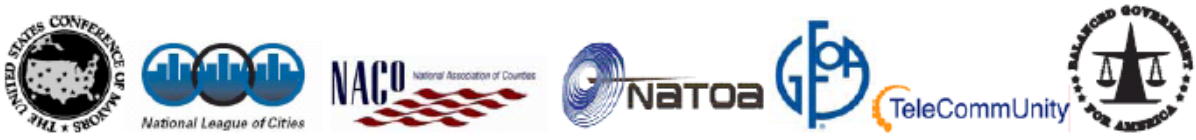

BEFORE UNITED STATES SENATE

COMMITTEE ON COMMERCE, SCIENCE AND TRANSPORTATION

VIDEO FRANCHISING

TESTIMONY

OF

MAYOR KENNETH S. FELLMAN

ON BEHALF OF THE

NATIONAL LEAGUE OF CITIES,

THE UNITED STATES CONFERENCE OF MAYORS,

NATIONAL ASSOCIATION OF COUNTIES,

NATIONAL CONFERENCE OF BLACK MAYORS, INC.

NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS,

GOVERNMENT FINANCE OFFICERS ASSOCIATION

AND

TELECOMMUNITY

JUNE 13, 2006

WASHINGTON, D.C.

Introduction:

Good morning, Chairman Stevens, Senator Inouye and members of this Committee. I am Ken Fellman, Mayor of Arvada, Colorado. I am honored to be here today to testify not only on behalf of the National League of Cities ("NLC"), but also on behalf of local governments across this nation, as represented by the National Association of Counties ("NACo"), the United States Conference of Mayors ("USCM"), the National Conference of Black Mayors, the National Association of Telecommunications Officers and Advisors ("NATOA"), the Government Finance Officers Association ("GFOA"), and TeleCommUnity.[1]

Before I address specifics, the national organizations want to thank both the majority and minority staffs for their professionalism, courtesy and time spent with us to hear our concerns and work toward resolutions. The revised draft represents a good faith effort to address many of our concerns. There are matters that we could not resolve, and agreed to disagree, but that is the nature of the legislative process. We look forward to continuing this dialogue as we move towards markup.

Just as my friend, Dearborn's Mayor Michael A. Guido, testified at your last hearing, I want to again stress that America's local governments embrace technological innovation and competition in the video marketplace. We want and welcome real competition in a technologically neutral manner. Local governments – and our residents – support the deployment of new video services in our communities.

Our last testimony outlined our well-known, and oft-stated, principle that the video franchising process should remain at the local level. To do so permits each community, based on its unique community needs and citizen input, to decide for itself – in a fair,

[1] NLC, USCM, NCBM and NACo collectively represent the interests of almost every municipal or county government in the United States. NATOA's members include elected officials as well as telecommunications and cable officers who are on the front lines of communications policy development in cities nationwide. GFOA's members represent the finance officers within communities across the country who assist their elected officials with sound fiscal policy advice. TeleCommUnity is an alliance of local governments and their associations that promote the principles of federalism and comity for local government interests in telecommunications.

equitable and politically accountable manner – the nature of the video service that will be provided to its citizens.

Based on this principle, we put forth our philosophical concerns with this legislation – that video franchising authority would be stripped away from local governments; that Congress should not attempt to speed entry into the marketplace for new video providers through subsidies paid for out of local government budgets to private sector entities for the use of the public rights-of-way; that no citizen should be deprived of video service because of the neighborhood they live in; and that public, governmental and educational (PEG) access channels and institutional networks are critical links to our communities.

The Specifics:

In our review of the first draft, we raised five specific criticisms that we believed needed to be addressed.

First, we testified that while ostensibly preserving local franchising authority, the net effect of the earlier version of the legislation would be to strip authority from local governments and grant that authority to the Federal Communications Commission ("FCC"). The proposed timeframes for local action were wholly unrealistic and requiring a franchise authority to act in 15 days - and to approve a franchise in 30 days - would, in many instances, violate state and local law, deprive elected officials of their statutory rights and authority, and leave consumers without a voice in their community.

