

Statewide Cable Franchising: Expand Nationwide or Cut the Cord?

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I. INTRODUCTION

The cable television business traces its roots to John Walson, an appliance storeowner in mountainous eastern Pennsylvania, and his creation of Community Antenna Television (“CATV”).¹ In June of 1948, seeking to provide broadcast channels from Philadelphia to improve television set sales, Walson placed an antenna at the top of a mountain on the outskirts of town to receive the broadcast signal and then delivered it down to the residents of Mahanoy City, Pennsylvania.²

By 1952, Walson’s idea spread beyond Pennsylvania to seventy CATV systems with approximately 14,000 subscribers.³ That exponential growth would continue as operators realized the value of bringing in distant programming to a market as opposed to simply relaying the local stations.⁴ Eight hundred cable systems were in place by 1962, servicing 850,000 subscribers.⁵ By 1990, cable had reached nearly fifty-three million subscribers nationwide.⁶ However, the phenomenal growth was also “accompanied by rising prices for consumers, incurring growing concern among policy makers.”⁷

The cable television market has been subject to significant foundational changes in response to policy makers’ concerns and technological developments. Twenty years ago, the industry operated with the benefit of local monopolies and competition coming only from broadcast stations and the C-Band⁸ satellite market.⁹ In 1994, the satellite broadcasting industry changed when DIRECTV (and later DISH Network) entered cable’s market space with the introduction of the direct broadcast

1. *History of Cable Television*, BROADBAND CABLE ASSOCIATION OF PENNSYLVANIA, <http://www.pcta.com/about/history.php> (last visited Nov. 13, 2011).

2. *Id.*

3. *History of Cable Television*, NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION, <http://www.ncta.com/About/About/HistoryofCableTelevision.aspx> (last visited Oct. 13, 2011) [hereinafter NCTA].

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. C-Band refers to microwave signals received by 6’-9’ satellite dishes that are also known as Television Receive-Only (TVRO).

9. See Gareth Marples, *The History of Satellite TV – A Vision for the Future*, THEHISOTRYOF.NET (Sept. 9, 2008, 6:55 AM), <http://www.thehistoryof.net/history-of-satellite-tv.html>.

satellite (“DBS”) technology.¹⁰ Adoption of the technology was swift; since that time, the two major direct broadcast satellite players in the United States have grown to account for over thirty-three million subscribers.¹¹ In 2005, the efforts of traditional phone companies to introduce further competition began to get traction in various state legislatures. As of 2011, AT&T and Verizon account for approximately 7.4 million video subscribers¹² and have been instrumental in the passing of laws encouraging their establishment of cable franchises in twenty-five states.¹³ With approximately fifty-nine million subscribers, traditional cable companies remain the dominant force in the marketplace.¹⁴ Yet even without the effects of competition, changes are occurring within their business model as a result of the legislation that passed in various forms.¹⁵

This Note will explore the approaches taken by four states to invite competition into the cable marketplace to encourage price reductions, improve service offerings, and reduce the digital divide by increasing the broadband service footprint. Part II describes the efforts of Congress, the FCC, and the Supreme Court to create and apply the law to the nascent cable industry. Part III discusses the differences in approaches taken by selected states. Part IV outlines the most significant areas to account for when considering cable franchise reform and analysis of the pros and cons of the different approaches to the various areas of concern. Finally, Part V argues that the data available at this point suggests that those states that adopted laws in coordination with their industry partners are seeing

10. *Company Profile*, DIRECTV, <http://www.directv.com/DTVAPP/global/content/Page.jsp?assetId=1400012> (last visited Nov. 30, 2011).

11. This figure was calculated by adding the subscriber count provided by the DISH Network Investor Relations Summary showing 14 million U.S. subscribers as of September 30, 2011 with DIRECTV’s corporate overview, showing 19.76 million subscribers as of June 30, 2011. DISH NETWORK CORP, *Investor Relations*, <http://dish.client.shareholder.com/> (last visited Nov. 13, 2011); DIRECTV, *Corporate Profile*, <http://investor.directv.com/overview.cfm> (last visited Nov. 13, 2011).

12. This figure was calculated by the addition of the subscriber count provided by the Verizon 3Q 2011 Highlights sheet, showing 4.0 million subscribers as of September 30, 2011, with AT&T’s U-verse At A Glance count, showing 3.4 million subscribers as of June 30, 2011. *Verizon Generates Strong Wireless Results, Increased Cash Flow, and FiOS and Strategic Services Growth in 3Q*, VERIZON (Oct. 21, 2011), http://www22.verizon.com/investor/news_verizon_generates_strong_wireless_results_increased_cash_flow_and_fios_and_strategic_services_growth.htm; *AT&T U-verse At A Glance*, AT&T, http://www.att.com/Common/about_us/pdf/mediakit/u-verse/uverse_2q_infographic.pdf.

13. DIGITAL POLICY INST., BALL STATE UNIV., TELECOMMUNICATION DEREGULATION: A POLICY PROGRESS REPORT, 1 (March 2010), available at <https://cms.bsu.edu/Academics/CentersandInstitutes/~media/DepartmentalContent/DPI/PDFs/TelecommDeregulation.ashx>.

14. NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION, *Industry Data*, <http://www.ncta.com/Statistics.aspx> (last visited Nov. 13, 2011).

15. NCTA, *supra* note 3.

promising results. The positive results also suggest, that for most states, there are minor revisions to existing law that may improve the overall service to the public, but major overhauls or reversals of policy do not appear to be necessary. This Note concludes with a prescription recommended for use by any state considering cable franchise reform.

II. NATIONAL CABLE TELEVISION REGULATORY BACKGROUND

A. *Communications Act of 1934*

With the advent of cable television still more than a decade away, the 1934 Communications Act did not lay out provisions setting out the regulation of its operations.¹⁶ Instead, the Act laid out provisions governing the burgeoning telephone and radio networks.¹⁷ The legislation addressed telephony with “common carrier” provisions in Title II of the Act and radio with radio transmission regulations in Title III.¹⁸ During cable’s formative years, the FCC recognized the limits of Title II and Title III, thus taking a hands-off approach to the new technology.¹⁹ However, with the rapid expansion of cable systems, the FCC began to assert its implied authority to protect the public interest in having local broadcasters when CATV proposed retransmitting distant programming into underserved rural areas.²⁰ Cable providers proposed using the existing antenna technology to collect broadcast signals and then using microwave transmission equipment to make them available far beyond the geographic footprint that would have been possible using existing broadcast methods.²¹ For example, this proposed innovation could have allowed a Chicago television station to be retransmitted to cable subscribers in rural Iowa at the expense of the local stations of Iowa City or Cedar Rapids.

