HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1199 Statewide Cable Television Franchises
SPONSOR(S): Traviesa and others
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Utilities & Telecommunications Committee		Cater	Holt
2) Finance & Tax Committee			
3) Commerce Council			
4)			
5)			

SUMMARY ANALYSIS

HB1199 establishes the Department of State with the authority to issue state-wide cable franchises and designates it as the state franchising authority. The bill preempts municipality or county authority to negotiate cable service franchises.

The bill creates ss. 61.102 through 610.116 to create the new franchising authority. Specifically, the bill:

- Provides definitions.
- Provides for the application for a statewide authorization to provide cable services, including provisions as to under what circumstances a cable operator with an existing franchise with a municipality or county may receive a state-issued franchise for its current franchise area.
- Prohibits franchise fees; however, it should be noted that franchise fees are currently being collected through the Communications Services Tax.
- Prohibits buildout requirement.
- Provides that an incumbent cable provider must abide by customer service standards reasonably comparable to those in the Federal Communications Commission (FCC) rules until there are two or more cable service providers in the relevant area.
- Provides guidelines for the number of public, educational, and government (PEG) channels to be provided in a certain area, including when a channel is considered substantially used.
- Prohibits municipalities or counties from discriminating against certificates for items such as access to rights-of-ways, buildings or property, terms of utility pole attachments, filing certain documents with the municipality or county.
- Prohibits discrimination against subscribers based on income.
- Provides that complaints regarding cable service are to be accepted by the Department of Agriculture and Consumer Services (DACS).

The bill also amends statutes related to the Communications Services Tax and the use of rights-of-way to conform to this act.

The Revenue Estimating Conference has yet to meet on this bill to determine a fiscal impact.

This act shall take effect July 1, 2006.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide Limited Government- The bill preempts a municipality or county's authority to issue cable franchises, and gives this authority to the state, specifically the Department of State. The Department of Agriculture and Consumer Services receives the authority to receive complaints concerning state issued cable franchises, and complaints that these franchises are discriminating against customers based on their income.

B. EFFECT OF PROPOSED CHANGES:

<u>Background</u>

<u>Federal Law</u>

In 1965, the Federal Communications Commission (FCC or Commission) established rules for cable systems that used microwave antennas to receive signals. The next year, the FCC established rules for all cable systems. In 1968, The United States Supreme Court affirmed the FCC's jurisdiction over cable. In 1972, FCC rules went into effect that required cable television operators to obtain a certificate of compliance from the FCC prior to operating a cable television system or adding a television broadcast signal. Two of the issues these rules addressed were franchise standards and technical standards. Since then many of these rules have been either modified or eliminated.

In 1984, Congress passed the Cable Communications Policy Act of 1984 (1984 Cable Act). This law established policies in such areas as franchise provisions and renewals, subscriber rates and policy, and pole attachments. It also defined jurisdictional boundaries among federal, state, and local governments regulating cable television systems. This law prohibited cable operators from providing service without obtaining a franchise from the local franchise authority (LFA). This law also required the LFA's to assure that cable service is not denied to residential customers based on their income and it is to allow a reasonable period of time for the cable company to be able to provide service to all houses in the franchise area. Additionally, the law provided that the LFA may require assurances from the cable company that it will provide adequate capacity, facilities, or financial support for public, educational, and government access channels.

In 1992, Congress passed the 1992 Cable Act, which provides that a franchising authority may award one or more franchises within its jurisdiction, but it may not award an exclusive franchise or unreasonably refuse to award an additional competitive franchise.

Current Cable Act

The purposes of the federal Cable Act (Cable Act) as found in 47 USC 521 are to:

(1) Establish a national policy concerning cable communications;
(2) establish franchise procedures and standards which encourage the growth and development of cable systems and which assure that cable systems are responsive to the needs and interests of the local community;
(3) establish guidelines for the exercise of Federal, State, and local authority with respect to the regulation of cable systems;
(4) Assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public;
(5) Establish an orderly process for franchise renewal which protects cable

operators against unfair denials of renewal where the operator's past performance and proposal for future performance meet the standards established by this subchapter; and
(6) Promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems.

Federal Franchise Requirements

The federal Cable Act, 47 USC s. 541 et. seq., allows a franchising authority to award one or more franchises within its jurisdiction, except that it may not issue an exclusive franchise or unreasonably refuse to award an additional competitive franchise.

The franchise is to be construed to authorize the construction of a cable system over public rights-of-way and through easements; except that in using the easements the cable operator shall ensure:

- The safety, functioning, and appearance of the property and the convenience and safety of others not adversely affected by the installation or construction of cable facilities;
- The cost of installation, construction, operation, or removal of such facilities by the cable operator or subscribers, or both;
- The owner of the property is justly compensated by the cable operator for any damages caused by the installation, construction, and operation of facilities.

In awarding the franchise, the LFA:

- Shall allow the applicant's cable system reasonable time to be able to provide cable service to all households;
- May required adequate assurance that the cable operator will provide adequate public, educational, and governmental access channel capacity, facilities, or financial support.
- May require adequate assurances that the cable operator has the financial, technical, and legal qualifications to provide cable service.

In awarding franchises, the LFA shall assure that access to cable service is not denied to a group of potential subscribers because of the income of the residents of the local area in which the group resides.

Federal law also does not require persons who lawfully provided cable service without a franchise on July 1, 1984, to obtain a franchise, unless the LFA requires them to do so.

Pending Federal Legislation

There are several proposals concerning cable regulation that are currently pending in congress. The following are summaries of some of those proposals.

