United States Senate



WASHINGTON, D.C. 20510



December 12, 1983

Mr. Paul E. Healy
Clerk, City of Cambridge
City Hall
Cambridge, Massachusetts 02139

Dear Mr. Healy:

Thank you for sending me a copy of your recent Resolution concerning H.R. 4103, the Cable Telecommunications Act of 1983. While I voted for S. 66, which passed the Senate in June, I have reservations about H.R. 4103, currently being considered by the House Commerce Subcommittee on Telecommunications. Allow me to take this opportunity to explain my vote on the Senate bill, S. 66, and to outline its legislative history.

As you know, the National League of Cities (NLC) and the National Cable Television Association (NCTA) initially came to an agreement on this legislation; however, numerous cities later expressed serious reservations about the final wording of the Senate Commerce Committee's bill.

Fortunately, my colleagues and I were able to amend the bill to the satisfaction of many municipalities and consumer groups. For instance, Section 613 (d) of S. 66 would have allowed cable companies to change service and remove equipment without the permission of local authorities "in any case in which there has been a significant change in circumstance". Senator Durenberger offered an amendment which deleted the offending phrases relating to cable facilities and equipment. I supported this amendment which the Commerce Committee decided to accept. The Committee also accepted other amendments by Senators Durenberger and Lautenberg dealing with franchise renewal and rate regulation. Each of these amendments contributed to the protection of local authorities.

Several amendments offered on behalf of cities and state governments did not prove successful. I supported an amendment by Senator Bentsen to grandfather existing cable franchises. This amendment, however, was rejected by a vote of 19 to 79.

I also worked for clarification of several other issues important to cities on the floor of the Senate. This was vital to establishing the Congressional intent of some potentially controversial matters. By so doing, we were able to establish that S. 66 allows for local communities to assume significant responsibilities in the planning, construction, financing and ownership of cable systems. I have enclosed a copy of the dialogue on the Senate floor which clarified these points.

While the bill did not provide all of the protection for cities that I believe they deserved, S. 66, as amended in the final days of consideration, was a significant improvement over what the National Cable Television Association had sought. Thus, despite my reservations, I voted for final passage. The legislation was passed by a vote of 87 to 9.

The House of Representatives must now pass its own version of a cable deregulatory bill. Please be assured that I will closely scrutinize H.R. 4103, and I will keep your views in mind should this bill reach a Conference Committee.

Thank you once again for contacting me. I will be sure to keep your views in mind when this legislation passes Conference Committee and returns to the Senate floor.

Sincerely,

Paul

PAUL E. TSONGAS
United States Senator

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Enclosure

er, are to ever reap the benefits of cable's potential. If we do not pass this bill now, I firmly believe that the current patchwork system of Federal, State, and local regulation will be too firmly entrenched to undo. The American public deserves better than that, and I urge my colleagues in the Senate to join me in supporting this legislation. Its time has come; let us not let it pass.

CHANGED CIRCUMSTANCES, SECTION 613(d)(2)

● Mr. DURENBERGER. Mr. President, I should like to take a moment to understand the view of the distinguished Senator from Arizona on the amendment to section 613(d) of the act. It is my understanding that the amendment recognizes that commitments made by cable operators with respect to the provision of facilities and equipment would be distinguished from those commitments with respect to services. Does the Senator share this view?

Mr. GOLDWATER. Yes; I do, Mr. President. While it has always been the committee's view that such commitments should be met, the purpose of today's amendment is to establish procedures for reviewing commitments for facilities and equipment and to permit the modification or deferral, as well as the termination of such commitment, under appropriate conditions. The amendment would provide that where a commitment becomes impracticable as the result of a significant change in the circumstances surrounding the operator's original commitment there would be a requirement to revise that commitment.

Mr. DURENBERGER. The purpose of the amendment, then, does not automatically relieve the operator of commitments which he understood at the time he made them would be costly or otherwise burdensome. Rather, the negotiations required by the amendment would take place if the operator makes a showing that a significant change in circumstances has made the provision of particular facilities and equipment impracticable.

Mr. GOLDWATER. That is essentially correct. However, a significant change in the operator's good-faith assessment as to present and future market conditions would be sufficient to trigger negotiation under the section. We also do not want to foreclose the cable operator from responding to innovation in new facilities and equipment offering comparable capability nor to preclude a review of these commitments if economics or technology makes their fulfillment impracticable.

Mr. DURENBERGER. If the Senator will indulge me further on this point, it is the concern of State and local governments that the provision may have the effect of reducing the financial risks an operator undertakes when agreeing to demands for impracticable commitments in the franchising process. What does the Senator see in the bill to prevent a cable operator from making commitments to providing particular facilities and equipment under assumptions that he believes could change?

Mr. GOLDWATER. Several mechanisms exist. first, as to facilities and equipment, the purpose of mandatory conciliation will permit alternative, practical commitments by the operator, in addition to the option of relieving the operator of his financial commitments. Second, it can be anticipated that the uncertainty associated with binding arbitration, required by the amendment, would instill discipline and reasonableness in the franchising process from the standpoint of the franchising authority's demanding and the operator's agreeing to impracticable commitments. Third, all parties should be able to respond to the ever-changing, fast-paced technology and market demand for cable, thereby insuring the accompanying efficiencies and economic savings for the public.