B. *Carter Mountain Transmission Corporation v. FCC*

The issue came to a head in *Carter Mountain Transmission Corp. v. FCC* in 1963.²² Carter Mountain sought a license from the FCC to

16. The Communications Act of 1934, ch. 652, 48 Stat. 1064, has since been amended to become the Telecommunications Act of 1996, 104 P.L. 104 (codified as amended in various at scattered sections of 47 U.S.C. (2000)). The original version may be found at *Communications Act of 1934*, DEPARTMENT OF TRANSPORTATION, <http://www.dotcr.ost.dot.gov/documents/ycr/communicationsact.pdf>.

17. *Id.* at tit. I, § 1.

18. *Id.* at tit. II–III.

19. *See* NCTA, *supra* note 3.

20. *See id.*

21. *See e.g.*, *Carter Mountain Transmission Corp. v. FCC*, 321 F.2d 359, 361 (D.C. Cir. 1963).

22. *Id.*

retransmit via microwave transmitter stations from out of state into Riverton, Lander, and Thermopolis, Wyoming.²³ The licensee of television station KWRB-TV, in Riverton, filed a protest.²⁴ The FCC determined that it “would not serve the public interest, convenience, and necessity to grant” Carter Mountain’s request.²⁵ The FCC reasoned that permitting Carter Mountain to bring in outside programs for the CATV systems on the basis proposed “would result in the ‘demise’ of the local television station (intervenor KWRB-TV) and the loss of service to a substantial rural population not served by the community antenna systems, and to many other persons who did not choose (or were unable) to pay the cost of subscribing to [CATV] systems.”²⁶ The FCC decided this on the basis that “the need for the local outlet outweighed the improved service which appellant’s proposed new facilities would bring to those who subscribed to the community antenna systems.”²⁷ The FCC did, however, suggest in its ruling that it may have decided differently had the applicant showed that the CATV system would carry the local station without duplicating its network programming.²⁸

Rather than adjust the application as suggested, Carter Mountain appealed the ruling of the FCC on several grounds, including that the FCC was acting outside of its authority in regulating cable systems.²⁹ The court upheld the FCC decision by suggesting that the ruling by the FCC was not regulating the CATV system; instead the court found the FCC was protecting the public interest in having local broadcasters, and by noting that the FCC does have the power to indirectly affect CATV systems in furtherance of that legitimate goal.³⁰ Hence, the era of FCC involvement in cable systems began.

C. United States v. Southwestern Cable Company

Newly empowered by the *Carter Mountain* decision and concerned about the explosive growth of cable television systems nationwide, the FCC began putting rules in place to regulate CATV systems. Most significantly, the FCC developed “must-carry” regulations to protect local broadcasters via formal regulatory provisions, unlike the method used in

23. *Id.* at 361.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *See id.* at 362.

30. *Id.* at 365–66.

Carter Mountain where the suggestion was made to the denied applicant to carry the local station.³¹ These rules specifically outlined that “CATV systems were required to transmit to their subscribers the signals of any station into whose service area they have brought competing signals” and that “CATV systems were forbidden to duplicate the programming of such local stations for periods of 15 days before and after a local broadcast.”³²

In 1966, Southwestern Cable was expanding its CATV offerings south from Los Angeles into the San Diego marketplace.³³ Upon reaching the viewing area of San Diego, local broadcaster KFMB-TV, through its owner and licensee, Midwest Television, filed a protest with the FCC due to the carriage by Southwestern Cable of Los Angeles network stations.³⁴ Midwest Television alleged that this violated both the must-carry provision and the prohibition against the carriage of the same network content from outside the market in direct competition with the local broadcast station.³⁵ The FCC agreed, ruling that Southwestern Cable must cease further expansion during the consideration of the merits of Midwest Television’s allegations.³⁶ Southwestern Cable appealed to the Ninth Circuit Court of Appeals, which held that the FCC lacked authority for such an order under the Communications Act of 1934.³⁷ The FCC appealed to the Supreme Court and was granted certiorari.³⁸

The Court, in Justice Harlan’s unanimous opinion, overturned the Ninth Circuit by upholding the FCC ruling.³⁹ While the Court declined to issue a blank check regarding FCC authority of the cable television industry, it did set out that the FCC could regulate that which was “reasonably ancillary to the effective performance of the Commission’s various responsibilities for the regulation of television broadcasting.”⁴⁰ The FCC “may, for these purposes, issue ‘such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law,’ as ‘public convenience, interest, or necessity requires.’”⁴¹

Armed with the endorsement of the Supreme Court, the FCC continued its regulatory role in the development of cable television in the

31. See *United States v. Sw. Cable Co.*, 392 U.S. 157, 166 (1968).

32. *Id.* (citations omitted).

33. *Id.* at 159–60.

34. *Id.*

35. *Id.* at 160.

36. *Id.*

37. *Id.* at 161.

38. *Id.*

39. *Id.*

40. *Id.* at 178.

41. *Id.* (quoting 47 U.S.C. § 303(r)).

absence of congressional action. The FCC set forth a program of dual responsibility between itself and the local authorities. The FCC “retained exclusive jurisdiction over all operational aspects of cable communication, including signal carriage and technical standards.”⁴² State and local communities were given the “responsibility for granting franchises to cable operators within their communities and for overseeing such local incidents of cable operations as delineating franchise areas, regulating the construction of cable facilities, and maintaining rights of way.”⁴³

D. *Cable Communications Act of 1984*

When the City of Miami, Florida put the city’s cable franchise agreement out to bid for renewal in 1984, it included an unusual provision in excess of the five percent franchise fee: \$200,000 to help finance a local drug enforcement program.⁴⁴ However noble and useful the cause may have been, on appeal the FCC held that cable operators should not pay more than five percent of their gross revenues and that payments for items unrelated to the cable franchise were not permitted.⁴⁵ In light of such extreme concessions required by municipalities in the renewal process, in addition to the lack of clear congressional direction, Senator Barry Goldwater sponsored⁴⁶ what would become the Cable Communications Act of 1984 (“1984 Cable Act”).

The 1984 Cable Act’s declared purpose was the following:

(1) establish a national policy concerning cable communications; (2) establish franchise procedures and standards . . . ; (3) establish guidelines for the exercise of Federal, State, and local authority with respect to the regulation of cable systems; (4) assure that cable . . . provide[s] . . . the widest possible diversity of information . . . ; (5) establish an orderly process for franchise renewal . . . ; and (6) promote competition⁴⁷

These aims were accomplished primarily by adding language to expand the work of the 1934 Communications Act to include cable service as a specific regulated industry under the FCC, the addition of sections outlining franchise renewal, maximum franchise fees, and the public,

42. *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 702 (1984).