Broadband Investment and Consumer Choice Act, by S.1504, by Ensign (R-NV)
This bill provides that any provider of video services, including existing cable operators, may provide service without obtaining a State or local video franchise. State or local governments may require a reasonable fee to compensate the local government for the costs of managing the public rights-of-way used by the provider, which may not exceed five percent of gross revenues received from subscribers for the provision of video service

Video Choice Act of 2005- S. 1349, by Rockefeller (D-WV), by Smith (R-OR)
This bill provides that any entity with existing rights-of-way authority (*e.g.*, the Bells and other utilities) may provide video programming without obtaining a cable franchise. Existing cable operators would not be entitled to any relief. A "competitive video services provider" "may" be subject to the payment of local franchise fees.

Digital Age Communications Act -S. 2113, by DeMint (R-TN)
This bill provides that existing cable franchise agreements remain in effect until the earlier of the agreement's expiration or four years after enactment. States and their political subdivisions may not renew, extend or otherwise enforce the terms of existing cable franchise agreement beyond these limits. Until an existing agreement is terminated, a State or political subdivision may require competing video service providers to contribute an equitable portion of costs associated with any fees directly attributable to the agreement and the provision of any public access channels required by such agreement.

Reps. Barton (R-TX), Rush (D-IL), Upton (R-MI), Pickering (R-MS) (no bill number assigned yet)
This bill provides that a "new cable operator" that begins providing cable service in a franchise area after date of enactment may elect to obtain a national franchise in lieu of a local franchise. Existing cable operator can obtain national franchise for franchise areas where a new entrant "is providing" service under a national franchise. Franchise fee same as current law (up to 5 percent of gross revenues, with exact level determined by LFA), plus any additional fee imposed by locality for rights-of-way "management."

Principles of Sens. Burns (R-MT) and Inouye (D-HI)
- Recognize and Reaffirm the Role of States and Localities in the Video Franchising Process.
- Promote Competition by Facilitating Speedy Entry on Fair Terms.
- Promote Competitive Neutrality and a Level Playing Field.

Federal Rulemaking

On November 18, 2005, the FCC released a *Notice of Proposed Rulemaking (Notice)* to initiate a proceeding to further the interrelated goals of enhanced cable competition and accelerated broadband deployment. The FCC tentatively concludes that the mandate of Section 621(a)(1) of the Cable Act (47 USC 547, (a)(1)) should be interpreted to prohibit not just the ultimate refusal to award a franchise, but also a broader range of behaviors, and the *Notice* seeks comment on that conclusion.

The relevant section of the federal Cable Act states:

(a) Authority to award franchises; public rights-of-way and easements; equal access to service; time for provision of services; assurances

(1) A franchising authority may award, in accordance with the provisions of this subchapter, 1 or more franchises within its jurisdiction; except that a franchising authority may not grant an exclusive franchise and may not unreasonably refuse to award an additional competitive franchise. Any applicant whose application for a second franchise has been denied by a final decision of the franchising authority may appeal such final decision pursuant to the provisions of section 555 of this title [judicial proceedings] for failure to comply with this subsection.

Specifically, the *Notice* addresses a broad range of questions, including:

- If local franchising authorities are unreasonably refusing to grant competitive franchises. The *Notice* also asks what problems cable incumbents have encountered with LFAs, including how best the Commission can ensure that the local franchising process is not inhibiting the ability of incumbent cable operators to invest in broadband services.

- Whether the Commission has authority to implement the pro-competitive mandate of Section 621(a)(1). The *Notice* tentatively concludes that the Commission is empowered by provisions of both Title I and Title VI of the Communications Act to take steps appropriate to ensure that the local franchising process does not serve as an unreasonable barrier to entry for competitive cable operators. The *Notice* also tentatively concludes that the Commission may deem to be preempted and superseded any law or regulation of a State or LFA that causes an unreasonable refusal to award a competitive franchise in contravention of Section 621(a).

- The *Notice* tentatively concludes that it is not unreasonable for an LFA, in awarding a franchise, to "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"; "allow [a] cable system a reasonable period of time to become capable of providing cable service to all households in the franchise area"; and "require adequate assurance that the cable operator will provide adequate public, educational and governmental access channel capacity, facilities, or financial support."

- Assuming there is both the need and the authority for Commission intervention, the *Notice* asks how the Commission should interpret the mandate of Section 621(a)(1). The item tentatively concludes that the Commission should interpret the relevant language of Section 621(a)(1) broadly in order to prohibit not only unreasonable refusals to award competitive franchises, but also the establishment of procedures and other requirements that unreasonably interfere with the ability of would-be new entrants to introduce quickly their competitive offerings.

- What specific steps should the Commission take to implement Section 621(a)(1).

- The *Notice* seeks comment on whether the Commission has authority to establish a minimum amount of time for potential competitors with existing facilities to build out their networks beyond their current service territories. It also seeks comment on what would constitute a reasonable minimum timeframe.

- Finally, the *Notice* asks whether the Commission should address actions at the state level, to the extent we find such actions create unreasonable barriers to entry for potential competitors.

Comments were filed on February 13, 2006. Reply comments were filed March 28, 2006. It is unknown when the FCC will make its decision.

<u>State Law</u>

In 1987 the Legislature enacted s. 166.046, F.S., providing minimum standards for cable television franchises. Section 166.046(2), F.S. provides:

> 2) No municipality or county shall grant a franchise for cable service to a cable system within its jurisdiction without first, at a duly noticed public hearing, having considered:
> (a) The economic impact upon private property within the franchise area;
> (b) The public need for such franchise, if any;
> (c) The capacity of public rights-of-way to accommodate the cable system;
> (d) The present and future use of the public rights-of-way to be used by the cable system;
> (e) The potential disruption to existing users of the public rights-of-way to be used by the cable system and the resultant inconvenience which may occur to the public;
> (f) The financial ability of the franchise applicant to perform;
> (g) Other societal interests as are generally considered in cable television franchising;
> (h) Such other additional matters, both procedural and substantive, as the municipality or county may, in its sole discretion, determine to be relevant.