Mr. DURENBERGER. These indeed appear to be appropriate. Will there be FCC jurisdiction under this section?

Mr. GOLDWATER. We have provided the Federal Communications Commission with exclusive jurisdiction over matters covered by the act with the explicit intent that all governmental levels shall exercise less regulatory control than at present. We intend that these matters can be resolved fairly among the parties, taking into consideration market conditions in the particular cable community. The parties would consider such things as the purpose of the original commitment contemplated with respect to particular facilities and equipment, opportunities available to the operator and franchising authority to defer or modify the commitment for facilities and equipment or secure alternative commitments, and the financial viability of the operator, including his ability to make a reasonable profit.

Mr. DURENBERGER. I thank the distinguished chairman for his comments. He has significantly clarified this subject.●

ACQUISITION RESTRICTIONS AND FRANCHISE FEES

● Mr. TSONGAS. Mr. President, will the Senator yield for a question?

Mr. GOLDWATER. I yield.

Mr. TSONGAS. I am hopeful that alternatives which have not been considered within the scope of this bill remain available for members of the public and communities themselves to assume significant responsibilities in the planning, construction, financing, and ownership of the art communications facilities and services to members of those communities. While not numerous, those cable systems presently operating which are owned or managed in part by the communities in which they are located have been at the forefront in promoting new and innovative uses of cable and in stimulating educational and other local community programing. We should continue to encourage these different approaches which are not addressed by this bill.

While the bill recognizes the principle of municipal ownership, I am particularly concerned about certain provisions which may, contrary to its apparent purpose, be interpreted to preclude certain mechanisms of financing which are integral to making that ownership possible. In my State, for example, there are a number of towns which are interested in owning and financing the construction of their own cable systems through the issuance of general obligation bonds. Under one proposal, on completion of construction, the town would lease the system to an operator for the period of the license, while retaining title to the system and the risk incurred through financing. Such a system is immensely beneficial to the town, as it maintains ultimate responsibility for the cable system, thereby shielding itself from the potential instabilities of private operators. under Federal tax law and certain accounting principles, however, an operator holding this lease might be considered the owner of the underlying cable property, depending on the term of the lease. If this principle were carried over to this bill, section 605(c)(1), which on its face prohibits municipal acquisition "pursuant to a buy back provision" or "sale of a system * * * on expiration of a franchise" for less than fair market value might be construed to prohibit this type of arrangement. Since, as related in the committee report, the sole purpose of section 605(c)(1) was to preclude an inequitable acquisition from a private operator at the end of a franchise, would there be any basis for applying this restriction under such circumstances, where the town builds the cable system and owns it at the outset?

Mr. GOLDWATER. The Senator is correct in that the concept of municipal construction and ownership of cable systems was not addressed by the drafters with respect to this provision. Section 605(c)(1) is clearly designed for those situations where a private company takes upon itself the substantial task of constructing and franchising the construction of a system and finds itself forced through license restrictions or otherwise to sell its valuable assets to a State or subdivision at the end of the term for a fraction of the real value of the property. Such expropriation is clearly unfair and must be prohibited. At the same time, from the words of this particular section itself, there should be no question that the restriction does not apply where the municipality acquires its ownership interest in the system at the outset through financing and overseeing its own construction of the project. That the lease provisions which you describe may have some particular effect under the tax laws would not, in my view, change this result. Does that clarify the Senator's concern?

Mr. TSONGAS. It does, but there is also an additional issue I would like to address in this regard. Under the proposal described under contemplation in my State, the town which has assumed the responsibility for financing and building the cable system would obviously be entitled to a significant rent from a private operator proposing to lease the system, not only to cover the debt service called for by the financing instruments and at least part of the construction costs but also to reflect the value of the system which has been provided to the operator through the town's efforts. My concern is that section 608(d)(1) defines the term "franchise fee" so broadly—as "any * * * fee or assessment * * * imposed by a franchise authority * * *"—that the restriction in section 608(b)(1) prohibiting imposition of franchise fees over 5 percent of an operator's gross revenues might be interpreted as precluding a rental mechanism which in fact merely permits a local government to recover its costs relating to constructing its system, together with reasonable compensation for the risk taken in financing those costs. Could you address this concern?

Mr. GOLDWATER. Again, I think the answer to the Senator's question can be found in the committee report, which indicates that the overriding purpose of the 5-percent fee cap was to prevent local governments from taxing private operators to death as a means of raising local revenues for other concerns. This would be discriminatory and would place the private operator/owners at a disadvantage with respect to their competitors. However, under the plan which the Senator describes, the town is simply asking the private operator to assume a part of the total risk of constructing a system which the operator would otherwise have had to assume in full if he had been responsible for financing and constructing the cable system. Under those circumstances, it would seem to me that the owner—the town—would be free to require payment of reasonable rentals as the Senator describes. In short, rentals taking into account municipal costs and risks of financing, construction and ownership should not be considered franchise fees within the meaning of section 608.●

FRANCHISE COMPETITION

Mr. THURMOND. Mr. President, I want to take this opportunity to make clear what purpose the distinguished Senator from Arizona (Mr. GOLDWATER) and I intend to achieve by amending S. 66. Quite simply, that purpose is the preservation of competition in the franchise renewal process.

