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Cable Franchising Provisions in House-Passed H.R. 5252, 109th Congress

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Summary

On June 8, 2006, the House of Representative passed H.R. 5252, the Communications Opportunity, Promotion, and Enhancement (COPE) Act of 2006. Title I of the COPE Act amends Title VI of the Communications Act of 1934 (47 U.S.C. 541 et seq.) to create a process for granting a national franchise that would give a cable operator the authority to provide cable service in a franchise area. The purpose of this legislation is to foster competitive entry into the cable television market by creating a streamlined franchising process that new entrants could employ as an alternative to the current process of negotiating for franchise authority with potentially thousands of local jurisdictions. Further, once competitive entry has occurred in a franchise area, an incumbent cable company serving that area would be able to seek a national franchise. Under the bill, the Federal Communications Commission (FCC) is instructed to issue a number of national rules and is given certain enforcement and appeals responsibilities. Local franchise authorities retain authority over management of rights-of-way and some other requirements.

Major provisions in Title I of H.R. 5252 cover the eligibility requirements and certification process for a national franchise; requirements for identifying the boundaries of franchise areas; the national franchise renewal and revocation process; franchise fees; revenue definitions; public, educational, and governmental use (PEG) requirements; PEG and institutional network financial support requirements; rights-of-way authority and management; national consumer protection and customer service standards; the consumer protection and customer service complaints process; antidiscrimination (redlining) requirements; child pornography protections; the reporting, records, and audits processes; fee dispute resolution; definition changes in the Communications Act; and FCC monitoring and reporting requirements.

This report will not be updated.

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Title I of the COPE Act consists of four sections. Section 101 adds a new section, Section 630, to the Communications Act to create national cable franchises. The bulk of the new national cable franchising provisions are in this section. Section 102 revises some definitions in Section 602 of the Communications Act. Section 103 creates monitoring and reporting requirements for the FCC. Section 104 retains the current law on pole attachments.

Section 101. National Cable Franchising

This section creates a new Section 630 in the Communications Act, entitled National Cable Franchising, with the following major provisions.

Election

An eligible applicant may elect to obtain a national franchise to provide cable service in a franchise area, or it may obtain a franchise from an existing state or local franchising authority. Sec. 630(a)(1) and (a)(4)(B).

Eligibility

New cable providers may obtain a national franchise on the date of enactment of this law. Existing providers of cable service may obtain a national franchise for a franchise area if there is a competitive provider in that franchise area. Sec. 630(d).

Return to Local Franchising if Cable Competition Ceases

If only one cable operator is providing cable service in a franchise area and that cable operator obtained a national franchise when there had been more than one cable operator in that area, the local franchising authority may file a petition with the FCC requesting that the FCC terminate the national franchise for that franchise area. If the FCC finds there is only one cable provider in that franchise area, it shall issue an order granting the petition, which would take effect one year from the date of such grant if no other cable operator offers cable service in that area during that one year. The cable operator that lost its national franchise may obtain a franchise from the local franchising authority. Sec. 630(b)(1)(G).

Certification

An applicant for a national franchise must file a certification with the FCC that provides certain basic information and a declaration that it will comply with the rights-of-way requirements of the franchising authority in the locality for which it seeks a franchise and the consumer protection and customer service rules adopted by the FCC. Sec. 630 (a)(2) and (3).

Identification of Each Franchise Area

The applicant must identify each franchise area in which it intends to offer cable service pursuant to the national certification. Because some of the national franchise requirements explicitly require the franchisee to meet the franchise requirements currently imposed on cable companies with local franchises, the bill requires that applicants define their proposed franchise areas in a fashion that does not overlap the boundaries of existing cable franchises. Specifically —

- a franchise area must be the entirety of a franchise area in which an incumbent cable operator is authorized to provide cable service; or
- if the applicant seeks to serve a geographic area for which currently there is no authorized cable provider,¹ the franchise area must cover the entirety of the jurisdiction of a unit of general local government. If the applicant also seeks to serve a contiguous geographic area for which currently there is an authorized cable provider, the certification must specify separate franchise areas for the currently unserved and currently served areas; or

¹ Currently, more than 95% of U.S. households are located in a geographic area that at least one cable company is franchised to serve.