The new staff discussion draft imposes a timeframe of 90 calendar days within which the franchising authority must act on the video provider's application. While this new deadline will require some jurisdictions to change their processes, it is a more reasonable time for local governments to act than appeared in the first draft. Still, we would prefer that the language be revised to accommodate the public notice and hearing requirements of state and local law. These requirements are the foundation of democracy at the local level, not merely for cable franchising, but for all local laws. We see no need to give preferential treatment to one industry.

Second, we testified the bill would send all rights-of-way disputes to the FCC, an agency that lacks the resources and expertise to handle them. We said the bill would second guess not only the general police powers of the community, but the policies and engineering practices of public works departments nationwide – and put those decisions within a federal agency with no stake in the outcome other than to speed deployment at any or all cost.

The new discussion draft changes that model and replaces it with a court of competent jurisdiction as the sole recourse for dispute resolution. This works in today's environment, and should work in the future. And we welcome the addition in Section 612 in which new video service providers will have to agree to comply with all regulations regarding the use and occupation of public rights-of-way, including the police powers of local governments. We have some concern, however, that the right-of-way language places too many obligations on local rights-of-way regulators. We believe that, much like 47 U.S.C. §253, if a right-of-way management requirement is competitively neutral and non-discriminatory, no more is required. As drafted, the bill would preempt local right-of-way regulations that satisfy the requirements of §253 in certain circumstances.

Third, we testified that while the stated intent of the original draft may have been to keep localities financially whole, the bill would result in a significant revenue loss to local governments. The exclusion of advertising and home shopping revenues from the definition of "gross revenues" would significantly diminish the rent paid for the use of public property. Further, the reduction in the base of gross revenues would undermine local government's ability to provide necessary services through the use of public, educational and government access facilities and deprive public safety and governmental use of institutional networks.

The revised draft attempts to address this concern over gross revenue, although we note that there may be some reluctance to accept language we have suggested. The language appears in brackets in the definitions section – Page 69 "(2) Gross Revenue (A)(iii), (iv)".

We strongly urge you to retain this language, which includes both home shopping and advertising revenues.

Regarding PEG financial support, we still believe the percentage of support should be higher. While many communities across the country already impose a one percent of gross revenue formula for PEG financial support, a number of communities have entered into freely negotiated franchise agreements with video providers that provide for additional support. This draft would strip those communities of the support that their video providers agreed to give to support these vital local resources.

We also recommended that in addition to the language providing one percent of gross revenues for PEG support, that an additional section be added to provide an alternative of a "per-subscriber" payment basis. We note that this language has been included (Page 63, line 16), but it too is bracketed, and may be subject to further consideration. We strongly urge that this language be retained as well. We are also troubled by the exclusion of one-time or lump-sum PEG support payments from the "per subscriber" formula. This arbitrarily punishes communities which did not have the foresight years ago in anticipating what Congress would do now.

Fourth, we testified that while at first glance the bill appeared to prohibit redlining, it would permit video providers to pick and choose the neighborhoods they would like to serve and bypass others completely. This would not enhance the position of this country in the standing of broadband deployment, but will certainly widen the gap between those who have access to competitive, affordable services and those who do not. Rather than ensure that everyone is served and served equitably, the legislation would continue the downward spiral that the unregulated market has created thus far.

While the new staff discussion draft expands the definition of what groups are covered by the anti-redlining section, this section alone falls far short of the measures we believe will be necessary to enhance broadband deployment and ensure competitive services are offered to all segments of our communities. Local governments should retain the

discretion to impose reasonable, competitively neutral and nondiscriminatory buildout requirements.

The new language does put in place dual, non-duplicative complaint-initiated enforcement mechanisms, state commission enforcement, or state attorney general enforcement. While some guidance is given to the state, absent the discretion on the part of local governments to require buildout, we are not convinced this will be sufficient to actually address our redlining concerns.