In addition s. 166.046(3), F.S., provides that a municipality or county cannot grant any overlapping cable franchises on terms or conditions more favorable or less burdensome than existing franchises.

Cable service is taxed pursuant to the Communications Services Tax (CST) contained in ch. 202, F.S. Additionally, cable companies are subject to regulation for the use of rights-of-way under s. 337.401, F.S.

Franchise Agreements

In order to provide cable service in Florida, a cable company is required to obtain a franchise agreement from the LFA, which is either the city or county. The local franchise agreements address issues such as rates, customer service standards, buildout, the number of public, education, and government (PEG) channels, support for PEG channels, use of rights-of-way, and service to government buildings.

Proposed Changes

The bill creates the "Consumer Choice Act of 2006."

Statewide Cable Franchises

The bill creates ss. 610.102 through 610.116, F.S., to provide for statewide franchising authority.

Section 610.102, F.S., designates that the Department of State (DOS) shall be the franchising authority pursuant to 47 U.S.C. s. 522(10)) for a state-issued franchise for the provision of cable service. A municipality or county is prohibited from granting a new franchise for provisioning cable service within its jurisdiction.

Definitions

Section 610.103, F.S., provides the following definitions as used in ss. 610.102-610.115:

Cable service-(a) The one-way transmission to subscribers of video programming or any other programming service; (b) Subscriber interaction, if any, that is required for the selection of such video programming or other programming service.

Cable system-a facility consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service that includes video programming and that is provided to multiple subscribers within a community, but such term does not include: (a) a facility that serves only to retransmit the television signals of one or more television broadcast stations; (b) a facility that serves only subscribers in one or more multiple-unit dwellings under common ownership, control, or management, unless such facility or facilities use any public right-of-way; (c) a facility that serves subscribers without using any public right-of-way (i.e. satellite service); (d) a facility of a common carrier that is subject, in whole or in part, to the provisions of 47 U.S.C. s. 201 et. seq. (federal common carrier regulation), except the specific bandwidths or wavelengths over such facility shall be considered a cable system only to the extent such bandwidths or wavelengths are used in the transmission of video programming directly to subscribers, unless the extent of such use is solely to provide interactive on-demand services (i.e. video programming from internet websites), in which case it is not a cable system; or (e) Any facilities of any electric utility used solely for operating its electric utility systems.

With the definition of "cable system" exempting interactive on-demand service, concern has been raised that the definition also creates an exemption from the requirement to obtain a franchise for providers of internet-protocol television (IPTV). However, some providers have argued that IPTV does not trigger local cable franchise requirements. The IPTV technology is an interactive delivery service as opposed to a traditional cable that provides one-way transmission service.[1]

Cable service provider-a person that provides cable service over a cable system.

Certificateholder-a cable service provider that has been issued and holds a certificate of franchise authority from the department.

Department-the Department of State.

Franchise-an initial authorization or renewal of an authorization, regardless of whether the authorization is designated as a franchise, permit, license, resolution, contract, certificate, agreement, or otherwise, to construct and operate a cable system in the public right-of-way.

Franchise authority-any governmental entity empowered by federal, state, or local law to grant a franchise.

Incumbent cable service provider-the cable service provider serving the largest number of cable subscribers in a particular municipal or county franchise area on July 1, 2006.

Public right-of-way-the area on, below, or above a public roadway, highway, street, sidewalk, alley, or waterway, including, without limitation, a municipal, county, state, district, or other public roadway, highway, street, sidewalk, alley, or waterway.

Video programming-programming provided by, or generally considered comparable to programming provided by, a television broadcast station.

State Authorization to Provide Cable Service

Section 610.104, F.S., outlines the procedures and requirements associated with applying to the DOS for a state-issued certificate, including applicant criteria and information to be included in the application. The bill provides that after July 1, 2006, an entity or person who seeks to provide cable service, over a cable system, shall file with DOS an application for a state-issued certificate of franchise authority as required by the section. An incumbent cable provider operating under an unexpired franchise agreement is not subject to this subsection with respect to that municipality or county until the franchise agreement or ordinance expires, except as provided in subsection (2) and s. 610.105(4). Additionally, as of July 1, 2006, an incumbent may seek a state issued certificate to provide service in an area where it does not have an existing franchise agreement. Concern has been raised that this provision creates an unfair advantage for incumbent providers who are restricted to the terms and conditions of the unexpired franchise agreement.

A cable service provider who is not an incumbent may within 90 days after July 1, 2006,[2] elect to terminate an existing local franchise and seek a state-issued certificate by providing written notice to the DOS, and the affected municipality, or county not later than 180 days after July 1, 2006. This non-incumbent provider also is required to provide cable service to less than 40% of the total cable services subscribers in a particular franchise area. The franchise is terminated on the date DOS issues the certificate of franchise authority. It is unclear how 40% was established as criteria. Also, no methodology is included for determining the service area percentage or the entity that performs the calculation.

DOS is required to notify the applicant within 10 business days as to whether the application is complete. If DOS denies the application, it must specify the particular reason that it is denying the

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[1] AT&T and BellSouth Comments to the FCC in MB Docket No. 05-311. February 13, 2006.

[2] The actual time frame would be between September 29 and December 28, 2006.

application and allow the applicant to amend the application to cure the deficiency. The applicant shall be permitted to amend the application to cure any deficiency and DOS shall act upon the amended application within five business days.