- if the applicant seeks to serve a geographic area that includes areas that are within the jurisdiction of different franchising authorities (e.g., contiguous counties), the certification must specify each such area as a separate franchise area. Sec. 630(a)(3)(F).

Local Notification

On the day of filing any (national) certification for a franchise area, the applicant must transmit a copy of the certification to the (local) franchising authority for that area. Sec. 630(a)(4)(A).

Effectiveness, Duration, Renewal, Revocation

A national franchise shall be effective within 30 days of the date of the filing of a completed certification, for a term of 10 years. It shall be renewed automatically upon expiration of the 10-year period. During the last year of the 10-year period, a local franchising authority may request a public hearing to identify cable-related community needs and interests and to assess the performance of the cable operator that holds the national franchise (hereinafter referred to as the “national franchisee”) in that franchise area. A franchise may be revoked by the FCC for willful or repeated violation of any federal or state law or Commission regulation relating to the provision of cable service in the franchise area, for false statements or material omissions in FCC filings, for willful or repeated violation of rights-of-way management laws or regulations, or for willful or repeated violation of the antidiscrimination requirement. A national franchisee whose franchise has been revoked for a specific franchise area may seek reinstatement. Sec. 630(b)(1)(A) through (F).

Franchise Fee

A national franchisee shall pay to the franchising authority a franchise fee of up to 5% of gross revenues from the provision of cable service within the franchise area. Sec. 630(c)(1).

Definition of Gross Revenues

Gross revenues means all consideration of any kind or nature, including cash, credits, property, and in-kind contributions (services or goods) received by the cable operator for the provision of cable service within the franchise area. Gross revenues include —

- all charges and fees paid by subscribers for the provision of cable services, including fees attributable to cable service when sold individually or as part of a package or bundle, or functionally integrated, with services other than cable service;
- any franchise fee imposed on the cable operator that is passed on to subscribers;

- compensation received by the cable operator for promotion or exhibition of any products or services over the cable system, such as on “home shopping” or similar programming;
- revenues received by the cable operator as compensation for carriage of video programming or other programming service on that operator’s cable service;
- all revenues derived from the cable operator’s cable service pursuant to compensation arrangements for advertising; and
- any advertising commissions paid to an affiliated third party for cable services advertising.

Gross revenues do *not* include:

- any revenues not actually received, even if billed, such as bad debt not recovered;
- refunds, rebates, credits, or discounts to subscribers or to a municipality, to the extent the discount is attributable to the cable service;
- except as relates to functionally integrated services (discussed below) any revenues received by the cable operator or its affiliates from the provision of services or capabilities other than cable service, including telecommunications services; Internet access services; and services, capabilities, and applications that may be sold as part of a package or bundle, or functionally integrated, with cable service;
- any revenues received by the cable operator or its affiliates for the provision of directory or Internet advertising, including yellow pages, white pages, banner advertisement, and electronic publishing;
- any amounts attributable to the provision of cable service to customers at no charge, including the provision of such service to public institutions without charge;
- any tax, fee, or assessment of general applicability imposed on the customer or the transaction by a federal, state, or local government or any other governmental entity, collected by the provider, and required to be remitted to the taxing entity, including sales and use taxes and utility use taxes;
- any forgone revenue from the provision of cable service at no charge to any person, except for any forgone revenue exchanged for trades, barter, services, or other items of value;
- sales of capital assets or surplus equipment;

- reimbursement by programmers of marketing costs actually incurred by the cable operator for the introduction of new programming; or
- the sale of cable services for resale to the extent the purchaser certifies in writing that it will resell the service and pay a franchise fee with respect thereto.

Functionally Integrated Services. In the case of a cable service that is bundled or integrated functionally with other services, capabilities, or applications, the portion of the cable operator's revenue attributable to such other services, capabilities, or applications shall be included in gross revenue unless the cable operator can reasonably identify the division or exclusion of such revenue from its books and records that are kept in the regular course of business.