43. *Id.*

44. See City of Miami, Florida, *Memorandum Opinion and Order*, 56 Rad. Reg. 2d (P & F) 1, 5 (1984) [hereinafter City of Miami].

45. *Id.* at 15–16.

46. Public Access TV, *Regulation and Franchising*, <http://www.publicaccessstv.net/history05.html> (last visited Nov. 13, 2011).

47. Cable Communications Policy Act of 1984, Pub. L. No. 98-549, sec. 601, 98 Stat. 2779, 2780 (1984) (codified as 47 U.S.C. § 521 (2002)) (internal quotation marks omitted).

educational, and governmental (PEG) channels.⁴⁸ The Act codified the existing FCC rules regarding franchising, including the maximum franchise fee of five percent of gross revenue.⁴⁹ The legislation also contained a specific prohibition of common carriers competing in the cable business within the same geographic footprint as their telephone service area unless no alternative service was available.⁵⁰

E. Telecommunications Act of 1996

The mid-1990s witnessed significant technological innovation within the telecommunications marketplace. This, coupled with the maturation of the cable business, produced a seismic shift that Congress responded to with the 1996 Telecommunications Act (“1996 TelCom Act”). Among other changes, the Act removed restrictions on competition in the cable television market.⁵¹ This removal of restrictions effectively leveled the playing field, since the introduction of phone service by the cable companies and the arrival of the direct broadcast satellite companies into the cable market had already occurred.

III. STATEWIDE CABLE FRANCHISING LEGISLATION

With the passage of the 1996 TelCom Act, the last of the federal regulations barring phone companies from seeking entry to the cable television market were removed. Still, telephone companies faced the daunting task of negotiating with each local franchise granting authority to compete. The piecemeal approach would be both time-consuming and costly. Verizon suggested that it would “be able to offer competitive video service to consumers much faster if [it could] get a statewide franchise instead of knocking on every city's door, [because] a franchise can take anywhere between six to 18 months to negotiate. The network itself only takes about 18 months to build.”⁵² Faced with this reality, Verizon and AT&T pursued changes to the laws—first at the federal level, and then at the state level—to ease the economic and time barriers to entry. Even as the first state legislation was pending in Texas, Verizon clearly stated that it was actively pursuing congressional action to ease the “labor-intensive

48. *Id.* at §§ 601(5), 611, 613(c).

49. *Id.* at § 622(b).

50. *Id.* at § 613(b)(1)-(2).

51. Telecommunications Act of 1996, Pub.L. 104-104, tit. 3, 110 Stat. 118, 118 (1996) (codified at 47 U.S.C. § 543 note § 302(a) (1996)).

52. Marguerite Reardon, *Telcos, Cable Companies Face off Over TV Franchises*, CNET NEWS, (May 27, 2005, 1:34 PM), http://news.cnet.com/Telcos,-cable-companies-face-off-over-TV-franchises/2100-1034_3-5723368.html?tag=mncol (quoting Bill Kula).

city-by-city approach” to franchising.⁵³ During that period, the companies began the arduous process of applying to individual franchise authorities, with success in locations such as Ft. Wayne, Indiana⁵⁴ and Keller, Texas.⁵⁵ In early 2006, Verizon estimated it had close to three hundred individual franchise applications pending with only a “handful” of successes over that two-year period.⁵⁶ Faced with the failure to secure congressional action and the reality of the negotiation process, the telephone companies began to focus on state legislatures for solutions.

A. *State of Texas – September 2005*

In September of 2005, Texas became the first state to enact legislation to permit statewide cable franchises.⁵⁷ The bill underwent substantial changes to overcome the stiff opposition of the cable industry and the Texas Municipal League (“TML”).⁵⁸ The original version, which passed the Texas House of Representatives but not the Senate, did not include provisions ensuring service to all residents in a franchise area, provisions protecting local government authority of rights of way and other terms common in cable franchise agreements.⁵⁹ After changes to bring the legislation more in line with the existing franchise agreements in Texas, Governor Rick Perry called an emergency session of the legislature during which the bill was passed and signed into law by Perry.⁶⁰

The law transferred franchising authority from local authorities to the Texas Public Utilities Commission.⁶¹ The legislation balanced the franchise

53. *Id.*

54. Michael Summers, *Big Cable vs. Big Telephone*, FORT WAYNE READER, (March 6, 2006), available at <http://www.fortwaynereader.com/story.php?uid=669>.

55. *Battling for the Eyes of Texas: Verizon's TV Service Is Winning Fans in a Forth Worth Suburb. Will it Sell Nationwide?*, BLOOMBERG BUSINESSWEEK, March 20, 2006, available at http://www.businessweek.com/magazine/content/06_12/b3976057.htm.

56. *Id.*

57. DIGITAL POLICY INST., BALL STATE UNIVERSITY, *supra* note 13, at 7; see also KAYE HUSBANDS FEALING ET AL., HUBERT H. HUMPHREY INST. OF PUB. AFFAIRS, UNIV. OF MINN., STATEWIDE VIDEO FRANCHISING LEGISLATION: A COMPARATIVE STUDY OF OUTCOMES IN TEXAS, CALIFORNIA, AND MICHIGAN 6 (March 2009) [hereinafter COMPARATIVE STUDY].

58. The Texas Municipal League is the major association of cities in the State of Texas with more than 1,115 cities counted among the membership. *About the Texas Municipal League*, TEXAS MUNICIPAL LEAGUE, <http://www.tml.org/about.asp> (last visited Nov. 13, 2011); Marguerite Reardon, *Texas TV Franchise Bill Not Dead*, CNET NEWS, (July 15, 2005, 12:33 PM), http://news.cnet.com/texas-tv-franchise-bill-not-dead/2100-1033_3-5790370.htm.

59. See Reardon, *Telcos, Cable Companies Face off Over TV Franchises*, *supra* note 52.

60. See Reardon, *Texas TV Franchise Bill Not Dead*, *supra* note 58.

61. 2005 Tex. Gen. Laws 58, available at <http://www.capitol.state.tx.us/tlodocs/792/billtext/pdf/SB00005F.pdf#navpanes=0>.

agreements in force at the time of enactment against the interests of encouraging rapid introduction of competition by prohibiting the transfer of in-force agreements to the statewide franchise scheme until their contractual expiration.⁶² Additional concessions to the cable industry and TML included a mandatory franchise fee of five percent of gross revenue and a PEG channel fee equal to one percent of gross revenue.⁶³ The law also called for new entrants into the cable business to match the carriage of any existing PEG channels carried by the incumbent, and if none existed until that point, the new entrant would be required to offer space for up to three PEG channels.⁶⁴

Despite the provisions above designed to even the playing field, Verizon and AT&T did secure favorable terms compared to their incumbent cable competitors as to build-out requirements and their prospective service area footprints. While the incumbent cable operator set up its network based on the requirement that it serve all households within a given franchise authority's service area footprint, the Texas Legislature relaxed this requirement for the phone company competitors.⁶⁵ As a deterrent to the practice of redlining,⁶⁶ which may have been encouraged by the lack of full build-out requirements, the legislation includes an antidiscrimination clause which sets out that an operator "may not deny access to service to any group of potential residential subscribers because of the income of the residents in the local area in which such group resides."⁶⁷ The passage of Senate Bill 5 in Texas was under close scrutiny by lawmakers around the country, including those in California and New Jersey who were on the verge of their own transition to the statewide cable model.⁶⁸

B. State of New Jersey – August 2006

With the Texas law in place, eight states passed statewide franchise laws in 2006 alone.⁶⁹ New Jersey closely followed the developments in Texas and had legislation introduced as early as November 2005.⁷⁰ Unlike

62. *Id.* at 62.

63. *Id.* at 64.

64. *Id.* at 68.

65. COMPARATIVE STUDY, *supra* note 57, at 3.

66. *Id.* ("Redlining is the practice of firms delineating certain areas in a city where they will not provide a service based predominantly on the demographics of the region").

67. 2005 Tex. Gen. Laws 76, available at <http://www.capitol.state.tx.us/tlodocs/792/billtext/pdf/SB00005F.pdf#navpanes=0>.

68. Reardon, *Texas TV Franchise Bill Not Dead*, *supra* note 58.

69. DIGITAL POLICY INST., BALL STATE UNIVERSITY, *supra* note 13, at 7.

70. Linda A. Rushnak, Note, *Cable Television Franchise Agreements: Is Local, State or*

Texas, where both Verizon and AT&T had a significant interest, the New Jersey legislature was largely negotiating with Verizon alone. Despite this exclusivity, the bill that became law called for an aggressive build-out schedule to be implemented within six years of the issuance of a statewide franchise.⁷¹ It included the installation of fiber-optic cables to each home within the 526 towns served by Verizon at the time of the bill.⁷² A build-out of the network at this level was certain to remove any redlining concerns, as under this scenario every home would be served where Verizon was doing business.⁷³

Not content with making its mark with the build-out requirement, New Jersey also introduced a unique franchise fee system. The bill not only increased the fee from two percent to three percent for all cities with prior franchise agreements, but also clarified the calculation of gross revenue as including “basic, expanded basic, and premiere tier programming, for pay-per-view events, seasonal or sporting events of limited duration, and for all similar programming or channels.”⁷⁴ Additionally, the law provided for one-half of one percent to go to the county in which the franchise city resides, as well as setting aside another one-half of one percent to provide basic tier service to residents enrolled in the “Pharmaceutical Assistance to the Aged and Disabled” program.⁷⁵ The law also required the franchisee to provide each municipality with two PEGs and free equipment for use by those PEGs, to allow each municipality to retain their rights-of-way management, and to supply free Internet access and cable to municipal buildings.⁷⁶

C. *State of California – September 2006*

With the ink barely dry on the New Jersey law, California began to finalize its own version of the statewide franchise law. The California approach is unique in two regards: first, the legislation specifically targets the expansion of broadband service for closure of the digital divide as a goal of the bill, and second, the build-out provisions account for the difference in the technologies utilized by the two main competitors.⁷⁷ Presumably, the competition to be inspired by the law as a whole and the build-out requirements would have the net effect of closing the digital

Federal Regulation Preferable?, 33 RUTGERS COMPUTER & TECH. L.J. 41, 59 (2006).

71. *Id.* at 60.

72. *Id.*

73. *Id.* at 60, 63.

74. A. B. 4430, 211th Leg., Reg. Sess. § 30(a) (N.J. 2005).

75. *Id.*

76. Rushnak, *supra* note 70, at 63–64.

77. COMPARATIVE STUDY, *supra* note 57, at 4-6.

divide. The different types of technology that underpin the Verizon (fiber-optic) and AT&T (copper wire) systems are formally recognized in the law.⁷⁸

AT&T utilizes the same copper wire technology that its telephone network and digital subscriber line (“DSL”) Internet service operate on to provide video service over an internet protocol transfer.⁷⁹ This system involves little to no additional hardware and allows for two-way communication (interactive television) in much the same way the Internet works.⁸⁰ Conversely, Verizon chose to run fiber-optic cable to each home, greatly expanding the bandwidth from traditional copper wire, but at considerable additional expense.⁸¹ This difference may have long-term implications in the capabilities of the two carriers, as demands on the broadband infrastructure continue to grow.

In California this distinction, for the time being, means that AT&T must reach thirty-five percent of homes within three years and fifty percent within five years.⁸² Verizon must reach twenty-five percent of homes within two years and forty percent within five years.⁸³ To prevent potential redlining, both carriers must include no less than twenty-five percent low-income strata⁸⁴ homes in their subscriber totals.⁸⁵

D. State of Florida – May 2007

Florida headlines the nine additional states that passed statewide franchise laws in 2007, bringing the total to eighteen nationally.⁸⁶ The Florida law contained three significant features: (1) existing local franchises were voidable by the cable operator upon receipt of a statewide license, (2) the statewide license included no franchise fee, and (3) the ongoing regulation of the new statutory regime was not assigned to a single administrative unit of the government (such as a public utility commission).⁸⁷ With few exceptions, cable operators applied for statewide licenses and terminated local agreements, leaving local governments with a

78. *Id.* at 4–7.

79. *See id.* at 7.

80. *See id.*

81. *Id.*

82. *Id.* at 5.

83. *Id.* at 4–5.

84. “\$35,000 or less per annum household income” is considered low income. *Id.* at 5.

85. *Id.*

86. DIGITAL POLICY INST., BALL STATE UNIV., *supra* note 13, at 7.

87. *See* OFFICE OF PROGRAM POLICY ANALYSIS AND GOV’T ACCOUNTABILITY, AN OFFICE OF THE FLA. LEGISLATURE, REPORT NO. 09–35, BENEFITS FROM STATEWIDE CABLE AND VIDEO FRANCHISE REFORM REMAIN UNCERTAIN 3 (Oct. 2009).

revenue shortfall.⁸⁸ The Florida franchise fee calls for a one-time \$10,000 application fee, a \$1,000 renewal fee every five years, and an annual \$35 fee for information updates to be paid to the state general fund.⁸⁹

The state takes a piecemeal approach to regulatory oversight in applying the new licensure system. Rather than charging a single agency with all aspects of oversight, governmental oversight responsibility is dependent on the subject matter. For instance, the Department of State handles the applications, renewals, payments of fees, and issuance of acceptance.⁹⁰ The Department of Agriculture and Consumer Services handles consumer complaints about quality of service.⁹¹ The Department of Legal Affairs, as defender of the state's unfair and deceptive trade practices law, handles the investigation of complaints regarding race or income discrimination in the provision of cable service.⁹² As expected, this system has led to complaints by local officials about the inability to handle service problems directly given the lack of leverage a franchise agreement provided under the prior system.⁹³ Concerns have also been raised about the quality and availability of state agency service when addressing complaints.⁹⁴

IV. ANALYSIS OF CONSEQUENCES

There are several issues worth exploring that arise out of changes to the cable franchise system: (A) franchise fees, (B) PEGs, (C) public rights-of-way management, (D) regulatory oversight, (E) redlining and build-out provisions, and (F) pricing and broadband access.

A. *Franchise Fees*

Traditionally, the cable operator pays a franchise fee to a municipality as part of a cable franchise agreement. Federal law specifically limits any franchise fee agreement to an amount not to exceed five percent of gross revenues of the cable operator.⁹⁵ This limitation was included in the 1984 Cable Act to prevent unscrupulous municipalities from holding a cable operator hostage for more exorbitant concessions, such as the attempt by the City of Miami to secure funds for a drug enforcement unit through a

88. *Id.* at 6–7.

89. *Id.* at 3.

90. *Id.*

91. *Id.*

92. *Id.*

93. *See id.* at 6.

94. *See id.*

95. 47 U.S.C. § 542(b) (2006).

cable franchise renewal.⁹⁶ In practice, this fee serves as an additional tax on the citizens of the municipality who choose to purchase cable because it is passed directly back to the general fund for uses that may—or more likely may not—be used for any telecommunications purpose. This fee may be used to support the PEG channels or, in some cases, the operational costs of these channels may be negotiated separately (discussed in depth below).

Statewide franchise laws have taken different forms as to franchise fee provisions. In many jurisdictions such as Michigan, Texas, Virginia, California, and Iowa, the law simply allows the franchise fee for a state licensee to match the incumbent in any municipality in which it competes.⁹⁷ This should effectively make a resident's change of cable provider revenue neutral to the municipality, notwithstanding any potential reduction in fee due to a lower price in the competitive environment. However, the definition of "gross revenues" is subject to considerable interpretative license, a problem that has only been complicated by the introduction of additional services, packages, and tiers. In some cases, a statewide franchise may permit a municipality to collect five percent, but of a lower base number due to a more narrow definition of "gross revenues." For instance, that definition might only include basic cable service rather than digital or premium packages. The entry of new competitors only exacerbates the difficulty of standardizing the accounting for franchise fees. It is in this area that some progress has been made through the statewide franchising legislative process. In Texas, for example, the franchise fee was set to five percent of gross revenue, where gross revenue was defined as "all fees charged to subscribers for any and all cable service or video service"⁹⁸ This marks an increase in fee percentage for most Texas municipalities, as well as an increase in the underlying revenue to which that percentage is applied. As such, it seems that where a franchise fee is included in any statewide franchise legislation, municipality revenues are at least static, if not enhanced through the process. All of this assumes that additional service providers will only split, rather than enhance, the existing cable subscriber base. If enhanced, the expanded subscriber base would also serve to increase revenues to the franchise authority.

Other states, such as Florida, did away with traditional franchise fees altogether in the statewide application process; instead, the applicant only pays the application fee and renewal to the state.⁹⁹ Such a regime

96. See City of Miami, *supra* note 44.

97. COMPARATIVE STUDY, *supra* note 57, at 6.

98. TEX. UTIL. CODE ANN. § 66.002(6)(A)(i) (West 2005).

99. See FLORIDA OFFICE OF PROGRAM POLICY ANALYSIS & GOV'T ACCOUNTABILITY, *supra* note 87, at 3.

presumably only encourages cable operators to move at the earliest possible time to the statewide licensure system to remove the franchise fee from their operational expenses.

One can surmise that the states allowing the five percent model to persist were faced with the political compromise imposed by more organized and potent organizations representing municipalities in the cable franchise business, specifically, those with political influence and something to lose. It is arguably better to use the Florida model—where any revenue needed to offset the costs of managing the cable operators should be borne via the traditional tax regime—rather than via a franchise fee for transparency and true needs-based taxation.

B. Public, Educational, and Governmental Access Channels (PEGs)

The 1984 Cable Act codified the right of franchise authorities to require carriage of channels for governmental access, public access, and educational purposes.¹⁰⁰ Many franchise agreements required the cable operator to provide equipment, facilities, and in some cases staff, to produce material for airing. While it is not clear what viewership these channels receive¹⁰¹ or what social value may be gained from them, it is clear that vocal opposition does exist in pockets of the country to the elimination or reduction in accessibility of PEG channels.¹⁰²

The statewide franchise legislation has varied as to the handling of the PEGs. Some jurisdictions, such as New Jersey, have been particularly friendly to the PEG cause by mandating two PEG channels in each of the traditional cable franchise municipalities in addition to the licensee-provided equipment and training that would allow for the creation of content.¹⁰³ Many states, such as Virginia, California, and Michigan, adopted a hybrid that includes provisions requiring a statewide licensee to match the incumbent operator's PEG carriage, with specified limits on the number of channels and fee structure.¹⁰⁴ Other states, such as Texas and

100. See FCC, CABLE TELEVISION FACT SHEET: CABLE TELEVISION INFORMATION BULLETIN (June 2000), <http://transition.fcc.gov/mb/facts/csgen.html> (last visited Nov. 13, 2011) [hereinafter FACT SHEET].

101. Theodore Bolema, MACKINAC CTR. FOR PUB. POLICY, AN EVALUATION OF LEGISLATIVE PROPOSALS FOR HIGHER CABLE FEES TO FINANCE PUBLIC, EDUCATION AND GOVERNMENT ACCESS CHANNELS 8 (Nov. 10, 2008), <http://www.mackinac.org/archives/2008/2008-11REGfeesWEB.pdf>.

102. See, e.g., Tracy Rosenberg, *Why Public Access Television is Important and You Should Fight for the CAP ACT*, HUFFINGTON POST (Feb. 10, 2010, 4:40 PM), http://www.huffingtonpost.com/tracy-rosenberg/why-public-access-televi_b_457414.html.

103. 2006 N.J. Laws C.48:5A-3(k), (l).

104. COMPARATIVE STUDY, *supra* note 57, at 6.

Iowa, also maintained the incumbent PEG fee percentage, and used municipality population to determine the number of PEG channels required, with two or three channels in most cases.¹⁰⁵ Finally, Florida maintained the access right, but did away with PEG fees in the course of eliminating franchise fees.¹⁰⁶

While the number of channels has been protected in many cases, the introduction of statewide competition has lessened the degree to which these channels are obvious to the channel surfer. AT&T engages in what is called “channel slamming”¹⁰⁷ by placing all of the PEG channels into a submenu rather than providing individual spots on the “dial” that you might stumble upon while channel surfing.¹⁰⁸ Proponents of the PEG channels argue that this erodes a major source of their audience, since few turn the television on for the purpose of watching PEG programming, but may watch once they happen upon it.¹⁰⁹

An additional concern may arise where legislation is not clear as to mandatory carriage provisions of PEG channels. If the incumbent cable operators are forced to carry and contribute to the operation of these PEG channels, while the law does not require the statewide licensees to do the same, unfair competition results where only one of the two competitors is saddled with the added expense of the PEG program.

As with the franchise fee, the balance of interests is likely best struck by using the Florida legislation as a model. It ensures the PEGs access through must-carry provisions, while shifting the cost to maintain them from the indirect PEG fee built into consumers’ cable bills to a direct funding mechanism by any municipality that determines their value to the community sufficient to warrant direct tax payer support. While this model may result in closure of some less competitive PEG channels, those communities that value the service will be able to preserve it by virtue of the grant of mandatory carriage by all cable operators.

105. *Id.*

106. See FLORIDA OFFICE OF PROGRAM POLICY ANALYSIS & GOV’T ACCOUNTABILITY, *supra* note 87, at 6–7.

107. See Katie Saxon, *PEG Communities Concerned Over Channel Slamming*, WADSWORTH POST (Dec. 7, 2010), available at <http://thepostnewspapers.com/wadsworth/cable-tv-commission-wadsworth-12-12--saxon->.

108. *City Hands Bright House Bill for Cable Franchise Fees*, INDIANAPOLIS BUS. J., July 27, 2009, available at <http://www.allbusiness.com/government/government-bodies-offices-regional/13142357-1.html>.

109. See Rosenberg, *supra* note 102.

C. *Public Rights-of-Way Management*

Local government maintains primary responsibility over the public rights-of-way to ensure the orderly and efficient use of them.¹¹⁰ “Local governments have a duty and an obligation to bear the cost of acquiring and maintaining public right-of-way,”¹¹¹ and subsequently “require fair and reasonable compensation from telecommunications providers on a competitively neutral and nondiscriminatory basis”¹¹² for their use. How a municipality issues construction permits is the most frequent display of this regulatory power over the limited public space. These rights-of-way can take the form of telephone poles, underground utility conduits, or the development of systems on previously undeveloped land. There is no current example of a statewide franchise law passing with language that encroaches in a significant way on this local power and the permitting revenue stream that accompanies it.

D. *Regulatory Oversight*

The 1992 Cable Act required the FCC to issue minimum customer service guidelines for cable operators.¹¹³ The guidelines are not binding but rather serve as a starting point for individual franchising authorities (either state or local) to establish rules governing the cable operator.¹¹⁴ The guidelines specifically lay out customer service items: maximum hold times for customers using phone customer service; maximum time delay in reestablishing service after a disruption; maximum service hour window; and notice requirements for changes in rates, channel lineups, or fees.¹¹⁵

Prior to the statewide cable franchise reforms, it was relatively straightforward to determine the regulatory body responsible for handling complaints. Regardless of whether the issue arose out of a consumer complaint, disputes as to payment of franchise fees, or issues regarding PEG channel delivery, the franchise authority had the leverage of having been one-half of the contractual relationship when calling for fulfillment of aspects of the agreement. Additionally, a poor service record or fee disputes could sour the renewal negotiation, leading to a revenue loss (and presumably a profit loss as well) to the cable operator.

110. NAT'L ASS'N OF TELECOMMS. OFFICERS & ADVISORS, LOCAL GOVERNMENT PRINCIPLES RELATING TO RIGHTS-OF-WAY MANAGEMENT AND COMPENSATION & OWNERSHIP OF TELECOMMUNICATIONS FACILITIES 2, (Aug. 20, 1998), http://www.natoa.org/documents/Local_Government_Principles_Relating_to_Rights-of-Way.pdf.

111. *Id.* at 3.

112. *Id.* at 4.

113. FACT SHEET, *supra* note 100.

114. *Id.*

115. *Id.*

Under the statewide franchise model, the states have differed in the treatment of the regulatory body. Some states, such as Texas and Indiana, assign the responsibility to the state utilities regulator.¹¹⁶ Other states, such as California, attempt to maintain local enforcement of regulations made at the state level, but without their prior leverage to cajole cooperation by the cable company.¹¹⁷ Finally, other states, such as Florida, allowed the state agencies to assume responsibilities within the cable business, by subject matter, just as they might for any other business. This model when applied to Florida led to licensure by the Department of State, consumer complaints reported to the Department of Agriculture and Consumer Services, and unfair trade practice complaints being investigated by the Department of Legal Affairs.¹¹⁸

Each of the noted statewide franchise legislation models suffers from the incurable reality of shifting the power to license to the state from the local level. Local city council members likely had political motivations for putting effort into quickly resolving problems of constituents. However, the same effort may be less likely when working with a state administrative agency employee who has no such vested interest in the outcome, personal relationship with the complaining resident, or personal knowledge of who locally to call within the offending cable company to request a change in customer service practice. This failure in service has been the experience in Florida¹¹⁹ (state agency by subject matter model) and Indiana¹²⁰ (the utility regulatory commission model). Indiana State Representative Matt Pierce (D-Bloomington) notes that cities “don't have the power to deal with [cable franchise issues] directly now. You have to go through this bureaucracy in Indianapolis All the communities look at it and say, ‘We don't have the resources to battle a multinational company in court [or in an Indiana Utility Regulatory Commission proceeding].’”¹²¹

Data is not available to pinpoint where complaints are originating about issues such as customer service. However, the problem is of primary concern in areas where the telephone company competitors have not yet arrived. In these areas, a consumer has lost the protections of the regulated local monopoly before realizing the benefit of competition. This puts the

116. *City Hands Bright House Bill for Cable Franchise Fees*, INDIANAPOLIS BUS. J., July 27, 2009, available at <http://www.allbusiness.com/government/government-bodies-offices-regional/13142357-1.html>; COMPARATIVE STUDY, *supra* note 57, at 3.

117. COMPARATIVE STUDY, *supra* note 57, at 6.

118. FLORIDA OFFICE OF PROGRAM POLICY ANALYSIS & GOV'T ACCOUNTABILITY, *supra* note 87, at 3.

119. *Id.* at 6.

120. *City Hands Bright House Bill for Cable Franchise Fees*, *supra* note 116.

121. *Id.*

consumer at a disadvantage compared with his fellow citizens who have the option of shopping their business around to at least four competitors¹²² when customer service standards are not met. Given the potential of partial self-correction through increased competition, this issue is best left undisturbed until more data is available.