Fifth, we testified that it appeared that the original draft would undermine the taxing authority of state and local governments in areas wholly unrelated to rights-of-way compensation.

The new draft addresses this concern on page 65, line 7, "(d) Other Taxes, Fees, and Assessments Not Affected. -- Except as otherwise provided in this section, nothing in this section shall be construed to modify, impair, supersede, or authorize the modification, impairment, or supersession of, any State or local law pertaining to taxation." We appreciate your resolving this issue in this manner.

Other Interests and Concerns:

Having addressed the five main points from our earlier testimony, we would like to call the committee's attention to other matters in the discussion draft.

Consumer Issues:

Section 632, as proposed to be amended by this discussion draft, would have the FCC, after consultation with a variety of groups, promulgate regulations with respect to customer service and consumer protection. Local communities would not be able to create different standards tailored to meet local needs. Existing standards would be preempted if inconsistent with the new FCC standards. The new draft would allow local governments to enforce the federal standards, with the video service provider having the

opportunity to appeal to the FCC. The ability to tailor local standards to meet local needs has served consumers well, and this local authority should not be preempted.

GAAP:

We expressed concern to the committee staff about utilizing Generally Accepted Accounting Principles (GAAP) as a standard for the Annual Review of PEG financial support. GAAP are "principles" and, as such, are guidelines. It is not a clear set of black and white rules. The accounting treatment of many issues involving the definition of gross revenue can be subject to interpretation, as well as materiality standards.

Utilizing GAAP will present the following issues:

- The categories of revenues will not be clearly and consistently defined because GAAP can issue new standards and guidelines. GAAP can change based on new accounting standards by industry and or new interpretations of old standards by industry resulting in variations in the calculation of gross revenues from year to year.
- Recognition of revenue under GAAP can hinge on contract language making gross revenues subject to the manipulation of the Franchisee.
- GAAP is utilized within the accounting industry as a guideline and is subject to interpretation. Thus, the Franchisor and Franchisee may have differing opinions of what revenues to include in franchise and PEG fee calculations.
- Issues such as advertising commissions, launch fees, distribution fees, and cooperative advertising may be accounted for as "contra-expenses" in accordance with GAAP, even when the "third party" is an affiliated entity. This allows manipulation of the recognition of gross revenues by the Franchisee and this presentation of revenues is advantageous only to the video service providers.
- There is more than one method to record revenues in accordance with GAAP. The video service provider could choose the version that lowers fees, resulting in debate as to the proper treatment and interpretation.

Municipal Provisioning:

We believe the new language recently agreed to by Committee members is a marked improvement and we are grateful to Senators McCain and Lautenberg for their leadership in ensuring that communities can explore broadband options.

Having noted a number of concerns, we would like to point out some acceptable parts of the revised draft.

We appreciate the staff's rescission of the "video source" definition to accommodate IPTV and interactive, on-demand services.

We want to note that the committee staff accepted our recommendation in assuring that PEG channels be available to all subscribers in a franchise area by requiring they be in a basic tier of service.

We like Title I of the draft, particularly the section on interoperability and SAFECOM. The interoperability section of Title I appropriately allocates available funds, and utilizes the expertise of the Department of Homeland Security's SAFECOM program.

Conclusion

We value the deliberative process, such as today's hearing, to be sure that we are making informed decisions. The franchising process should be designed to promote fairness for consumers and promote a level playing field for all providers and this draft makes significant process towards ensuring this is the case.

Collectively, we represent the interests of almost every municipal and county government in the United States. We strongly endorse promoting competition that will permit new video providers to come into our communities on a level playing field, while preserving

local franchising authority that has proved to be so valuable to our cities and counties around the country. We note that there were many areas of initial concern within the bill that have been addressed. We look forward to continuing our work in assessing the legislation and its impact, and believe that the Committee should continue its excellent work and ensure a strong record in support of any decision to change existing law.

Thank you. I look forward to answering any questions you may have.