Affiliate Revenue. Revenue of an affiliate shall be included in the calculation of gross revenues to the extent the treatment of such revenue as revenue of the affiliate has the effect (whether intentional or unintentional) of evading the payment of franchise fees that would otherwise be paid for cable service. Sec. 630(o).

Public, Educational, and Governmental (PEG) Use Requirements

A national franchisee shall provide channel capacity for PEG use that is not less than the channel capacity required of the cable operator with the most subscribers in the franchise area on the effective date of the national franchise. If there is no other cable operator in the franchise area required to provide channel capacity for PEG use, the national franchisee shall provide the channel capacity for such use determined by FCC rule. Every 10 years, a franchising authority may require a national franchisee to increase the channel capacity designated for PEG use by the higher of one channel or 10% of the PEG channel capacity required of that operator prior to the increase. PEG programming carried by the cable operator must be available to all subscribers in a franchise area. The production of any PEG programming is the responsibility of the franchising authority. The cable operator is responsible for the transmission of the programming. In a franchise area where there is more than one cable operator and at least one is a national franchisee, the cable operators must either agree to interconnection and cost sharing terms, or abide by FCC interconnection and cost-sharing regulations for the transmission of PEG programming without material deterioration in signal quality or functionality. A cable operator shall display program information for PEG channels on any navigational device, guide, or menu containing other video programming that is made available to subscribers in the franchise area. Sec. 630(e)(1), (3), and (4).

PEG and Institutional Network (I-Net) Financial Support

A national franchisee shall pay an amount equal to 1% of the cable operator's gross revenues in the franchise area to the franchising authority for the support of PEG use and I-networks. A cable operator that provided cable service in a franchise area on the date of enactment of this bill and then obtains a national franchise must continue to provide any institutional network that it was required to provide on the

day before its national franchise became effective. However, a franchising authority may not require a national franchisee to construct a new institutional network. Sec. 630(e)(2).

Authority To Use Public Rights-of-Way

A national franchise authorizes the construction of a cable system over public rights-of-way and through easements within the area to be served by the cable system, subject to assurance that —

- the safety, functioning, and appearance of the property and the convenience and safety of other persons are not adversely affected by the installation or construction of facilities;
- the cost of the installation, construction, operation, or removal of such facilities will be borne by the cable operator or subscriber, or a combination of both; and
- the owner of the property be justly compensated by the national franchisee for any damages caused by the installation, construction, operation, or removal of such facilities by the national franchisee. Sec. 630(f)(1).

Management of Public Rights-of-Way

A state or local government (including a franchising authority) retains its authority over a national franchisee to manage, on a reasonable, competitively neutral, and nondiscriminatory basis, the public rights-of-way and easements. A state or local government or franchising authority may impose charges for such management and may require compliance with such management and charges. Sec. 630(f)(2).

National Consumer Protection and Customer Service Standards

No state or local law or regulation shall impose on a national franchisee any consumer protection or customer service requirement other than consumer protection or customer service requirements of general applicability.

- Within 120 days of enactment of this bill, the FCC shall issue a report and order that updates for national franchisees the national consumer protection and customer service rules currently in section 632(b) of the Communication Act, taking into account the national nature of a franchise and the role of state and local governments in enforcing, but not creating, consumer protection and customer service standards.
- The national rules shall address, in addition to requirements in section 632(b), the following service issues: billing, billing disputes,

discontinuation of service, when and how late fees may be assessed (but not the amount of such fees), loss of service or service quality, changes in channel lineups or other cable services and features, and the availability of parental control options.

- The FCC's revised consumer protection rules shall provide for forfeiture penalties, customer rebates, refunds, or credits, and shall establish guidelines with respect to violations of such rules. These guidelines shall provide for increased forfeiture penalties for repeated violations of the standards in the rules and establish procedures for payments by the cable operator directly to the affected franchising authority. Sec. 630(g)(1)-(3).

Consumer Protection and Customer Service Complaints

A person may file a consumer protection or customer service complaint with respect to an alleged violation of the FCC's revised consumer protection rules by a national franchisee either with the local franchising authority or with the FCC.

- On its own motion or at the request of a person, a local franchising authority may initiate its own complaint proceeding with respect to an alleged violation or may file a complaint with the FCC regarding such an alleged violation.
- The local franchising authority or the FCC shall render a decision on any complaint filed within 90 days of its filing.
- In a proceeding commenced by a franchising authority, the franchising authority may issue an order requiring compliance with the FCC's consumer protection rules, but may not create any new standard or regulation or expand or modify the FCC's rules. In such a proceeding, the franchising authority may issue an order requiring the filing of any data, documents, or records that are directly related to the alleged violation.
- A franchising authority may charge a national franchisee a nominal fee to cover the costs of issuing orders.
- An order of a franchising authority shall be enforced by the FCC if the order is not appealed to the FCC, if the FCC does not agree to grant review, or if the order is sustained by the FCC on appeal.
- Any party may file with the FCC a notice of appeal of an order of a franchising authority, transmitting a copy of such notice to other parties to the franchising authority proceeding. Such appeal shall be deemed denied at the end of the 30-day period beginning on the date of the filing unless the FCC agrees within such period to grant review of the appeal. After the filing of a notice of appeal, if such notice is not denied, the FCC shall render a decision within 90 days of such filing.

- Within one year of the enactment of this section, and annually thereafter, the FCC shall submit a report to the House and Senate Commerce Committees on the implementation of this complaint process, including the number of complaints filed with franchising authorities; any trends concerning complaints, such as increases in the number of particular types of complaints or in new types of complaints; the timeliness of the response of franchising authorities and the results of complaints not appealed to the FCC; the number of complaints filed directly with the FCC; the number of appeals filed with the FCC and the number of such appeals that the FCC agreed to hear; the timeliness of the FCC's responses to such complaints and appeals; and the results of such complaints and appeals filed with the FCC.
- The FCC may request that franchising authorities submit information about the complaints filed with the franchising authorities, including the number of such complaints and the timeliness of the response and the results of such complaints. Sec. 630(g)(4) and (5).

Antidiscrimination (Redlining)

A national franchisee shall not deny cable service to any group of potential residential cable subscribers in the franchise area because of the income of that group.

- A franchising authority may file a complaint against a national franchisee with the FCC, after providing the franchisee with notice and the opportunity to respond.
- Upon receipt of a complaint, the FCC shall give notice of the complaint to the national franchisee. In investigating a complaint, the FCC may require the national franchisee to disclose such information and documents as the FCC deems necessary to determine whether the national franchisee is in compliance, subject to confidentiality protections. The FCC shall issue a determination with respect to each violation alleged in the complaint within 60 days.
- If the FCC determines that a national franchisee has discriminated against a group on the basis of income, it shall ensure that the national franchisee extends access to that group within a reasonable period of time.
- The maximum forfeiture penalty applicable to a violation of this subsection is \$750,000 for each day of the violation.
- Payment of any forfeiture payment shall be made directly to the franchising authority involved. Sec. 630(h).

- A national franchisee must submit to the FCC and the franchising authority, within 180 days of obtaining the franchise and then biannually, a report identifying the geographic areas in the franchise area where the cable operator offers cable service and describing the cable operator's progress in extending cable service to other areas in the franchise area.

Child Pornography

The FCC shall promulgate regulations to require a national franchisee to prevent the distribution of child pornography over its network. Sec. 630(I).

Leased Access

The provisions of section 612(I) of the Communications Act regarding the carriage of programming from a qualified minority programming source or from any qualified educational programming source shall apply to a national franchisee. Under current law, to promote diversity of program sources, a cable operator is required to set-aside a certain percentage of its channel capacity for commercial use by persons unaffiliated with the operator. Section 612(1) allows the cable operator to use up to 33% of that set-aside channel capacity for the provision of programming from a qualified minority programming source or from a qualified educational programming source. Sec. 630(j).

Applicability of Other Cable Provisions in the Communications Act

The provisions in Title VI of the Communications Act shall apply to national franchisees, except for sections 611(a), 611(b), 611(c), 613(a), 617, 621 (other than subsections (b)(3)(A), (b)(3)(B), (b)(3)(C), and (c)), 624(b), 624(c), 624(h), 625, 626, 627, and 632(a).² Sec. 630(k).

Emergency Alerts

A state or local government may access the emergency alert system of a national franchisee to transmit local or regional emergency alerts. Sec. 630(l).

² The Communications Act of 1934, as amended, is available in its entirety at [<http://www.fcc.gov/Reports/1934new.pdf>], viewed on June 14, 2006. Of the various sections of the current Communications Act that would not be applied to national franchisees, the one that has generated the most debate is Sec. 621(a)(4)(A), the so-called "build-out" provision, which states that "[i]n awarding a franchise, the franchising authority shall allow the applicant's cable system a reasonable period of time to become capable of providing cable service to all households in the franchise area." Without this provision, there are no build-out requirements for national franchisees.

Reporting, Records, and Audits

A national franchisee shall make periodic reports to the FCC and the franchising authority to verify compliance with fee obligations. Upon request by a franchising authority or the FCC, a national franchisee shall make available its books and records for periodic audit. A franchising authority may review the business records of a cable operator, to the extent needed to ensure proper payment of fees, not more than once in a 12-month period. To the extent that a review identifies an underpayment of franchise fees or PEG/I-net fees, the cable operator shall reimburse the franchising authority the reasonable costs of any such review conducted by an independent third party. The FCC shall determine by rule the minimum percentage underpayment that requires cost reimbursement. Any fee that is not reviewed by a franchising authority within three years after it is paid or remitted shall not be subject to later review by the franchising authority. Sec. 630(m)(1)-(5).

Fee Dispute Resolution

A franchising authority or a national franchisee may file a complaint at the FCC to resolve a dispute with respect to the amount of any fee required, if the franchising authority or the national franchisee provides the other entity written notice of such dispute and if they have not resolved the dispute within 90 calendar days after receipt of such notice. A complaint must be filed within three years of the period to which the disputed amount relates. The FCC shall issue an order resolving any complaint within 90 days of filing. Sec. 630(m)(6).

Access to Programming for Shared Facilities

A cable programming vendor in which a cable operator has an attributable interest shall not deny a national franchisee access to video programming solely because the national franchisee uses a headend for its cable system that is also used, under a shared ownership or leasing agreement, as the headend for another cable system. This provision is intended to protect small cable operators that share facilities with other cable operators. Sec. 630(n).

Additional Definitions

For the purposes of this section of the Act, the following definitions apply.

Cable Operator. The term “cable operator” has the meaning provided in section 602(5), except that such term also includes a person or group with a national franchise under this section.

Franchise Fee. The term “franchise fee” includes any fee or assessment of any kind imposed by a franchising authority or other governmental entity on a person or group providing cable service in a franchise area under this section, or on a subscriber of such person or group, or both, solely because of their status as such. The term “franchise fee” does not include (1) any tax, fee, or assessment of general applicability (including any such tax, fee, or assessment imposed on both utilities and a person or group providing cable service in a franchise area under this section (or

the services of such person or group) but not including a fee or assessment which is unduly discriminatory against such person or group or the subscribers of such person or group); (2) any fee assessed under subsection (e)(2) for support of public, educational, and governmental use and institutional networks (as such term is defined in section 611(f)); (3) requirements or charges under subsection (f)(2) for the management of public rights-of-way, including payments for bonds, security funds, letters of credit, insurance, indemnification, penalties, or liquidated damages; or (4) any fee imposed under title 17, United States Code.

Internet Access Service. The term “Internet access service” means a service that enables users to access content, information, electronic mail, or other services offered over the Internet.

Unit of General Local Government. The term “unit of general local government” means (1) a county, township, city, or political subdivision of a county, township, or city; (2) the District of Columbia; or (3) the recognized governing body of an Indian tribe or Alaska Native village that carries out substantial governmental duties and powers.

Section 102. Changes to Definitions in the Communications Act

Section 102 amends several of the definitions in section 602 of the Communications Act, as follows:

Definition of Cable Channel or Channel

Paragraph 4 is amended to read:

[T]he term “cable channel” or “channel” means a portion of the electronic frequency spectrum which is used in a cable system and which is capable of delivering a television channel (a television channel is defined by the Commission by regulation), or its equivalent as determined by the Commission.

Definition of Cable Operator

Paragraph 5A is amended to read:

[T]he term “cable operator” means any person or group of persons (A) who provides cable service over a cable system (regardless of whether such person or group provides such service separately or combined with a telecommunications service or information service) and directly or through one or more affiliates owns a significant interest in such cable system.

Definition of Cable Service

Paragraph 6 is stricken and replaced with the following:

[T]he term “cable service” means —

(A)(i) the one-way transmission to subscribers of (I) video programming, or (II) other programming service; and

(ii) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service; or

(B) the transmission to subscribers of video programming or other programming service provided through wireline facilities located at least in part in the public rights-of-way, without regard to delivery technology, including Internet protocol technology, except to the extent that such video programming or other programming service is provided as part of —

(i) a commercial mobile service (as such term is defined in section 332(d)); or

(ii) an Internet access service (as such term is defined in section 630(p))....

Definition of Cable System

Paragraph 7D is amended to read:

[A]n open video system that complies with section 653 of this title except in a franchise area in which such system is used to provide cable service under a national franchise pursuant to section 630.

Definition of Franchise

Paragraph 9 is amended to read:

[T]he term “franchise” means (A) an initial authorization, or renewal thereof (including a renewal of an authorization which has been granted subject to section 626), issued by a franchising authority, whether such authorization is designated as a franchise, permit, license, resolution, contract, certificate, agreement, or otherwise, which authorizes the construction or operation of a cable system, and (B) a national franchise that is effective under section 630 on the basis of certification with the Commission.

Definition of Franchising Authority

Paragraph 10 is amended to read:

[T]he term “franchising authority” means any governmental entity empowered by Federal, State, or local law to grant a franchise, but does not include the Commission with respect to a national franchise under section 630.

Section 103. Monitoring and Reporting

The FCC shall, commencing not later than one year after the date of enactment of the Act, issue a report annually on the deployment of cable services pursuant to the amendments in this title. In its report, the FCC shall describe in detail the following:

- With respect to deployment by new cable operators —
 - the progress of deployment of such service within the telephone service area of cable operators, if the operator is

also an incumbent local exchange carrier, including a comparison with the progress of deployment of broadband services not defined as cable services within such telephone service areas;

- the number of franchise areas in which such service is being deployed and offered;
 - where such service is not being deployed and offered; and
 - the number and locations of franchise areas in which the cable operator is serving only a portion of the franchise area, and the extent of such service within the franchise area.
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- The number and locations of franchise areas in which a cable operator with a franchise under section 621 of the Communications Act on the date of enactment of this Act withdraws service from any portion of the franchise area for which it previously offered service, and the extent of such withdrawal of service within the franchise area.
 - The rates generally charged for cable service.
 - The rates charged by overlapping, competing multichannel video programming distributors and by competing cable operators for comparable service or cable service;
 - The average household income of those franchise areas or portions of franchise areas where cable services are being offered, and the average household income of those franchise areas, or portions of franchise areas, where cable service is not being offered.
 - The proportion of rural households to urban households, as defined by the Bureau of the Census, in those franchise areas or portions of franchise areas where cable service is being offered and where it is not being offered, including a state-by-state breakdown of such data and a comparison with the overall ratio of rural and urban households in each state; and
 - A comparison of the services and rates in areas served by national franchisees and the services and rates in other areas.

The FCC is authorized to require cable operators to report all of the information that the FCC needs to compile the report and to require cable operators to file the same information with the relevant franchising authorities and state commissions.

Section 104. Rule of Construction

Nothing in this Act or the amendments made by this Act will affect the application or interpretation of section 224 of the Communications Act, which regulates pole attachments.