *reasonable* "build-out" requirements upon a cable television operator so as to ensure that *all* residents receive access to advanced communications services and entertainment products. This authority has extended to the initial construction of cable systems as well as to the upgrade of existing, but outdated systems. For example, in the agreement approving the transfer of the Cleveland cable television franchise from Cablevision to Adelphia in 2000, the City required that Adelphia upgrade its entire cable system within the City, in phases across a nearly three-year period, in return for the City's approval of the transfer. Adelphia satisfied this upgrade obligation and as a result, all City residents have access to digital cable and high speed cable modem internet access services.

S.B. 117 would take away from the City the authority to require that all of its residents enjoy the benefits of competition in cable television/video and other advanced communications services, when such competition arrives. The Bill contains only very minimal requirements concerning any obligations upon a video service provider to build out its system so as to require that service be universally available within a community and represents a dramatic change in long-standing public policy permitting the imposition of build-out requirements. Even a recent decision of the Federal Communications

Commission (FCC) that sought to establish a streamlined 90-day cable franchising process for telephone companies with existing access to the right of way recognized the authority of local communities to impose *reasonable* universal build-out requirements upon such companies. See *In The Matter of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, FCC 06-180, MB Docket No. 05-311 (released March 5, 2007).

The City of Cleveland, again, would welcome a new provider of cable television/video service, and would have no intention of attempting to impose an unreasonable build-out or deployment schedule upon a new entrant (such as requiring the provider to build out the entire City before providing service anywhere in the City, one of the examples of an unreasonable requirement cited by the FCC). The City would fully expect to engage any new entrant in a forthright discussion of the entrant's business plan, financial capability and a multi-year timetable for full-city deployment, possibly incorporating appropriate markers of success and market penetration. The City would certainly want for a new provider to be successful, and the imposition of an unreasonable build-out requirement (or other unreasonable franchise requirements) would threaten the prospects for that success. But the remedy proposed by S.B. 117, to strip the City of all franchise authority and to ensure that no entity could be required to provide universal service, is overbroad as well as unnecessary.

The City of Cleveland is deeply committed to *closing* the digital divide and *increasing* the broadband services available to all City residents. S.B. 117 *directly contradicts* these important efforts and would have a destabilizing effect on City neighborhoods and communities for decades to come.

2. Reduction in Local Authority to Manage Public Rights-of-Way

S.B. 117's abolition of the current cable franchising system, under which local consent for use of the right-of-way is required, represents an inherent reduction of municipal right-of-way management authority. The Bill goes further, however, by amending Revised Code Chapter 4939 to provide, essentially, that the City's consent is no longer required at all for a video service provider to conduct operations in the right-of-way. Specifically, S.B. 117 provides that a municipality's consent for use of the right-of-way is deemed granted 31 days after filing of a completed application for same, unless earlier granted. A municipality cannot deny this consent, even for reasons related to a video service provider's legal, technical or management qualifications. Thus the "consent" requirement for use of public rights-of-way is, in fact, transformed into a mere *notice* requirement. The City of Cleveland objects to this infringement upon its authority to properly manage occupiers of its public rights-of-way and to protect the public.

3. Public, Educational and Governmental Access Channels

Cities have historically been permitted to require access to cable channel capacity for non-commercial public, educational and governmental (PEG) access purposes as a

part of the consideration paid by cable operators in return for use of the public right-of-way. Across the State of Ohio, school districts utilize cable channels provided pursuant to local cable franchise agreements to cablecast their School Board meetings, plays, musicals and athletic events, and in connection with video production and broadcasting classes. Ohio municipalities and townships cablecast municipal council and township trustee meetings as well as other public meetings and provide other important programming contributing to an understanding of open government and the local community. Many City of Cleveland meetings, for example, are carried live on Time Warner's cable system, allowing the public to view its elected officials and City government in action. Members of the public unaffiliated with educational institutions or local government, in turn, avail themselves of public access channels dedicated to that purpose, including many civic and religious organizations, in addition to individuals. In Cleveland, six (6) PEG channels provided pursuant to the North Coast Cable franchise now held by Time Warner Cable fulfill these important purposes. In addition to channel space, current law permits local franchise authorities to require financial support for capital equipment needed for PEG and for PEG facilities.

S.B. 117 represents a complete and abrupt reversal of this long-honored right of public access, without justification. Here again, while the Bill purports to permit the continued existence of some PEG access in Ohio, in reality, S.B. 117 would place every access channel in Cleveland — and indeed, in the State of Ohio — at risk of going dark and being reclaimed at the sole discretion of the cable operator. The Bill achieves this result by imposing an arbitrary and unreasonably high standard for usage, by expressly forbidding all dedicated financial support for PEG (therefore requiring that any dollars spend on PEG must come from franchise fees or other local revenues), and by severely limiting the number of PEG access channels available.

These PEG provisions have the cumulative effect of stifling public access to the airwaves, chilling expression, hampering efforts to ensure public confidence in open government, and destroying educational programs in video production and broadcasting which depend upon the channels obtained through the cable franchising process. While S.B. 117 claims to preserve PEG access, in reality it is designed to end PEG in Ohio, and will likely do so in Cleveland.

4. Franchise Fees

While S.B. 117 ostensibly maintains the same level of franchise fees permitted under currently controlling law — i.e., a maximum of five percent of a cable operator's gross revenues earned in the community — it actually reduces franchise fee payments significantly, by defining "gross revenues" so narrowly that many cities will lose 10-15% of their franchise fees *each year*. The City of Cleveland conservatively estimates that it may see a reduction of \$250,000 per year versus the fees it receives under its current cable television franchise.

In addition, the bill would greatly restrict the City's ability to audit providers of video services to ensure that they properly calculate and timely pay franchise fees. In the

City's experience, the process of auditing cable franchise fee payments has uniformly resulted in the discovery of significant underpayments by cable operators. In the 2000 Cablevision/Adelphia transfer agreement, for example, the City, Cablevision and Adelphia finally resolved the underpayment of over \$900,000 in franchise fees by Cablevision. In 2005, the City conducted a multi-year audit of Adelphia's franchise fee payments and discovered underpayments of over \$250,000.

What possible proper justification can there be for legislative provisions designed specifically to ensure that public authorities are powerless to require that lawful compensation be provided by private entities using public property to carry on their private business interests? These changes are calculated solely to save money for cable/video operators by ensuring that there is *no* effective oversight of their payment of compensation. This is not a proper legislative purpose and is inimical to the public interest of Ohio and the City of Cleveland.

5. Cable Drops and Other Public Benefits Services

As part of the "rent" or compensation historically paid by cable operators for the privilege of using the public rights-of-way to provide cable television service, local franchise authorities and cable operators routinely agree that the operator will, as a term and condition of the franchise agreement, provide free installation and free monthly cable television service to local government buildings, schools and libraries (usually limited to only one installation per building). In the City of Cleveland, for example, free service is provided to over 250 locations, enabling those public facilities to receive news broadcasts, emergency messages, etc. at no charge. This may sound like a great deal of free service; but to put it in context, consider that from September 1, 2001 through June 2005, Adelphia generated revenues of over \$200,000,000.00 associated with the provision of video service alone within the City of Cleveland. This figure does *not* include revenues earned from the provision of high speed cable modem service. Additionally, there is no real ongoing cost of the service to the cable operator once the original installation is made — which, in the case of the City of Cleveland, was long ago, under another cable operator, for most public buildings.

Similarly, in the agreement approving the transfer of the cable franchise from Cablevision to Adelphia in 2000, Adelphia agreed to make a significant grant of monies to the Cleveland Foundation for the purpose of promoting the training and education of City residents in advanced telecommunications and the use of computers, leading to the creation of over two dozen "Neighborhood Technology Centers" where Cleveland residents can receive such training. In addition, the agreement required that the cable operator provide free cable modem high speed internet access to at least one neighborhood technology center in each Council ward, with volume discounts required for additional access locations. Together, these public benefits obligations, negotiated between and agreed to by the parties, have helped the City make significant progress in extending broadband services and familiarity with such services into all City neighborhoods, a meaningful step toward bridging the digital divide and helping City

residents climb out of poverty. In addition, the teaching of these skills has only assisted the cable operator in marketing and expanding subscription to its services.