By the 15th business day after receiving a completed affidavit signed by an officer of general partner of the applicant, DOS shall issue a certificate of franchise authority. The affidavit shall affirm:

- The applicant has filed or will timely file with the FCC, all forms required by the agency in advance of offering cable service.
- The applicant agrees to comply with all applicable federal and state laws and regulation, to the extent that such state laws and rules are not in conflict with or superseded by provisions of this chapter or other applicable state law.
- The applicant agrees to comply with all lawful state laws and regulations regarding the placement and maintenance of communications facilities in public right-of-way that are generally applicable to providers of communications services.
- A description of the service area for which the applicant seeks certificate of franchise authority, which need not be coextensive with municipal. County, or other political boundaries.
- The location of the applicant's principal place of business and the names of the applicant's principal executive office.

If DOS does not act on an application within 15 business days, the application shall be deemed granted. If an application is denied, the applicant may challenge the denial through a petition of mandamus[3] in a court of competent jurisdiction. Concern has been raised that no financial viability needs to be demonstrated in order for an entity to obtain a state-issued certificate. However, proponents feel the market will determine company success in a franchise area.

The certificate of franchise authority issued by DOS shall contain:

- A grant of authority to provide cable service over a cable system as requested in the application.
- A grant of authority to construct, maintain, and operate facilities through, upon, over, and under any public right-of-way or waters.
- A statement that the grant of authority is subject to the lawful operation of the cable system to provide cable service to the applicant or successor in interest.

If a certificateholder seeks to include additional service areas in its current certificate, it shall file notice with the DOS to reflect the new service area or areas.

Federal law allows franchises to require the franchise authority to approve the sale or transfer of a cable system, and gives the franchise authority 120 days to act upon the request for approval or the approval is deem granted. (47 USC 537). The bill provides that the certificate issued by DOS is fully transferable to any successor in interest to the applicant to which the certificate was initially granted. The notice of transfer shall be filed with DOS and the relevant municipality or county within 14 business days following the completion of the transfer.

The certificate of franchise authority issued by DOS may be terminated by the cable service provider by written notice. Concern was raised that the DOS has no grounds to cancel a certificate of franchise authority.

Eligibility for State-Issued Franchises

[3] Mandamus is ordering a public agency or government body to perform an act required by law when it has neglected to do so. mandamus. (n.d.) *The People's Law Dictionary*. (2005). Retrieved March 27 2006 from http://legal-dictionary.thefreedictionary.com/mandamus

Section 610.105 establishes, in more detail, eligibility for a state-issued franchise. The bill provides in s. 610.105(1), except as otherwise provided, an incumbent cable service provider with an existing, unexpired cable franchise, as of July 1, 2006, is not eligible to seek a state-issued certificate, and under this chapter as to that municipality or county until the franchise expires.

For purposes of this section, a cable service provider is deemed to have or have had a franchise to provide cable service in a specific municipality or county if any affiliate or successor entity of the cable service provider has or had a franchise agreement granted by that specific municipality or county. Also, for purposes of this section, “affiliate or successor entity” refers to an entity receiving, obtaining, or operating under a franchise that directly or indirectly owns or controls, is owned or controlled by, or is under common ownership or control with the cable service provider.

Section 610.105(4), F.S., provides that an incumbent cable service provider may elect to terminate an existing local franchise agreement and seek a state-issued certificate provided another cable service provider is granted a state-issued certificate for a service area that encompasses at least 50 percent of the total households within the service area covered by the incumbent’s existing franchise.

Termination of the existing franchise under this subsection is achieved by submitting written notice to the DOS, and to the affected municipality or county within 180 days following the issuance of the state certificate to the non-incumbent.

The existing franchise may be terminated by providing written notice to the DOS and the municipality or county within 180 days of the issuance of the state-issued certificate to the nonincumbent cable service provider. The franchise issued by the municipality or county is terminated as of the date the state-issued certificate to the non-incumbent provider. Concern has been raised regarding this provision being an unconstitutional impairment of contracts.

Franchise Fees

The Federal Cable Act allows LFAs to assess a franchise fee (a tax, fee, or assessment imposed by the franchise authority or other governmental entity on a cable operator or cable subscriber, or both, because of their status). The fee is not to exceed five percent of the cable operator’s gross revenues derived from the operation of the cable system to provide cable service.

Section 610.106, F.S., prohibits the DOS, as well as municipalities and counties from imposing any taxes, fees, charges, or other impositions, or extractions on certificate holders in connection with use of public right-of-way as a condition of doing business in a municipality or county, except those permitted by the Communications Service Tax (ch. 202, F.S.) and the use of the right-of-way (s. 373.401(6), F.S.).

While this section prohibits the imposition of any fees on certificateholders, there is no statutory authority for DOS to charge a filing fee for the applications in order to cover its costs associated with the processing.

Buildout

Federal law provides that in awarding a franchise, the LFA is required to allow the applicant’s cable system a reasonable amount of time to become capable of providing cable service to all households in the franchise area.

Section 610.107 prohibits any franchising authority, state agency, or political subdivision from imposing any buildout requirements on a state-issued certificate holder.

Buildout is a requirement in a franchise that requires the cable service provider to provide a service to customers in the local franchise area within a reasonable period of time. According to information provided by local governments buildout requirements prevent the cable operators from “cherry picking” markets and individual customers within a franchise area. Local governments also argue that that buildout requirements let local governments discourage disparage levels of service in their franchise area.