In its present form, S. 66 anticipates and rightfully encourages competition in the initial franchise award; multiple franchises serving the same area are also permitted and encouraged. My opinion, however, is that initial franchise competition and overlapping system competition is not enough. When deciding to renew a franchise, pursuant to section 609 of this bill, the franchising authority must not be required to make that decision in a competitive vacuum. Rather, the franchising authority may solicit and consider competing applications during the renewal process.

To effectively inject this added element of franchise competition into S. 66, we have done two things. First, section 609(b)(2), which prohibits consideration of competing bids prior to a final decision on renewal of an existing franchise, has been deleted. Second, the word "initial" in section 613(b) has also been deleted. The purpose of these changes is to assure that, should a franchising authority desire to solicit additional bids or proposals during the renewal process, it is not precluded from doing so in the same manner as in an initial request for proposals. This change in section 613(b) is necessary to effectuate the amendment to section 609. The value of permitting competing bids under section 609 would be greatly diminished if the franchising authority was unable to solicit bids in the same way that initial franchise proposals are solicited. Finally, the elimination of section 609(b)(2) clearly contemplates franchise competition based upon many factors, including rates.

Is this the understanding and intention of the Senator from Arizona with respect to this amendment?

Mr. GOLDWATER. Yes, Mr. President, that is my understanding. I would, however, like to make clear that by eliminating section 609(b)(2) and changing section 613(b), we do not intend to impose any delay on the renewal process. Section 609(d)(2) mandates that the renewal decision be made within 12 months of submission of the application, and that provision remains unchanged. While I support the concept of competition in the renewal process, it cannot be used as an excuse to delay that renewal process.

Mr. THURMOND. I agree with the Senator from Arizona.

● Mr. DANFORTH. Mr. President, I do not believe that section 610 of S. 66 applies to the reception of satellite-delivered programing by backyard satellite Earth station operators. Does the Senator from Arizona agree?

Mr. GOLDWATER. Yes, I say to Senator DANFORTH section 610 of S. 66 does not apply to the reception of satellite-delivered programing by backyard satellite Earth station operators. This section applies only to the unauthorized interception or reception of broad-band telecommunications.

Mr. DANFORTH. I thank Senator GOLDWATER for his clarification of this matter. I appreciate his expression of support for the development of this new technology.●

"UTILITY USERS TAXES" AND DEFINITION OF "FRANCHISE FEE"

● Mr. WILSON. Mr. President, I am concerned about a particular section of the Cable Telecommunications Act of 1983, S. 66, and its impact on a number of cities in my State of California. I would appreciate having an opportunity to engage in a colloquy the Senator from Arizona (Mr. GOLDWATER) in order to clarify the meaning of this section and the committee's intent in proposing it.

Section 608(d)(1), provides as follows:

(a) 'franchise fee' shall include any tax, fee or assessment of any kind imposed by a franchising authority or governmental authority or a cable system operator or cable subscriber because of their status as such;

Mr. President, my concern is that this definition might be read so as to preclude the levying of what in California is referred to as a utility user tax.

A utility user tax is a tax which a so-called charter law city in California is empowered by the State to levy on consumers of the services of a utility. As applied in California, these taxes are levied, at the discretion of each city, on electric and gas users and telephone subscribers as well as cable television subscribers.

Presently, at least 17 cities in the State have exercised their power to levy utility user taxes on cable television subscribers, and others may soon do the same, for as of July 1, so-called general law cities will also have the power to levy this type of tax on consumers.

Mr. President, a utility user tax, as applied to cable television, is levied upon the consumer, not the cable operator. It is similar to a sales or use tax, and is collected by the cable operator just as a merchant collects a sales tax. The franchise fee, by contrast, is analogous to the rent from a shopping center located on land leased from a city, and is paid directly by the cable company. All utility consumers are subject to a utility users tax, whether or not the utility is under the jurisdiction of the Public Utilities Commission.

Most importantly, in relation to the definition of the term "franchise fee" in S. 66, the cable consumer is not separately classified for tax purposes, but is part of either a larger class of utility consumers or a larger class of home entertainment buyers. The tax charged is a transaction tax much like a sales or use tax. It is not being classified discriminately.

Mr. President, understandably, I have received letters of concern from a number of cities, as well as the league of California cities that S. 66 will disable the collection of utility user taxes on cable television and therefore end a source of revenue for them. Without endorsing the levying of utility user taxes—for as mayor of San Diego I op-

7. S-26

Comm. from Senator Paul Tsongas in appreciation of resolutions adopted by the City Council regarding H.R. 4103, the Cable Telecommunications Act of 1983.



In City Council,

January 9, 1984

1/9/84

Placed on File