

# Memorandum



DATE May 19, 2005

TO Members of the City Council Transportation and Environment Committee: Linda Koop, Chair; Dr. Maxine Thornton-Reese, Vice Chair; Ed Oakley; Donald W. Hill; Ron Natinsky; Pauline Medrano; Bill Blaydes

SUBJECT Telecommunications Legislative Update

In 2005, the Texas Legislature asked cities, cable providers, and telecommunications companies to reach a compromise on issues related to our local cable franchise system. While Texas cities were in favor of competition in the provision of video services, they were naturally concerned that any new cable franchising system would ensure that Texas cities were made financially whole and that all technologies and services that use the public rights-of-way pay a fair and equitable fee for use of the public's land. In addition, Texas cities wanted to ensure that they retained enforceable police-power authority over their rights-of-way and were still able to provide public, educational, and governmental (PEG) programming to their citizens.

The end result, after several failed attempts, extensive and prolonged negotiations, one regular legislative session, and two special legislative sessions, was Senate Bill 5. S.B. 5 authorizes a state-issued certificate of franchise authority and represents a compromise that meets the needs of interested parties and is acceptable to Texas cities. Months of arduous negotiations led to a workable bill, and Texas cities believe S.B. 5's provisions should serve as a baseline for any federal legislation.

Federal legislation has been filed - both in the House and in the Senate - that would create national franchising procedures for video services. The current versions of both bills are good starting points. However, we are concerned that in their current form, Texas cities would be worse off than they are under S.B. 5. Key areas of concern with the federal legislation are:

**Right-of-Way Enforcement:** Both bills fail to provide sufficient enforcement authority to assure compliance with local ROW ordinances. Right-of-way management issues should be enforced at the local level, not by the Federal Communications Commission. Cities do not have the resources to defend their right-of-way authority in Washington, D.C., and it doesn't make sense for a federal agency to oversee local rights-of-way from thousands of miles away. The FCC also has insufficient expertise and resources to oversee right-of-way matters across the nation. For similar reasons, S.B. 5 contains a provision that expressly prohibits the Texas Public Utility Commission from asserting jurisdiction over right-of-way management issues. S.B. 5 leaves those matters to local governments, and where disputes arise between local

governments and providers, to the courts. An equivalent provision precluding FCC jurisdiction over right-of-way matters and leaving those matters to the courts would be a valuable addition to the federal legislation.

**PEG Support:** Under S.B. 5, the holder of a state-issued certificate of franchise authority generally pays a city, for PEG support, the greater of one percent of gross revenues, or an amount based on the per-subscriber equivalent of the PEG obligations of the incumbent cable operator. This compromise allows Texas cities that provide PEG programming to remain whole. Federal legislation should be amended along these lines. Otherwise, Texas cities will not be made whole, and would lose one of the primary benefits of S.B. 5.

**Cable Service Definition:** Under S.B. 5, "video service" is defined as "video programming services provided...without regard to delivery technology, including Internet protocol technology." The Texas definition was designed to include Internet protocol technology as well as other technological advances that may be on the horizon. A provider using city rights-of-way to provide multichannel video service, regardless of the technology involved, should not be exempt from paying right-of-way compensation. Competitive neutrality also demands similar treatment of similar providers. The House version of the federal legislation includes an amendment to the "cable service" definition that is similar to S.B. 5's "video service" definition, but then contains two new additional exclusions to the "cable service" definition relating to on-demand and information services that are not in S.B. 5 and also not in the current federal Cable Act. The result, we fear, is that the very types of on-demand IPTV programming that AT&T intends to provide in Texas, the revenues of which are included in the S.B. 5 fee revenue base, will be lost to Texas cities unless the "cable service" definition in the federal legislation is amended.

For the briefing scheduled on Monday, May 22, 2006, please find attached an analysis of the federal versions of video franchising legislation and SB 5.

Respectfully submitted,

  
Larry Casto  
Assistant City Attorney

**House and Senate  
Franchising & Municipal Provisioning Bills<sup>1</sup>**

Issue	Stevens Bill SB 2686	Barton COPE HR 5252	SB 5
<b>Sponsors &amp; Status</b>	<p>Senator Stevens (R-Alaska)</p> <p>The 1st committee mark up on May 18th. Addresses more issues than COPE legislation such as:</p> <ul style="list-style-type: none"> <li>• Universal service, including a broadband services standard and eligibility for support.</li> <li>• Sports programming,</li> <li>• Rates for servicemen calling home.</li> <li>• FCC Commission meetings in non-public setting.</li> <li>• Public safety interoperability grants,</li> <li>• DTV conversion consumer education, and</li> <li>• Whitespace wireless technology efforts.</li> </ul>	<p>Joe Barton (R-TX) Fred Upton (R-Mi) Bobby Rush (D-III)</p> <p>Reported favorable by the House Energy and Commerce Committee</p>	<p>Current law in Texas passed and signed by governor in the summer of 2005.</p>
<b>Summary</b>	<p>Amends Title VI to create a national franchise template, Amends Title II to ensure municipal provisioning, but not well.</p> <p>Clarifies rights and responsibilities of VoIP providers, weakens even FCC current standards on net neutrality.</p>	<p>Amends Title VI to create a national franchise, amends Title II to ensure municipal provisioning, clarifies rights and responsibilities of VoIP providers, begins to address net neutrality</p>	<p>Amends state law to allow for state-issued franchise for provision of all video services utilizing PROW, provides for compensation to municipalities, and maintains local control of PROW management.</p>