E. Redlining and Build-Out Provisions

In awarding a franchise or franchises, a franchising authority shall assure that access to cable service is not denied to any group of potential residential cable subscribers because of the income of the residents of the local area in which such group resides.¹²³

The politically charged subject of redlining stirs a great deal of emotion as it speaks to the heart of fair access to information. This provision of the United States Code effectively countered purely market-motivated build-out plans until the rise of statewide cable franchising. The market, if left to its own devices, would likely target wealthy areas first, where more premium services could be sold, which in all likelihood would lead to greater profits. The market did not get that chance; instead, local franchise agreements contained build-out provisions for areas of the franchise footprint with enough population density to make cable service economically feasible, which ensured compliance with the United States Code. A franchise operator could not choose whom to provide service to on any basis when required to provide service to everyone.

Redlining concerns are not so easily dismissed in an environment such as statewide cable franchises. However, the concerns are even more difficult to dismiss when industry fans the flames, just as SBC (now AT&T) did in the fall of 2004. During a conference call with investors announcing its new “Lightspeed” service, “SBC said it planned to focus almost exclusively on affluent neighborhoods.”¹²⁴ Project Lightspeed was a pilot program to roll out fiber-optic broadband in select neighborhoods. During the conference call, presumably to reassure investors of the expected return on the investment, SBC “boasted that Lightspeed would be available to 90% of its ‘high-value’ customers[,] . . . 70% of its ‘medium-value’ customers [,] . . . [and] less than 5% . . . in ‘low-value’ neighborhoods.”¹²⁵ While the statement was incendiary and politically tone

122. The four include the incumbent cable provider, the telephone company video provider, and the two direct broadcast satellite providers.

123. 47 U.S.C. § 541(a)(3) (2006).

124. Leslie Cauley, *Cable, Phone Companies Duke it out for Customers*, USA TODAY, May 23, 2005, at 1B, available at http://www.usatoday.com/money/media/2005-05-22-telco-tv-cover-usat_x.htm.

125. *Id.*

deaf, the policy itself was not against the law. At that time, SBC was not in the cable business and thus not doing business in opposition to the Cable Act.¹²⁶ However, less than a year later, Texas, in the charged environment created by comments like those of SBC above, would pass its statewide cable franchising law.¹²⁷ Soon thereafter, AT&T would become a cable operator.¹²⁸

The logical start to a discussion about preventing redlining is a mandatory build-out of all areas, such as what exists at the local level. However, in a state the size of Texas, such a requirement may not be economically feasible. A state may be faced with the dilemma of having imperfect competition or no competition at all. Texas tackled the problem without using mandatory build-out provisions, but instead put in an antidiscrimination clause that is very similar to the federal redlining provision.¹²⁹ New Jersey took the opposite approach by requiring the full build-out of the state within six years of receiving a statewide license, thus avoiding the redlining question entirely.¹³⁰ Michigan, Virginia, and California allowed a phased build-out, with both Virginia and California setting specific percentage goals by certain years to ensure the project would serve the greatest number of residents in the shortest period of time.¹³¹

While the New Jersey approach is relatively foolproof to prevent redlining, the state may be at a size, population density, and development such that a full build-out can be accomplished. It should be noted that upon hearing that the build-out provision was in New Jersey's bill, the president of Verizon at the time stated that it "was 'a barrier to [Verizon's] entry.'"¹³² It is unlikely that a state any larger or less dense in population than New Jersey will see such a provision successfully implemented.

In the absence of a full build-out provision, a state must again remember its obligations under the United States Code that as "a franchising authority [it] shall assure that access to cable service is not denied" due to income.¹³³ In order to make such a determination a state

126. While SBC was in a joint marketing agreement at the time with Echostar (now DISH Network) to provide video service to its customers, that agreement does not have the effect of making SBC a cable operator. *Id.*

127. COMPARATIVE STUDY, *supra* note 57, at 2, 6.

128. *Id.* at 7, 21.

129. 2005 Tex. Gen. Laws Laws 76 available at <http://www.capitol.state.tx.us/tlodocs/792/billtext/pdf/SB00005F.pdf#navpanes=0>.

130. Rushnak, *supra* note 70, at 60.

131. COMPARATIVE STUDY, *supra* note 57, at 6.

132. Rushnak, *supra* note 70, at 60.

133. 47 U.S.C. § 541(a)(3).

would have to be provided data, by the carriers themselves, as to where the statewide licensees were operating down to the household (or at least to the census block level). However, because the cable companies consider the information proprietary and a trade secret, they will not release the data for fear of it being subject to a public records request by a rival cable operator or potential new entrant to the marketplace.¹³⁴ Due to this complication, no conclusive data is currently available to determine if redlining is occurring. Florida's Office of Program Policy Analysis and Government Accountability ("OPPAGA") was tasked by the legislature at the passage of the statewide franchise bill to evaluate the build-out and compliance with the antidiscrimination clause of the law.¹³⁵ After acknowledging the issue facing the agency, the OPPAGA recommended that this portion of the study be scrapped due to lack of data or the legislature adjust the law to both require companies to provide the data to OPPAGA, while protecting it from a public records request so the study can be conducted.¹³⁶ This legislative adjustment appears to be necessary to head off an accusation of a state failure to comply with the United States Code in "assuring" no redlining is taking place.

As opposed to the Texas and Florida approach (no build-out) and the New Jersey approach (full build-out), the California approach (phased build-out) appears most realistic for the greatest number of states that still lack a statewide franchise law. This approach, when reached in cooperation with the industry that will serve the market, seems most likely to increase the total number of residents served while giving more direct instruction to the carriers on how to avoid redlining. California's requirement that both AT&T and Verizon have no less than twenty-five percent of homes in their network be low-income, at least facially, puts the onus on the carriers to ensure compliance.¹³⁷

F. Pricing and Broadband Access

The analysis of cable pricing is one fraught with difficulties. The FCC releases a report on cable pricing annually. However, even this report leads to contentious debate as to its efficacy. While discussing the 2007 report before the House Telecommunications and Internet Subcommittee, the National Cable & Telecommunications Association president called the

134. FLORIDA OFFICE OF PROGRAM POLICY ANALYSIS & GOV'T ACCOUNTABILITY, *supra* note 87, at 7.

135. *See id.*

136. *Id.*

137. COMPARATIVE STUDY, *supra* note 57, at 6.

report “false and deceptive”¹³⁸ while Mary Diamond, a spokeswoman for the FCC, responded that “[n]o one except the cable industry believes consumers are paying less for cable than they used to.”¹³⁹ The cable industry prefers to use a per channel cost approach, because this may capture more completely the vast increase in service provided, both in quantity of channels and quality of delivery (High Definition, Digital, On-Demand, etc.).¹⁴⁰ Conversely, the FCC uses actual cost paid.¹⁴¹ It is not surprising that these numbers create very different pictures of the industry. These problems are exacerbated by the difficulties of accounting for bundled Internet and telephone services.