Customer Service Requirements

Federal rules in 47 C.F.R. s. 76.309(c), provide the following minimum cable service standards which the LFA may enforce with 90 days written notice to the cable provider:

(c) Effective July 1, 1993, a cable operator shall be subject to the following customer service standards:

(1) Cable system office hours and telephone availability--

(i) The cable operator will maintain a local, toll-free or collect call telephone access line which will be available to its subscribers 24 hours a day, seven days a week.
(A) Trained company representatives will be available to respond to customer telephone inquiries during normal business hours.
(B) After normal business hours, the access line may be answered by a service or an automated response system, including an answering machine. Inquiries received after normal business hours must be responded to by a trained company representative on the next business day.
(ii) Under normal operating conditions, telephone answer time by a customer representative, including wait time, shall not exceed thirty (30) seconds when the connection is made. If the call needs to be transferred, transfer time shall not exceed thirty (30) seconds. These standards shall be met no less than ninety (90) percent of the time under normal operating conditions, measured on a quarterly basis.
(iii) The operator will not be required to acquire equipment or perform surveys to measure compliance with the telephone answering standards above unless an historical record of complaints indicates a clear failure to comply.
(iv) Under normal operating conditions, the customer will receive a busy signal less than three (3) percent of the time.
(v) Customer service center and bill payment locations will be open at least during normal business hours and will be conveniently located.

(2) Installations, outages and service calls. Under normal operating conditions, each of the following four standards will be met no less than ninety five (95) percent of the time measured on a quarterly basis:
(i) Standard installations will be performed within seven (7) business days after an order has been placed. "Standard" installations are those that are located up to 125 feet from the existing distribution system.
(ii) Excluding conditions beyond the control of the operator, the cable operator will begin working on "service interruptions" promptly and in no event later than 24 hours after the interruption becomes known. The cable operator must begin actions to correct other service problems the next business day after notification of the service problem.
(iii) The "appointment window" alternatives for installations, service calls, and other installation activities will be either a specific time or, at maximum, a four-hour time block during normal business hours. (The operator may schedule service calls and other installation activities outside of normal business hours for the express convenience of the customer.)
(iv) An operator may not cancel an appointment with a customer after the close of business on the business day prior to the scheduled appointment.
(v) If a cable operator representative is running late for an appointment with a customer and will not be able to keep the appointment as scheduled, the customer will be contacted. The appointment will be rescheduled, as necessary, at a time which is convenient for the customer.

(3) Communications between cable operators and cable subscribers--
(i) Refunds--Refund checks will be issued promptly, but no later than either--

(A) The customer's next billing cycle following resolution of the request or thirty (30) days, whichever is earlier, or

(B) The return of the equipment supplied by the cable operator if service is terminated.

(ii) Credits--Credits for service will be issued no later than the customer's next billing cycle following the determination that a credit is warranted.

Currently, many cable franchise agreements and cable television ordinances have customers service provisions contained in them. In addition to the above requirements, there may be provisions concerning notice prior to construction, and requiring employees in the field carry photo identification indicating that they are employees of the cable company.

Section 610.608, F.S., requires an incumbent cable service provider to comply with customer service standards reasonably comparable to the federal standards, until there are two or more providers in the relevant service area, excluding direct-to-home satellite service. Thereafter, the Department of Agriculture and Consumer Services (DACS) will receive service quality complaints from customers of certificate holders. The term “reasonably comparable” is not defined by the bill. Concerns have been raised regarding this provision: 1) the DACS role in resolving service quality complaints and its lack of expertise; 2) the DACS lack of specific requirement or enforcement provisions; and 3) there is no enforcement mechanism concerning these standards once two or more providers are providing service in a given area, and do the standards go away.

Local governments have also collected monies from cable operators as a result of violating the customer service provisions of a franchise.

Public, Educational, and Government Access Channels

Since the 1984 Cable Act, LFAs may require cable operators to set aside channels for public, educational, and governmental (PEG) use. In addition, LFAs may require cable operators to provide services, facilities, and equipment for the use of these channels. In general, cable operators are not permitted to control the content of programming PEG channels, but they may impose non-content-based requirements, such as minimum production standards, and they may mandate equipment user training.

PEG channel capacity which is not used for its designated purpose may, with the LFA’s permission, be used by the cable operator to provide other services. Under certain conditions, a franchising authority may authorize the use of unused PEG channels to carry low power commercial television stations and local non commercial educational television stations that are required by law.

In s. 610.109, F.S., the bill provides detailed requirements for a certificateholder to provide PEG channels or equivalent capacity to municipalities and counties. This section also requires active use by the municipality or county of the PEG channels with a variety of programming or the PEG channels will revert to the certificate holder. Additionally, this section requires interconnection, where technically feasible, between the certificate holder and the incumbent’s cable systems for the purpose of providing PEG programming, so long as the programming does not bear the logo or name of the other cable service provider.

Specifically, if a municipality or county within whose jurisdiction a certificateholder is providing cable service requests, a certificateholder is required to designate a sufficient amount of capacity to allow the provision of PEG channels for non commercial programming as set forth in the bill. The certificateholder has 180 days to do so.

If PEG channels were provided by the incumbent cable provider, the certificate holder must provide the same number of PEG channels supplied by the incumbent, until the expiration of the incumbent’s existing franchise agreement or ordinance. For purposes of this section, a public, educational, or governmental channel is deemed activated if the channel is being used of public, educational, or governmental programming within the municipality for at least 10 hours a day.

If the municipality or county did not have any PEG channels, the certificateholder must provide i) up to three PEG channels for a municipality or county with a population of at least 50,000, or ii) up to two PEG channels for a municipality county with a population of less than 50,000.