S.B. 117 would prohibit each and every of the above obligations, leading inexorably to higher costs borne by the City, a reduction in services and benefits provided to neighborhoods and residents, and further digital disinvestment in urban neighborhood vitally in need of communications investments. Under current law, the City of Cleveland has authority to negotiate a meaningful contract providing benefits to City residents with a cable/video operator needing to use the public rights-of-way to provide service. Under S.B. 117, the City would have no authority at all to safeguard neighborhoods and residents in this manner, with such decisions left, instead to the discretion of the cable/video service providers who must certainly justify to shareholders any expenditures that are not legally required. As none of the expenditures above could be required under S.B. 117, they would be at risk and would almost certainly be lost. These losses would have a tremendous negative impact upon the City of Cleveland.

6. Direct Local Emergency Override

Local franchise authorities have traditionally been permitted to require direct access to the cable systems within their borders for purposes of transmitting emergency notifications. The FCC has repeatedly recognized the value of cable franchise-based local alert systems and has expressly declined to preempt them. See, for example, *In re Amendment of Part 73, Subpart G, of the Commission's Rules Regarding the Emergency Broadcast System*, Second Report and Order, FCC 97-338 (September 29, 1997), ¶¶1, 33. In the FCC's Third Report and Order, it was stated that "the record in this proceeding continues to support our finding that 'franchising officials are most familiar with local conditions and threats to their communities as well as the types of emergency information needed to respond to such threats.'" *In re Amendment of Part 73, Subpart G, of the Commission's Rules Regarding the Emergency Broadcast System*, Third Report and Order, FCC 98-329 (December 23, 1998), ¶15. In part, the FCC's conclusion was supported by its recognition of the value of cable-based local alert systems in providing alerts for localized emergencies for which activation of the Federal EAS on a regional or county-wide basis would be inappropriate. See Third Report and Order, ¶8.

Unlike the FCC, S.B. 117 fails to recognize the value of local override systems. Under S.B. 117, cable/video providers would be required only to comply with the Federal Emergency Alert System requirements, which do not provide immediate, unmediated access to the cable system for local governments. Despite the time-honored tradition of local override and despite the *growing* role of local police and fire authorities as first responders in times of crisis in this post 9/11, post Katrina world, no *local* direct override may be required under S.B. 117.

7. Constitutional Violations (Home Rule, Impairment of Contract)

S.B. 117 represents a full-frontal assault on the Home Rule Authority of the City of Cleveland, as embodied in Art. XVIII, §3 and §7 of the Ohio Constitution. Federal law has recognized for decades that the cable franchising process is conducted at the local community level and, in fact, the 1984 Cable Act sets out express procedures and parameters under which a local franchise authority is charged with determining the future cable-related needs and interests of the community. This process, and consideration of appropriate providers of cable/video services, therefore, is quintessentially a matter of *local*, rather than statewide, concern. S.B. 117 represents a blatant failure to recognize the City's Home Rule powers of local self-government.

In addition S.B. 117 patently violates both the United States Constitution and the Ohio Constitution. Art. I, §10 of the United States Constitution provides that "No state shall...pass any...law impairing the obligation of contracts." Art. II, §28 of the Ohio Constitution states that "The general assembly shall have no power to pass...laws impairing the obligation of contracts..." While the federal government may have this power, the State of Ohio does not. Note that the right of abandonment that S.B. 117 purports to grant to cable incumbents does not even depend upon the existence of competition in a community.

Conclusion

In summary, for all the reasons detailed above, S.B. 117 would have tremendous negative impacts upon the City of Cleveland and indeed, upon all local communities in Ohio. In addition, we respectfully submit that the bill is entirely unnecessary. Technological developments (i.e., high speed cable modem/Internet access services and Voice Over Internet Protocol services) now permit cable/video operators to wring substantially greater revenues from their systems than ever before, to the point where overbuilding an incumbent provider is now, clearly, financially feasible. Considering that another of the effects of those developments has been the widespread and accelerating deployment of VoIP telephony by traditional cable companies, the City of Cleveland recognizes the need of telephone companies such as AT&T to enter the cable television business if they are to survive. As stated above, the City of Cleveland would welcome AT&T's entry into the business of providing competing advanced cable/video and broadband services to its residents so long as the benefits of this competition may be enjoyed by all.