Some have attempted to overcome these difficulties in the underlying numbers to make even more assumptions about the specific impact of statewide franchise laws on pricing. The state of Minnesota commissioned a study by the University of Minnesota to study the effect of statewide franchise laws on, among other things, pricing. The March 2009 study concludes that “there is no one outcome in the data; the presence of [Statewide Video Franchise] is not necessarily correlated with lower video service prices.”¹⁴² The report speculates that the time horizon may not have been long enough to get past the capital-intensive build-out of capacity for real competition to heat up.¹⁴³ After multiple carriers conduct full build-outs of their networks the market will benefit from the overcapacity, at which point we should expect price to be more significantly affected.¹⁴⁴

The real issue with price appears to be the sense that the public was misled during the effort to pass the laws. In 2006, bills were being pushed in many state legislatures and even in Congress on the promise of more competition creating better pricing and more access. However, information came out to the contrary, such as an Atlanta Journal-Constitution interview with AT&T CEO Ed Whitacre, where he said that consumers should “expect no change” to their monthly bill from AT&T’s cable service.¹⁴⁵ In

138. John Eggerton, *Eshoo Takes Martin to Task over Cable Policies*, BROADCASTING & CABLE (Feb. 13, 2008, 7:05 AM), http://www.broadcastingcable.com/article/112439-Eshoo_Takes_Martin_to_Task_Over_Cable_Policies.php.

139. John Eggerton, *FCC Responds to Criticism of Cable-Price Data*, BROADCASTING & CABLE (Feb. 15, 2008, 12:18 PM), http://www.broadcastingcable.com/article/112478-FCC_Responds_to_Criticism_of_Cable_Price_Data.php.

140. William Triplett, *NCTA challenges FCC report*, Variety (Jan. 4, 2007), <http://www.variety.com/article/VR1117956720?refCatId=18>.

141. *Id.*

142. COMPARATIVE STUDY, *supra* note 57, at 16.

143. *Id.*

144. *Id.*

145. *Q&A with AT&T CEO Ed Whitacre: 'Nothing's moved'*, ATLANTA JOURNAL-CONSTITUTION, Feb. 13, 2007, at C1, available at <http://www.redorbit.com/news/>

June 2006, Representatives John Dingell¹⁴⁶ and Edward Markey¹⁴⁷ wrote a letter to the House Energy and Commerce Committee suggesting, without citation, that AT&T's CFO reportedly said that their services "probably will be priced somewhat higher than the average cable TV subscription."¹⁴⁸ The letter did not spare Verizon either; their Director of Federal Public Affairs, Thomas Maguire, was quoted saying that Verizon cable service will be priced "competitively, but *not a discount*."¹⁴⁹ To be certain, neither Verizon, nor AT&T hoped to compete on price until such time as they had recovered some of the significant capital investment required to build out the service footprint.

While price is inconclusive at this stage, the same does not have to be said for the additional broadband connections attributable to the statewide franchise laws. Ball State University's Digital Policy Institute released a study in early 2010 showing over five million new broadband connections that were directly attributable to the statewide franchise laws.¹⁵⁰ For most of the twenty-two states studied (Texas was notably absent), the increase in subscribers was between 1.5% and 2.5%.¹⁵¹ However, Vermont and Rhode Island, perhaps due to size and population concentration managed increases of more than five percent.¹⁵²

The data taken as a whole, suggests that frustration over pricing or broadband access by the state franchise authorities may be significant; however, it is best met with patience as the marketplace matures. Until overcapacity is reached and full competition on price is unleashed, regulators should expect stability in cable pricing while operators seek to recover a portion of the significant capital investment necessary to build-out twenty-five states simultaneously. The initial data on increased broadband access bodes well for those that make the argument that the state franchise system is part of the solution to bridging the digital divide.

technology/841058/qa_with_att_ceo_ed_whitacre/index.html.

146. Ranking Member, House Committee on Energy and Commerce (D-Michigan).

147. Ranking Member, House Subcommittee on Telecommunications and the Internet (D-Massachusetts).

148. JOHN DINGELL & EDWARD MARKEY, OPEN LETTER TO HOUSE COMMITTEE ON ENERGY AND COMMERCE, DON'T LEAVE CONSUMERS HAVING TO COPE WITH WORSE CABLE SERVICE, June 5, 2006, http://democrats.energycommerce.house.gov/Press_109/109dc25.pdf.

149. *Id.* at 1 (internal quotation marks omitted).

150. Cecil Bohanon & Michael Hicks, *Statewide Cable Franchising and Broadband Connections*, DIGITAL POLICY INSTITUTE BALL STATE UNIVERSITY 9 (2010).

151. *Id.*

152. *Id.*

V. CONCLUSION & SUMMARY OF RECOMMENDATIONS

Statewide cable franchise laws should be strongly considered for the states that have resisted such a change until this point. While no state has managed to combine all of the elements recommended in the course of this analysis, the options available have been largely explored and results are available for consideration by future decision makers. At the outset, a prospective statewide franchise law would benefit from cooperation with the major carriers that might enter the market. The best laws are those that encourage the investment in the state from as many carriers as possible via a phased build-out model based on the underlying technology to be used (California approach). This approach can balance the state desire to protect against redlining, while also making the investment of capital attractive to the prospective carrier entrant.

For those states that are able to overcome local municipal association opposition, franchise and PEG channel fees should be eliminated to encourage transparency in tax policy and ensure that only those communities who value PEG channels will be forced to pay for them (Florida approach). PEG channels should, however, receive protection in the form of matching carriage rules. Local government, while losing franchise fee income, should receive explicit reinforcement of their right to manage public rights-of-way, including reasonable fees and nondiscriminatory practices for usage of the public property. The regulatory body will be largely determined by the existing governmental structure of a given state; however, thought should be given to managing the transition from local monopoly to statewide franchise competition with a specific agency responsible for all complaints. However, a state might consider a sunset clause on such a law, as the need for such a resource outlay should naturally subside as the market matures and competition better enforces customer service standards. All such laws should include at least an adoption of the FCC minimum guidelines for customer service and a mechanism for complaint and enforcement to protect constituents from egregious behavior by cable operators.¹⁵³

Finally, the public should be informed that these laws are not a cure-all that will instantly provide lower prices and more access to broadband. There are positive effects to be gained in the short run in the form of job creation for the build-out process and some new broadband connectivity. However, the long-term implications may be far more significant as pricing becomes competitive and increased broadband access lessens the digital divide.

153. FACT SHEET, *supra* note 100.