If a municipality or county has not used the number of access channels or capacity equivalent as permitted above, access to additional channels or capacity equivalent allowed above shall be provided upon 180 day's written notice, if the municipality or county meets the following standards:

- If the municipality or county has one active PEG channel and wished to activate one additional PEG channel, the initial channel is considered substantially used when it is programmed for 12 hours each calendar day. At least 40 percent of the twelve hours of programming for each business day on average must be nonrepeat programming, which is the first three videocastings of a program.
- If the municipality or county is entitled to three PEG channels and has in service two active PEG channels, each of the two active channels shall be considered substantially used when 12 hours are programmed on each channel each calendar day and at least 50 percent of the 12 hours for each business day for each calendar quarter is nonrepeat programming for three consecutive quarter

The operation of any PEG channel or capacity equivalent is the responsibility of the municipality or county receiving the benefit of such channel or capacity equivalent, and a certificateholder is only responsible for the transmission of the channel's content. The certificateholder is responsible for providing the connectivity to each public, educational, or governmental access channel distribution point up to the first 200 feet.

Municipalities and counties are responsible for ensuring that all transmissions, content, or programming transmitted over a channel or facility by a certificateholder are provided or submitted to the cable service provider in a way that is capable of being accepted and transmitted by a provider without any requirement for additional alteration or change in content by the provider, over the particular network or the provider, which is compatible to the protocol utilized by the cable service provider to deliver services. The provision of PEG content to the provider authorizes the provider to carry such content, including, at the provider option, the authority to carry contents beyond the jurisdictional boundaries of the municipality or county.

Where it is technically feasible, the certificateholder and incumbent cable service provider are to use reasonable efforts to interconnect their cable systems, to provide PEG programming. This interconnection may be accomplished through any reasonable means of interconnecting. The certificateholders and incumbent cable service providers are to negotiate in good faith and incumbent cable service providers may not withhold PEG channels.

A certificateholder is not required to interconnect, or otherwise transmit, PEG content that is branded with the identifying mark of another cable service provider, and the municipality or county may require a cable service provider to remove identifying marks from PEG content made available to another provider.

A court of competent jurisdiction has the exclusive jurisdiction to enforce any requirement under this section.

Nondiscrimination by Municipality or County

The bill creates s. 610.110, F.S., which requires a municipality or county to allow a certificate holder, to install, construct, and maintain a network within a public right-of-way and provide the certificateholder with open, comparable, nondiscriminatory, and competitively neutral access to the public right-of-way in accordance with the state law regulating the use of the right-of-way by utilities.[4] The use of a right-of-way by a certificateholder is nonexclusive.

The municipality or county also may not discriminate against a certificateholder regarding the authorization or placement of a network in a public right-of-way, access to buildings or other property, or the terms of utility pole attachments.

Limitations on Local Authority

Section 610.112, F.S., prohibits a municipality or county from imposing additional requirements, except those expressly permitted by this chapter, on certificateholders, including financial, operational, and administrative requirements. A municipality or county may not impose on a certificateholder requirements on:

- Having business offices located in the municipality or county;
- Filing reports and documents with the municipality or county that are not required by state or federal law and are not related to the use of the public right-of-way;
- The inspection of a certificateholder's business records;
- The approval of a transfer of ownership or control, but the municipality or county may require a notice of transfer within a reasonable of time.

The municipality or county may require a permit for a certificateholder to place and maintain facilities in or on a public right-of-way. The permit may require the permitholder, at its own expense, be responsible for any damage resulting from the issuance of a permit and restoring the public right-of-way to a substantially similar condition to how it was before the installation of such facilities. The terms of the permit shall be consistent with construction permits issued to other providers of communications services placing or maintaining facilities in a public right-of-way.

Discrimination Prohibited

Pursuant to federal law, s. 610.113, F.S., prohibits a certificateholder from denying access to service (redlining) to potential residential subscriber because of the income of the residents in the local area where such group resides. Enforcement may be sought by initiating a proceeding with DACS, pursuant to its powers of processing complaints in s. 570.544, F.S. Section 577.544(3), F.S., reads in part:

> [T]he Division of Consumer Services shall serve as a clearinghouse for matters relating to consumer protection, consumer information, and consumer services generally. It shall receive complaints and grievances from consumers and promptly transmit them to that agency most directly concerned in order that the complaint or grievance may be expeditiously handled in the best interests of the complaining consumer. If no agency exists, the Division of Consumer Services shall seek a settlement of the complaint using formal or informal methods of mediation and conciliation and may seek any other resolution of the matter in accordance with its jurisdiction.

In determining whether or not a certificateholder has violated the above provision, cost, distance, and technological or commercial limitations shall be taken into account, and the certificate holder shall have a reasonable time to deploy service pursuant to federal law. It may not be considered a violation to use an alternative technology that provides comparable content, service, and functionability. The inability to access a building is also not considered a violation. The section is not to be construed to authorize any buildout requirements.

[4] S. 337.401, F.S.

While the bill prohibits discrimination based on income (redlining), the bill does not prohibit a certificateholder from refusing to serve a certain area due to other factors such as it being uneconomical to serve a specific area (cherry picking).

Compliance

Section 610.114, F.S., provides that if a court finds a certificateholder to be in noncompliance with any requirements of ch. 610, F.S., the certificateholder shall have a reasonable time, as specified by the court, to cure such non-compliance.

Applicability of Other Laws

Section 610.115, F.S., provides that a provider of video programming that is not a cable service provider does not have its rights impaired by ch. 610, F.S.

Severability

Section 610.116, F.S., provides that if any provision of ch. 610, F.S., or its application to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of ch. 610, F.S., that can be given effect without the invalid provision or application, and the provisions of ch. 610, F.S., are severable.

<u>Communications Services Tax</u>

The bill amends the Communications Services Tax provisions in s. 202.24 (a) and (c), F.S., to conform to the legislation's proposed changes to video franchising. Specifically, it prohibits municipalities and counties from negotiating the terms and conditions related to franchise fees or the definition of gross revenues or other definitions or methodologies related to the payment of franchise fees on providers of cable service.