<sup>1</sup> While both the COPE and Stevens' bills address many more issues than franchising and municipal provisioning, this chart limits itself to those issues.  
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House and Senate  
Franchising & Municipal Provisioning Bills<sup>1</sup>

	Stevens Bill SB 2686	Barton COPE HR 5252	SB 5
<b>Cable Franchising</b>	<p>TITLE III—Page 37</p> <p>Provides for a streamlined franchise process utilizing an FCC franchise template. Provides no input to local government and does not address community needs.</p> <p>Two step franchise process results in franchise no later than forty-five days after application, and could be effective as soon as thirty-one days following application. <b>Step 1</b> -- Provider Files Application with LFA. <b>Step 2</b> – LFA fills in the its four blanks <b>Step 3</b> – Applicant accepts or rejects – LFA has not options</p>	<p>Permits traditional franchise negotiations, but more than likely operators will seek a national franchise, which is administered by the FCC, provides a 10 year term.</p> <p>Can still obtain franchise from local authority.</p> <p>Incumbents may seek a national franchise once a national franchisee provides service in “franchise area.” Franchise area is an undefined term and could be subject to amendment at April 25, 2006 mark up.</p>	<p>Provides for state-issued franchise through PUC once franchise area is defined. Franchise area undefined is not limited.</p>
<b>Efforts to Address IPTV</b> (This is most often done in the definition of what is captured under the definition of gross revenues)	<p>Authors claim it is their intent to capture IPTV in definition of services subject to gross revenue claims as a cable service</p> <p>Bill would eliminate the use of word cable almost universally and replace it with video.</p>	<p>Authors claim it is their intent to capture IPTV in definition of services subject to gross revenue claims as a cable service.</p> <p>Local government advocates believe that language could be clearer and that information service exemption found</p>	<p>Clearly includes all video services; whether IPTV or whether service is characterized as an information service at a later date.</p>

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Efforts to Address IPTV continued	<p>Defines “video service provider” as — “(A) ...a provider of video service that utilizes a public right-of-way in the provision of such service, including a cable operator; but (B) does not include (i) a satellite carrier; (ii) any person providing video programming using radio communication directly to the recipient’s premises; or (iii) any provider of commercial mobile service (as defined in section 332(d)).</p>	<p>in definition of cable service could become exemption that swallowed the rule.</p>	
Franchise Fee	<p>Legislation does not mandate percentage but does provide that LFA gets to set rate unilaterally up to 5%.</p> <p>Some states, however, have already imposed lower ceiling <i>See e.g.</i> New Jersey and Arizona.</p>	<p>Because bill seeks to amend Title VI, it builds on Act’s provisions set out in “Current Law” column.</p> <p>Legislation does not mandate percentage but does provide that LFA gets to set rate unilaterally up to 5%.</p> <p>Some states, however, have already imposed lower ceiling <i>See i.e.</i> New Jersey and Arizona.</p>	<p>5% based upon definition of gross revenue as set forth in the bill.</p>

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<b>Gross Revenue</b>	<p>Defined by the statute. Interactive on demand video is captured, but it is not clear that advertising, rental and installation fees are. It is clear that home shopping revenue is excluded. (page 60, line 15)</p> <p>Definition of gross revenues would exclude "other broadband-enabled applications." (page 62, Line 14). Not clear what that means</p>	<p>Defined by the statute to include advertising and other non-subscriber revenue</p> <p>Debate continues as to status of IPTV inclusion in debate</p>	<p>Defined by statute, similar to definitions found in most existing franchises</p>
<b>PEG Obligations and Duties</b>	<p>(Sec. 333, Page 66) Operator must match largest incumbent in terms of channels provided. If franchise area has no incumbent or incumbent provides no PEG channels, then that number of channels established by the Commission.</p>	<p>National franchisee must match incumbent cable channels.</p> <p>If no local PEG then national franchisee will need to provide number of channels established in FCC proceeding.</p> <p>Every ten years local government can petition for increase in PEG channel capacity by up to 1 channel or 10% of capacity.</p> <p>"Channel" definition unchanged from current law</p>	<p>Same number of PEG channels (up to 10) as were <u>active</u> on 9-15-05, but no fewer than: &lt;50,000 pop.: 2 channels &gt;50,000 pop.: 3 channels</p>
<b>PEG \$\$\$ Support</b>	<p><u>Proposed Section 542 (4)(A) would read:</u></p>	<p>Bill provides for one percent (1%) of gross revenue for PEG support.</p>	<p>Same as incumbent cable provider, on a per subscriber basis, until franchise expires, then one percent of Gross</p>

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<b>PEG \$\$\$ Support continued</b>	A video service provider with a franchise under this section for a franchise area may be required to pay an amount equal to not more than <b>one percent</b> of the video service provider's gross revenue in the franchise area to the franchising authority for the support of public, educational, and governmental use and institutional networks	Still unclear whether funds can be used for operating support or will continue to be limited to capital support.  Both of these issues will be subject to proposed amendments in the April 25, 2006 markup.	Gross Revenues which is intended to replace PEG support payments and cash value of in-kind services that are no longer provided.
<b>I- NET</b>	Bill appears to prohibit the requirement of future I-Nets	Bill appears to prohibit the requirement of future I-Nets  I-Nets or networks to provide upstream capacity from point of user to headend.	In-kind services from incumbent cable provider must be continued for free until the later of the expiration of the incumbent franchise agreement or Jan. 1, 2008, then municipality may require in-kind services at the level prior to expiration of the incumbent agreement. However, provider can deduct the "Actual incremental costs" from any franchise fee owed a municipality.
<b>Ability to Require Build Out</b>	There is no build out requirement, unless one assumes that a density line extension standard will be included in the FCC's standard template	No	No
<b>Redlining</b>	New Section 642 would read. A video service provider may not deny access to its video service to any group of potential residential video service subscribers because of the income, race, or religion of that group.	Prohibits redlining, but because the standard under act is intent and the act provides ability to meet obligations by means of satellite services, it is not clear that standard will ever be enforceable.	Prohibited. Now service areas can be defined by provider. But, legislative intent indicated that the prohibition on discrimination could extend beyond designated "service area" Municipality given right to bring suit.

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<b>Redlining continued</b>	<p>The FCC is the adjudicatory body and complaints may be brought by individual or LFA. Penalties include revocation of franchise.</p> <p>Interesting that no attorney fees are recoverable.</p>	This area will be subject to amendment.	
<b>Franchise Renewals</b>	<p>(Sec. 332, Page 65)</p> <p>Standard for renewal is whether operator has willfully and repeatedly violated a federal, state or local rights-of-way law, or an FCC regulation. Operators must be provided opportunity to cure and may appeal to a Court. Operators are also given the opportunity to appeal to the FCC under an abuse of power standard. Attorney's fees and costs are recoverable in such an action for the operator. No word on whether local government may recover its fees if it is successful</p>	No renewal issues as franchises are automatically renewed at ten year term.	State issued franchise is perpetual, no renewal is required.
<b>Franchise Transfers</b>	Stevens's bill does not change 47 U.S.C. 537 which permits 120 day review of transfers if such review is reserved in the franchise. The Stevens' treatment on transfers therefore will be determined by FCC model franchise.	National Franchise freely transferable without review. Also facilities transferable without FCC or LFA review.	State issued franchise: No approval required, only notice to PUC and municipality within 14 days after transfer.

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<b>Franchise Transfers continued</b>	But why would anyone wait 120 days for a transfer when they could apply for a new franchise in 30 days?		
<b>Right of Way Authority and other Police Powers</b>	<p>Stevens' legislation creates a four pronged test to determine if a rights-of-way management act is enforceable. It must be:</p> <ul style="list-style-type: none"> <li>• reasonable, competitively neutral, nondiscriminatory, and consistent with State statutory police powers.</li> </ul>	<p>"Nothing in this Act affects the authority of a State or local government ... to manage the public rights-of-way"</p> <p>Problem is several points where PROW manager is presumed to be same as LFA.</p> <p>No enforcement except through court proceedings.</p>	<p>Must be ordinance, municipality no longer has authority to franchise cable or video service. However, failure to comply with a city's local ROW ordinance can be grounds for revoking state-issued franchise.</p>
<b>Consumer Protection</b>	<p style="text-align: center;">(SEC. 338, Page 70)</p> <p>Bill calls upon the FCC to create new consumer protection rules. States may enforce the rules, but local government may not.</p> <p>Local government may serve as complainant .</p>	<p>Wynn amendment calls on FCC to create new rules that could be enforced by FCC or local government.</p> <p>Efficacy of new program cannot be determined until the FCC conducts its proceeding and issues rule.</p> <p>History of such actions has not been promising.</p>	<p>The PUC may only enforce minimal customer service standards established by the FCC and then only in areas that do not have an incumbent cable company.</p>

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