Additionally, a provision relating to in-kind contributions only applies with respect to cable ordinances or franchise agreements that are in effect prior to July 1, 2006.

<u>Use of Right-of-Way</u>

The bill amends s. 377.041(3), F.S., relating to the use of the right-of-way to conform to the new video franchising legislation. Section 377.041(3)(a)2, F.S., which is completely deleted, relates to the awarding of cable franchises by municipalities and counties. This deleted section provides that municipalities or counties may award one or more cable franchises and cable service providers shall not provide cable service without a franchise. Municipalities and counties retain the authority to negotiate the terms and conditions of cable franchises as provided by federal and state law, except those relating to franchise fees and gross revenues. The municipality or county may require cable providers to provide in-kind services such as institutional networks, support for PEG channels, to the extent permitted by federal law. Also, to the extent permitted by federal law, the cable provider may recover its expenses associated with in-kind requirements.

Section 337.4061, F.S., is amended to conform definitions to what is contained in the new video franchising law. Other conforming changes are made to this section.

<u>Repeal of Current Law</u>

The bill repeals s. 166.046, F.S., which is the current cable service franchise law that provided minimum standards for cable television franchises imposed upon municipalities and counties.

<u>Conforming Statutes</u>

Sections 358.81(3)(a) and 364.0361, F.S., are amended to conform to other statute changes.

Effective Date

This act shall take effect July, 1, 2006.

C. SECTION DIRECTORY:

Section 1	Provides a short title.
Section 2	Amends s. 202.24(a) and (c), F.S., relating to limitations of local taxes and fees imposed on dealers of communications services.
Section 3	Amends s. 366.401(3)(a), (e), and (f), F.S, relating to use of right-of-way for utilities subject to regulation; permit; fees.
Section 4	Amends s. 337.4061, F.S., relating to definitions; unlawful use of state-maintained road right-of-way by nonfranchised cable services.
Section 5	Creating ss. 610.102, 610.103, 610.104, 610.105, 610.106, 610.107, 610.108, 610.109, 610.110, 610.112, 610.113, 610.114, 610.115, and 610.116, F.S., creating a statewide cable franchise authority.
Section 6	Repeals s. 166.046, F.S., relating to cable television franchises.
Section 7	This act shall take effect on July 1, 2006.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None. The bill does not give DOS the authority to charge an application fee.

2. Expenditures:

   According to the DOS, its estimated first year operating cost would be $850,116, with $83,888 of that being non-recurring costs. This estimate is based on establishing a new filing section within the Division of Corporations with 16 full time equivalent positions. These figures are if the DOS's function is ministerial in nature. DOS may incur additional expenditures if it is required to litigate the denial of any certificate or establish rules to implement this law.

   More specific information has been requested from DACS. However, according to DACS, the section that tries to informally resolve complaints against unregulated entities currently have five full time equivalent positions, to resolve the approximately 25,000 complaints its receives annually. Therefore, it will need one full time equivalent position for approximately every 5,000 complaints it will receive.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None

2. Expenditures:

According to local governments they could potentially lose tens of millions of dollars in capital grants, facilities, and services that cable operators currently provide under franchise agreements. Federal law allows local governments to negotiate numerous benefits from cable operators, including PEG channels provided at no charge, free installation and service to government buildings, free or advantageously priced institutional networks and capital grants. While these benefits are permitted by federal law, the bill would eliminate them. While the bill would eliminate a local government's right to negotiate for these services, it does not eliminate the need for these services, and the local government will need to find the funds to pay for these services.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Instead of obtaining a cable franchise from each municipality or county where it wishes to provide service, an entity wishing to provide cable service will only need to obtain a statewide franchise, under the provisions of the bill, for the area in which it wishes to serve. This could potentially save the thousands of dollars per franchise.

D. FISCAL COMMENTS:

The Revenue Estimating Conference has yet to meet on this bill to determine a fiscal impact.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds. The bill does not reduce the percentage of a state tax shared with counties or municipalities. This bill does not reduce the authority that municipalities have to raise revenue.

2. Other:

<u>Impairment of Contracts</u>

The bill allows cable operators to unilaterally terminate their franchise agreements with municipalities and counties if certain conditions are met. These provisions may be an unconstitutional impairment of contracts under the United States and Florida constitutions. Staff was provided much of the following legal information from proponents and opponents of the bill.

<u>Local Government Authority to Establish Franchises</u>

Among the things to consider in determining whether or not provisions in the bill constitute an unconstitutional impairment of contracts is from where do municipalities and counties receive their authority to issue cable franchises.

An argument was be made that since the state gave the local governments the authority to grant cable franchises, the state can take this authority away. The statutory definition of "franchising authority" is "any governmental entity empowered by federal, state, or local law to grant a franchise." See ss. 166.046 and 337.4061, F.S. While s. 166.046(2), F.S., requires a public hearing and certain things to be considered prior to municipalities and counties granting a cable television franchise, there is nothing in the statute that declares the municipalities and counties as the LFAs.

Moreover, the argument was made that municipalities and counties receive their franchising authority from federal law. Federal law generally prohibits cable operators from providing cable service without a franchise. 47 USCA 541(b)(1).[5] However, nothing in federal or state law specifically declares that municipalities and counties are the franchising authority for the provision of cable service. Since neither the federal nor state governments have assumed the role of issuing d cable franchises; it has fallen on the municipalities and counties to become the LFAs.

Local Government Standing to Challenge State Statute

Another question is whether or not the municipalities and counties would have standing to challenge the constitutionality of a state statute.

It appears to be well established that subordinates of a state do not have standing to challenge a state's action under the federal contacts clauses contained in Article I, Section 10 of the United States Constitution. See *Williams v. Mayor of Baltimore*, 289 U.S. 36, 40 (1933), and *American Association of People with Disabilities v. Shelley*, 324 F. Supp. 2d 1120, 1131 (C.D. Cal. 2004).

It appears that the Florida Supreme Court has never addressed the issue of whether or not a city or county can challenge the constitutionality of a state statute.[6] Lower state courts have ruled that "[s]tate officers and agencies must presume legislation affecting their duties to be valid and *do not have standing to initiate litigation for the purpose of determining otherwise*. *Florida Department of Agriculture and Consumer Services v. Miami-Dade County,* 790 So.2d 555, 558 (Fla. 3d DCA 2001), quoting *Department of Education v. Lewis*, 416 So.2d 455, 458 (Fla. 1982). However, a state agency or officer may defensively raise the constitutionality of a statute if litigation is brought against it. *Department of Education v. Lewis*, 416 So.2d 455, 458 (Fla. 1982). There also appears to be an exception if the law being challenged involves the disbursement of public funds. *Fuchs v. Robbins*, 818 So.2d 460, 464 (Fla. 2002).

Contract Impairment

Instead of challenging the constitutionality of the statute, a municipality or county is more likely to sue a franchisee who terminates its franchise under the provisions of this statute for breach of contract. While the franchisee would argue that this new statute allows it to terminate its franchise agreement with the municipality or county. The municipality or county would argue that the statute is an unconstitutional impairment of contracts.

It is well established in Florida law that "[v]irtually no degree of contract impairment has been tolerated in this state." *Yamaha Parts Distributors, Inc. v. Ehrman*, 316 So. 2d. 557, 559 (Fla. 1975). In determining how much impairment it is willing to tolerate, the Florida Supreme Court has stated:

> [W]e must weigh the degree to which a party's contract rights are statutorily impaired against both the source of authority under which the state purports to alter the contractual relationship and the evil which it seeks to remedy. Obviously, this becomes a balancing process to determine whether the nature and extent of the impairment is constitutionally tolerable in light of the importance of the state's objective, or whether it unreasonably intrudes into the parties' bargain to a degree that is necessary to achieve that objective. *Pomponio v. Claridge of Pompano Condominium, Inc.* 378 So.2d 774, 780 (Fla. 1979).

While the cases above, were based on contracts between private parties, there is some case law concerning the Legislature's authority to impair the state's own contracts. The Florida Supreme

[5] There is an exception for persons lawfully providing cable service without a franchise prior to July 1, 1984, unless required to do so by the franchising authority.

[6] The question of whether or not a county would have standing to challenge the constitutionality of a state statute was certified to the Florida Supreme Court in 1995, the case was resolved on another issue and the court did not address the certified question. *Santa Rosa County v. Administration Commission, Division of Administrative Hearings*, 661 So.2d 1190 (Fla. 1995).

Court has ruled that once the Legislature accepted and funded a collective bargaining agreement, "the state and all its organs are bound by that agreement under the principles of contract law." *Chiles v. United Faculty of Florida*, 615 So.2d 671, 673 (Fla. 1993). In this case, after ratifying the collective bargaining agreement, in response to a fiscal emergency, the Legislature postponed, then terminated a scheduled pay-raise. The Supreme Court determined that while the legislature has the authority to reduce an appropriation related to a collective bargaining agreement, only when it demonstrates a compelling state interest. However, before exercising this authority:

> [T]he legislature must demonstrate that no other reasonable alternative means of preserving its contract with public workers, either in whole or in part. The mere fact that it is politically more expedient to eliminate all or part of the contracted funds is not in itself a compelling reason. Rather, the legislature must demonstrate that funds are from no other possible reasonable source. *Chiles at 673.*

In the *Chiles* case, the state interest that the Legislature was trying to remedy a $700 million budget shortfall, the Supreme Court determined that the budget shortfall was not sufficient reason for the state to impair the collective bargaining agreement.

If the courts have ruled that both a compelling state interest and no other remedy are required elements before the Legislature can impair the state's contracts.

<u>Home Rule</u>

Article VIII of the Florida Constitution gives municipalities and counties broad "home rule" power, which gives them the authority to enact an ordinance for any public purpose; however, state law prevails when there is a conflict between state law and local law.

Under home rule powers, municipalities and counties have established cable ordinances. These ordinances address the specific needs of the community including demographics, buildout, specific needs for PEG channels, safety and customer services issues.

With the proposed legislation, the bill would remove a municipality or county's authority over cable service, including ordinances and cable franchise provisions that address the specific needs of the community.

B. RULE-MAKING AUTHORITY:

It is unclear whether DOS will need to adopt rules to implement the statewide cable franchise authority. According to DOS, if it is required to adopt rules, and that process takes between 12 to 18 months. This timeframe does factor in legal challenges to the rules.

C. DRAFTING ISSUES OR OTHER COMMENTS:

<u>Comments</u>

It is unclear whether DOS will need enforcement authority, such as the ability to revoke certificates.

DOS has raised concern that a 15 business day turnaround on approving applications may be difficult to accomplish.

DOS has also raised the concern about whether or not it will be able to implement to provisions of this bill by July 1, 2006, especially if it is required to apply the federal cable regulations (47 USC 541 et, seq.).

Concern was raised about perpetual noncompliance. Section 610.114, F.S., provides that once a court determines that a certificateholder is not in compliance with the chapter's requirements, the certificateholder has a reasonable period of time to cure the noncompliance. However, there is no additional enforcement mechanism if the certificateholder continues to be in noncompliance.

The bill does not provide an appropriation to DOS for the administration of the act. There is also no appropriation to DACS for additional staffing to handle complaints concerning cable television.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES