# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: Communications and Public Utilities Committee

BILL: CS/SB 998

INTRODUCER: Communications and Public Utilities & Senator Bennett

SUBJECT: Communications

DATE: March 22, 2007 REVISED: _____ _____ _____ _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|---|---|---|---|---|
| 1. | Caldwell | Caldwell | CU | **Fav/CS** |
| 2. | | | GA | |
| 3. | | | RC | |
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## I. Summary:

The committee substitute establishes the authority to issue statewide cable and video franchises within the Department of State (department or DOS) and designates the department as the state franchise authority. The bill removes local government authority to negotiate cable service franchises.

Generally, the bill:

- Provides for definitions;
- Establishes application procedures for a state-issued certificate of franchise authority (certificate), including provisions that establish the circumstances under which a cable operator with an existing franchise with a municipality or county may terminate such franchise agreement and receive a state-issued franchise for its current franchise area;
- Requires certificateholders to update information every five years;
- Provides for application and processing fees, most of which are to be transferred to the Department of Agriculture;
- Prohibits the imposition of franchise fees by local governments, except those franchise fees already collected through the Communications Services Tax and permitting fees collected for the use of the right-of-way;
- Provides for certain buildout requirements;
- Provides that the incumbent cable service provider must abide by customer service standards reasonably comparable to those in the Federal Communications Commission's (FCC) rules until there are two or more cable service providers in the relevant service 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 certificateholders for items such as access to rights-of-way, buildings, or property; terms and conditions of utility pole attachments; and the filing of certain documents with the municipality or county;
- Prohibits discrimination against subscribers based on race or income, and provides a process to address complaints related to discrimination;
- Provides that effective January 1, 2009, cable service quality complaints from municipalities and counties that currently have an office or department dedicated to responding to cable service quality complaints are to be handled by the Department of Agriculture and Consumer Services (DACS);
- Requires the office of Program Policy Analysis and Governmental Accountability (OPPAGA) and DACS to submit reports to the Legislature;
- Provides for rulemaking by DACS.

The bill repeals statutes related to a 2003 law increasing basic local telecommunications rates and reduces rates for intrastate switched network access that affects long distance rates and adds an automatic enrollment requirement for Lifeline services.

The bill makes conforming changes to the Communications Services Tax (CST) and the use of rights-of-way statute. The bill repeals the current cable franchising law in s. 166.046, F.S., and the process for the commission to consider petitions for reductions in intrastate switched network access rates in s. 364.164, F.S. The bill takes effect upon becoming a law.

This bill substantially amends, creates, or repeals the following sections of the Florida Statutes: 116.046, 202.11, 202.24, 337.401, 337.4061, 350.081, 364,0361, 364.051 , 364.163, 364.164, 364.385, 610.102, 610.103, 610.104, 610.105, 610.106, 610,107, 610.108, 610.109, 610.112, 610.113, 610.114, 610.115, 610.116, 610.117, 610.118 and 610.119.

## II. Present Situation:

The provision of cable service is regulated at the federal level by The Federal Cable Act (Cable Act)[1]. The Cable Act was enacted for purposes set forth in 47 U.S.C. §521. These purposes are to:

- Establish a national policy concerning cable communications;
- 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;
- Establish guidelines for the exercise of federal, state, and local authority with respect to the regulation of cable systems;
- Assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public;

[1] 47 U.S.C. §521 et. seq.

- 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 the Cable Act; and
- Promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems.

The Cable Act allows a local 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. Cable franchises are the agreement or ordinance setting forth the terms on which a cable company is given permission to provide cable service in a municipality or county. The franchise is to be construed to authorize the construction of a cable system over public rights-of-way and through easements. In using the easements, the cable operator must ensure:

- The safety, functioning, and appearance of the property and the convenience and safety of others is not adversely affected by the installation or construction of cable facilities;
- The cost of installation, construction, operation, or removal of such facilities is borne by the cable operator or subscribers, or both; and
- 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 local franchising authority:

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

Finally, the local franchising authority must assure that access to cable service is not denied to a group of potential subscribers because of their economic status.

State regulation is set forth in s. 166.046, F.S., which provides minimum standards for cable television franchises between the local government and the provider. The section provides that 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:

- The economic impact upon private property within the franchise area;
- The public need for such franchise, if any;
- The capacity of public rights-of-way to accommodate the cable system;
- The present and future use of the public rights-of-way to be used by the cable system;
- 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;
- The financial ability of the franchise applicant to perform;
- Other societal interests as are generally considered in cable television franchising;

- Such other additional matters, both procedural and substantive, as the municipality or county may, in its sole discretion, determine to be relevant.

The section provides that no municipality or county shall grant any overlapping franchises for cable service within its jurisdiction on terms or conditions more favorable or less burdensome than those in any existing franchise within such municipality or county. However, this restriction does not apply when the area in which the overlapping franchise is being sought is not actually being served by any existing cable service provider holding a franchise for such area. Finally, consistent with federal law, the section provides that nothing in the section shall be construed to prevent any municipality or county from imposing additional terms and conditions upon the granting of such franchise as such municipality or county shall in its sole discretion deem necessary or appropriate.

Both federal and state law authorizes local governments to require a franchise agreement to use its public right-of-way and operate a cable service within its corporate limits.[2] By federal and state law, a cable company must have such a franchise to use the public rights-of-way for its lines and to provide service.[3] Franchises cover what services are to be provided, which company is authorized to provide cable service and what happens if the company changes, where the service is to be provided, the fees and other compensation the company provides the governmental entity, the protections for use of the rights-of-way, customer service requirements, channels for use by the local government, schools, and the public, and the financial support for such channels.

In Florida, franchise agreements are negotiated with either a municipality or a county (and sometimes with both for any given county).[4] The term of these agreements generally are for 15 years. Expiration of these agreements varies throughout Florida. Agreements may be short and contain a few general terms or complex with many specific terms included. Some franchise agreements have specific provisions that cause a renegotiation of the agreement to adopt terms or conditions of subsequently negotiated agreements with a competitive provider that the incumbent believe are more favorable than those in its own agreement. The following topics may be included in a current franchise agreement: definitions; grant of authority, limits, reservations; provision of service and area; system faculties, capacity and operation; public, education, and government services; public benefit support; insurance and indemnification; transfer, renewal, enforcement, and termination of franchise; security fund or letter of credit; remedies and liquidate damages; and customer services, information, and rights.

Recently, the Federal Communications Commission (FCC) issued an Order[5] that adopt rules and provide guidance which prohibits franchising authorities from unreasonable refusing to award competitive franchises for the provision of cable services. The FCC determined that it is an unreasonable refusal to award a competitive franchise when:

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[2] *See* 47 U.S.C. §551, et. seq. and s. 166.046, F.S.
[3] See 47 U.S.C. §541 and s. 337.401(3)(a)2., F.S.
[4] Section 166.046, F.S.
[5] Federal Communications Commission Report and Order and Further Notice of Proposed Rulemaking 06-180 (adopted December 20, 2006; released March 5, 2007); MB Docket No. 05-311, In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992.

- Franchise negotiations extend beyond certain time frames (90 days to reject a request);
- The LFA requires an applicant to agree to unreasonable buildout requirements;
- The LFA demands specified costs, fees, and other compensation, unless they count towards the five percent cap on franchise fees;
- The LFA denies an application based on a new entrant's refusal to undertake certain unreasonable obligations relating to PEG and institutional networks.

In its Order, the FCC proposed to preempt local laws, regulations, and requirements, including local level-playing-field provision, to the extent such provisions impose greater restrictions that the FCC's rules. The FCC concluded that it does not have sufficient information to make a determination as to what is an "unreasonable refusal to award an additional competitive franchise" at the state level, with such things as statewide franchising decisions. Therefore, the Order addresses only franchising decisions made by county or municipal franchising authorities. It is expected that the new rules will be challenged in federal court.[6]

Chapter 202, F.S., is the Communications Services Tax Simplification Law. Created in 2001 and 2002 to provide a fair, efficient, and uniform method for taxing communications services sold in Florida,[7] the Communications Services Tax includes cable franchise fees in its rates. Section 202.24, F.S., authorizes municipalities and counties to negotiate all terms and conditions of a cable service franchise allowed by federal and state law and further exempts local government requirements for in-kind requirement, institutional networks, or contributions for or in support of the use or construction of public education, or governmental access facilities from the limitation of taxes and fees they cannot collect.[8]

Section 364.10, F.S., provides for eligible telecommunications carriers to provide a Lifeline Assistance Plan to qualified residential subscribers. Lifeline (and Link-up) are part of the federal Universal Service Program designed to enable low-income households to obtain and maintain basic local telephone service. The Tele-Competition Innovation and Infrastructure Enhancement Act of 2003 (2003 Act) required that each state agency providing benefits to persons eligible for the Lifeline Assistance Program develop procedures to promote participation in Lifeline. In 2005, an income-based eligibility criterion of 135 percent of the Federal Poverty Guidelines was added to the list of other qualifying criteria.

Section 364.051, F. S., provides for price regulation of basic local telecommunications services. In 2003, this section was also amended by the 2003 Act to allow for adjustments to certain local exchange telecommunications companies' rates to compensate for reductions in its intrastate switched network access rates. Once a local exchange telecommunications company reduced its switched network access charges to the amount prescribed by statute, it could petition the Public Service Commission (commission) to reduce the level of regulatory treatment of its retail services to that of competitive local exchange telecommunications companies.

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[6] http://www.freepress.net/news/21487 , *Cities Challenge FCC on Cable Franchise Order***,** From *TV Week*, March 5, 2007 By Ira Teinowitz.
[7] Section 202.105(1), F.S., Legislative findings and intent.
[8] Section 202.24(2)(c)8., F.S.

Section 364.163, F.S., provides for network access services. The 2003 Act provided that once intrastate switched network access rates were equal to the interstate switched network access rate, such rate would be capped for three years. A long distance company was required to decrease its intrastate long distance revenues by the amount necessary to return the benefits of such reduction to both its residential and business customers. The commission has oversight authority to insure the correctness of any rate decrease and making any necessary adjustments.

Section 364.164, F.S., provides for competitive market enhancement and was created by the 2003 Act. This section provided the procedures for the rate adjustments between sections 364.051 (basic local telecommunications rates) and 364.163, F.S. (intrastate switched network access and intrastate long distance rates).

Section 364.385, F.S., provides for saving clauses.

## III. Effect of Proposed Changes:

**Section 1** creates the Consumer Choice Act of 2007.

**Section 2** amends s. 202.011, F.S., relating to definitions for the purpose of the Communications Services Tax Simplification Law. The term "video service" is defined as having the same meaning as provided in s. 610.103, F.S. Under that section, "video service" means video programming services provided through wireline facilities located at least in part in the public rights-of-way without regard to delivery technology, including Internet protocol technology. Programming provided by a commercial mobile service is not included.

**Section 3** amends s. 202.24, relating to the limitations on local taxes and fees imposed on dealers of communications services to conform it to the addition of Chapter 610, F.S. Paragraph (2)(a) is amended to eliminate municipality and county authority to negotiate all terms and conditions of a cable service franchise allowed by federal and state law and to clearly state these entities may not negotiate those terms and conditions related to franchise fees or the definition of gross revenues or other definitions or methodologies related to the payment or assessment of franchise fees on providers of cable or video services. Also, In-kind contributions allowed under federal law and imposed under an existing ordinance of franchise agreement for service provided prior to July 1, 2007, or permitted under ch. 610, F.S., are not subject to the prohibitions in s. 202.24(2), F.S.

**Section 4** amends s. 337.401, F.S., relating to use of right-of-way for utilities subject to regulation, permits, and fees. Subparagraph (3)(a)2 is deleted. It allowed municipalities or counties to award franchises within its boundaries and negotiate all terms and conditions related to franchise fees and the definition of gross revenues or other definitions or methodologies related to the payment or assessment of franchise fees and permit fees and provided for in-kind requirements and contributions for the use or construction of public, educational, or governmental access facilities.

**Section 5** amends s. 337.4061, F.S., relating to definitions and unlawful use of state-maintained road right-of-way by nonfranchised cable services by including video services. Within the definition of the term "cable system" are types of facilities that are not considered cable systems.

This list is amended to include a facility that serves subscribers without using any public right-of-way. The list also includes a "facility of a common carrier" and the bill modifies current language to: a ". . . carrier that is subject, in whole or in part, to the provisions of Title II of the Federal Communications Act of 1934, except such facility shall be considered a cable system other than for purposes of 47 U.S.C. s. 541 (c) to the extent such facility is used in the transmission of video programming directly to subscribers, unless the extent of such use is solely to provide interactive on-demand services." An open video system that complies with 47 U.S.C. s. 573 is not considered a cable system. The term "franchise" will include video service provider network facilities. The term "video service" is defined as having the same meaning as in s. 610.103, F.S. Other conforming changes were made to include video service.

**Section 6** creates a chapter 610 F.S. Section 610.102, F.S., authorizes the Department of State (department or DOS) to issue statewide cable and video franchises. A municipality or county is prohibited from granting a new franchise for the provision of cable or video service within its jurisdiction.

Section 610.103, F.S., provides for definitions of the following terms: "cable service," "cable service provider," "cable system," "certificateholder," "department," "franchise," "franchise authority," "incumbent cable service provider," "public right-of-way," "video programming," "video service," and "video service provider."

Section 610.104, F.S., provides for state authorization to provide cable or video service. The procedures and requirements associated with applying to the department for a state-issued certificate of franchise authority are described. It provides that after July 1, 2007, any person or entity seeking to provide cable or video service is required to file an application for a state issued certificate with DOS. Any entity or person providing cable or video service under an unexpired franchise agreement with a municipality or county as of July 1, 2007, is not required to obtain such a certificate to continue providing service in such municipality or county until the franchise agreement expires, except in the following circumstances:

- A cable or video service provider who is not defined as an incumbent and who provides cable or video service to less than 40% of the total cable or video service subscribers in the franchise area, beginning July 1, 2007, may elect to terminate an existing franchise and seek a state-issued certificate of franchise authority by providing written notice to the Secretary of State and the affected municipality or county after July 1, 2007. In such case, the franchise with the municipality or county is terminated on the date the department issues the state certificate.
- An incumbent cable service provider may elect to terminate an existing municipal or county franchise agreement and apply for a state-issued certificate of franchise authority with respect to such municipality or county if another cable or video service provider has been granted a state-issued certificate of franchise authority for a service area located in whole or in part within the service area covered by the existing municipal or county franchise and such certificateholder has commenced providing service in such area. The incumbent cable service provider is required to provide, at the time of filing its application, written notice of its intent to terminate its existing franchise to the department and the affected municipality or county. The municipal or county franchise is terminated on the date the state certificate is

issued to the incumbent cable service provider. Concern has been raised as to whether this provision creates an unconstitutional impairment of contract.

Information to be provided in the application is set forth in the bill and includes an affidavit affirming specified information by an officer, partner, or managing member. The bill provides procedures the department must follow in reviewing the application and affidavit, and provides the department must issue a certificate of franchise authority before the 15th business day after receipt of an accepted application. The bill provides the authority granted on the certificate and includes:

- Name and identification number;
- The authority is to provide cable or video service 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 lawful operation of the cable or video service by the applicant or its successor in interest;
- A statement that describes the service area for which the authority applies;
- The effective date.

The Department of Environmental Protection is concerned with the affect of the authority granted under the certificate to construct, maintain, and operate facilities through, upon, over and under any public right-of-way or water. According to DEP, this could conflict with law from both a regulatory and proprietary perspective. From a regulatory perspective, this provision would allow a certificateholder to construct its facilities without obtaining any of the necessary regulatory permits (e.g., an ERP permit for wetland impacts) which could result in water quality problems, loss of wetlands, etc. From a proprietary perspective, this provision would allow a certificateholder to place its facilities on state-owned lands, including sovereign submerged lands without getting authorization from the Board of Trustees (Board). Board approval is necessary because this statutory grant of authority may interfere or conflict with a prior existing Board authorization to someone else.

If the department does not act on an accepted application within 30 days, it is deemed approved without further notice. The bill also requires that the certificate must be issued by the 15th business day. If the department denies an application, the applicant may challenge the denial in a court of competent jurisdiction through a petition for mandamus. A "mandamus" is a "writ which orders a public agency or governmental body to perform an act required by law when it has neglected or refused to do so."[9] Read together, the purpose of these provisions is unclear. The bill provides for amendments to certificates to include additional service areas, for transfer to any successor in interest, and for termination.

The bill provides that the department shall function in ministerial capacity accepting information contained in the application and affidavit at face value. The applicant is required to ensure continued compliance with all applicable business formation, registration, and taxation statutes. A one-time application fee is set at $10,000. The bill provides that a parent company may file a

[9] The People's Law Dictionary, (2005). http://legal-dictionary.thefreedictionary.com/Mandamus, Feb. 1, 2007.

single application covering itself and all of its subsidiaries and affiliates, but the entity actually providing such service in a given area is to be considered the certificateholder.

After 5 years, and every five years, of approval of the application, the certificateholder is required to update the information contained in the original application. A $1,000 processing fee is required to accompany the update. Failure to pay the fee subjects the certificateholder to cancellation after certain notification and opportunity to comply is met. The bill requires the application and processing fees to be deposited into the Operating Trust Fund for immediate transfer by the Chief Financial Officer to the General Inspection Trust Fund of the Department of Agriculture and Consumer Services. The Department of Agriculture and Consumer Services is required to maintain a separate account within the General Inspection Trust fund to distinguish cable franchise revenues from all other funds. The application, any amendments to the certificate, or information updates must be accompanied by a fee to the department equal to that for filing articles of incorporation under s. 607.0122(1), F.S.

Section 610.105, F.S., provides for eligibility for state-issued franchise. Incumbent cable service providers are not eligible for statewide franchise authority as to any existing municipal or county franchise agreement. However, an incumbent cable service provider may elect to terminate an existing franchise and apply for a state-issued certificate if another cable or video service provider has been granted state authority for a service area located in whole or in part within the service area covered by the existing municipal or county franchise and has commenced providing service in the area. The incumbent must provide with its application for state authority written notice of its intent to terminate its existing franchise to the department and the affected local franchise authority. The local franchise is terminated on the date the department issues the state certificate for the local franchise area. A municipality or county cannot impose any additional obligation under any existing franchise that exceeds the obligations imposed on the incumbent cable or video service provider that has been granted a state-issued certificate. Such action is declared against public policy and void.

Section 610.106, F.S., prohibits franchise fees imposed by the department as a condition for issuance of the state certificate and by a municipality or county in connection with use of public right-of-way as a condition of doing business in the municipality or county, except such taxes, fees, charges, or other exactions permitted by ch. 202, F.S., s. 337.401(6), F.S., or under s. 610.117, F.S.

Section 610.107, F.S., provides for buildout and prohibits any franchising authority, state agency or political subdivision from imposing any buildout, system construction, or service deployment requirements on a certificateholder.

Section 610.108, F.S., provides for customer service standards. The bill requires incumbent cable service providers to comply with the federal customers service requirements until there are two or more providers offering service, excluding direct-to-home satellite service, in the incumbent service provider's relevant service area.

The bill provides, beginning on July 1, 2009, for all providers of cable service in municipalities or counties that, as of January 1, 2007, have an office or department dedicated to responding to cable service quality complaints, all such complaints shall be handled by the Department of

Agriculture and Consumer Services (DACS). Until that time, these complaints shall continue to be handled by the municipality or county. The bill provides that this provision shall not be construed to permit a municipality or county to impose customer service standards in conflict with this section. It appears that DACS already handles cable complaints that are not handled by counties and municipalities without consumer complaint departments for cable. Its website provides several links to entities that provide assistance regarding cable television complaints.[10]

The bill requires DACS to receive service quality complaints from customers of a certificateholder and address them in an expeditious manner by assisting in the resolution of such complaint between the complainant and the certificateholder. The bill states that DACS shall adopt any procedural rules necessary to implement this section. While the bill gives DACS the authority to assist consumers in resolving customer service issues with cable companies, the bill does not contain any enforcement provisions.

Section 610.109, F.S., provides for public, educational, and governmental (PEG) access channels. Section 610.109(1), F.S., provides that no later than 12 months after a request by a municipality or county within whose jurisdiction the certificateholder is providing cable or video service, the certificateholder must designate a sufficient amount of capacity on its network to allow the provision of PEG channels for noncommercial programming as set forth in the section, except that a certificateholder that has terminated a local franchise agreement is required to satisfy the PEG obligation as specified upon issuance of a certificate for any service area covered by the certificate that is located within the service area of the certificateholder's terminated franchise.

Section 610.109(2), F.S., provides that a certificateholder shall designate a sufficient amount of capacity on its network to allow the provision of a comparable number of PEG channels or capacity equivalent that a municipality or county has activated under the incumbent cable service provider's franchise agreement as of January 1, 2007. The bill provides that, for purposes of this section, a PEG channel is deemed activated if it is being used for PEG programming within the municipality for at least 8 hours a day of locally produced original programming, excluding repeat and character-generated programming, for any 6 consecutive-month period. The municipality or county may request additional channels or capacity allowed under an incumbent franchise agreement as of January 1, 2007. A provider may locate any PEG access channel on any tier of service offered that is viewed by at least 40 percent of the provider's subscribers.

If, as of July 1, 2007, a municipality or county did not have PEG channels activated under the incumbent cable service provider's franchise agreement, the bill provides that not later than 12 months following a request from a municipality or county within whose jurisdiction a certificateholder is providing cable or video service, the cable or video service provider shall furnish: (a) up to three PEG channels or capacity equivalent for a municipality or county with a population of at least 50,000, or (b) up to two PEG channels or capacity equivalent for a municipality or county with a population of less than 50,000.

Section 610.109(4), F.S., provides that if a PEG channel provided pursuant to this section is not used by the municipality or county for at least 10 hours a day, it shall no longer be made

[10] http://www.800helpfla.com/azguide_c.html

available to the municipality or county, but may be programmed at the cable or video service provider's discretion. When the municipality or county can certify to the cable or video service provider a schedule that meets the criteria in this section, the cable or video service provider shall restore the previously lost channel and may carry that channel on any tier of service offered that is viewed by at least 40 percent of the provider's subscribers.

Section 610.109(5), F.S., provides that if a municipality or county has not used the number of access channels or capacity equivalent to the number described above, access to additional channels or capacity shall be provided on 12 month's written notice if the municipality or county meets the following standard:

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

Section 610.109(6), F.S., provides that 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 PEG access channel distribution point up to the first 200 feet.

Section 610.109(7), F.S., provides that 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 of the cable or video service provider, which is comparable to the protocol utilized by the cable service provider to carry such content, including, at the providers option, the authority to carry contents beyond the jurisdictional boundaries of the municipality or county.

Section 610.109(8), F.S., provides that where technically feasible, the certificateholder and incumbent cable service provider are to use reasonable efforts to interconnect their networks to provide PEG programming. This interconnection may be accomplished by direct cable, microwave link, satellite, or other reasonable method of connection. The bill provides that certificateholders and incumbent cable service providers shall negotiate in good faith and incumbent cable service providers may not withhold interconnection of PEG channels.

Section 610.109(9), F.S., provides that a certificateholder is not required to interconnect or otherwise transmit PEG content that is branded with the identifying marks of another cable or video service provider, and a municipality or county may require a cable or video service

provider to remove its logo, name, or other identifying marks from PEG content that is to be made available to another provider.

Section 610.109(10), F.S., provides that a court of competent jurisdiction has the exclusive jurisdiction to enforce any requirements under this section.

Section 620.112, F.S., requires a municipality or county to allow a certificateholder to install, construct, and maintain a network within a public right-of-way and provide the certificateholder with 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.[11] 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 and conditions of utility pole attachments.

Section 610.113, F.S., provides for limitation on local authority by prohibiting 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 for:

- 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 not related to the use of the public right-of way;
- The inspection of a certificateholder's business records; or
- The approval of transfers of ownership or control. (The municipality or county may require a notice of transfer within a reasonable 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, to be responsible for any damage resulting from the issuance of a permit, and for restoring the public right-of-way to its original condition before the facilities were installed. The terms of the permits shall be consistent with construction permits issued to other providers of communications services placing or maintaining facilities in a public right-of-way.

Section 610.114, F.S., prohibits a certificateholder from denying access to service ("redlining") to any group of potential residential subscribers because of the race or income of residents in the local area where such group resides, which conforms to federal law.[12] The bill provides procedures for determining a discrimination violation. The certificateholder has a reasonable time to deploy service within its service area. Within 3 years the certificateholder shall provide access to video services to at least 25 percent of the low-income households, which is defined in the bill, in that service area and within 5 years to at least 50 percent. The bill allows certain alternative technology to fulfill this obligation. The bill provides for a waiver or extension of time under specified circumstances and provides the criteria under which a waiver may be

[11] S. 337.401, F.S.
[12] 47 U.S.C. s. 541(a)(3)

granted by DACS. The bill prohibits any other type of buildout requirement. The bill provides for enforcement and requires DACS to adopt rules.

The bill provides that in determining whether a certificateholder has violated the above provision, cost, distance, and technological or commercial limitations shall be taken into account. It may not be considered a violation to use an alternative technology that provides comparable content, service, and functionality. In addition, the inability to serve an end user due to lack of access to a building or property is not considered a violation. The bill provides that this section is not to be construed to authorize any buildout requirements. DACS is required to adopt the procedural rules necessary to implement this section.

Section 610.115, F.S., provides that if a court of competent jurisdiction finds a certificateholder not to be in compliance with the requirements of ch. 610, F.S., the certificateholder shall have a reasonable amount of time, as specified by the court, to cure such noncompliance.

Section 610.116, F.S., declares that nothing in ch. 610, F.S., shall be construed to give any local government or the department any authority over any communications service other than cable services or video services whether offered on a common carrier or private contract basis.

Section 610.117, F.S., provides procedures in the event an incumbent cable service provider is required to operate under its existing franchise and is legally prevented by court order to terminate the existing franchise as provided by the bill. Any non-incumbent certificateholder providing cable or video service within any part of the incumbent's franchise service area must comply with the certain franchise terms and conditions as applicable to the incumbent provider while the court order remains in effect. These terms and conditions are: lump-sum or recurring per subscriber funding to support PEG access channels, institutional networks, or other prospective franchise-required monetary grants related to PEG access facilities and capital costs (a formula is provided to calculate the amounts to be paid); an amount equal to one percent of the sales price for the taxable monthly retail sales of cable or video programming services the non-incumbent certificateholder received from subscribers in the affected municipality or county; and the payment is not due until 45 days after the municipality or county notifies the respective providers and the Department of Revenue of the appropriate per-subscriber amount. All payments made are part of the certificateholder's payment of communications services tax under s. 202.27, F.S., and all administrative provisions of ch. 202, F.S. apply to any payments made under this subsection.

If requested, the non-incumbent certificateholder will provide comparable, complimentary basic cable or video service to public K-12 schools, public libraries, or government buildings as required in the existing franchise under certain conditions. A non-incumbent may itemize any fee under this section on the customer's bill and recover such amount from the subscriber. The bill further clarifies that a non-incumbent cable or video service provider is subject to any buildout requirements under the local franchise agreement. Moreover, the non-incumbent cable or video service provider who is providing service in an incumbent's service area is given standing in any proceeding challenging the incumbent providers' right to terminate the existing franchise.

Section 610.118, F.S., requires two reports to the Legislature. By December 1, 2009, and on December 1, 2014, the Office of Program Policy Analysis and Governmental Accountability

(OPPAGA) is required to submit a report to the President of the Senate, Speaker of the House of Representatives, and the majority and minority leaders of the Senate and House of Representatives on the status of competition in the cable and video service industry. The report shall include, by municipality and county, the number of cable and video service providers, the number of cable and video subscribers served, the number of areas served by fewer than two cable or video service providers, the trend in cable and video service prices, and the identification of any patterns of service as they impact demographic income groups.

By January 15, 2008, DACS is required to make recommendations to the President of the Senate, Speaker of the House of Representatives, and the majority and minority leaders of the Senate and House of Representatives, regarding the workload and staffing requirements associated with consumer complaints related to video and cable certificateholders. The department shall provide to DACS, for inclusion in the report, the workload requirements for processing the certificates of franchise authority. The department will also provide the number of applications filed for cable and video certificates of franchise authority, and the number of amendments received to the applications for certificates of franchise authority.

Section 610.119, F.S., provides that if any provision of ss. 610.102-610.116, F.S., or its application to any person or circumstance is held invalid, such invalidity shall not affect other provisions or application of ss. 610.102-610.116, F.S., that can be given effect without the invalid provision or application, and to this end, the provisions of ss. 610.102-610.116 are severable.

**Section 7** amends s. 350.81, F.S., related to communications services offered by governmental entities to conform to the statutory changes in the bill.

**Section 8** amends s. 364.0361, F.S., relating to local government authority, nondiscriminatory exercise to conform to the statutory changes in the bill.

**Section 9** amends s. 364.051, F.S., relating to price regulation. The bill repeals the provisions that allow basic local telecommunications rates to be adjusted in a revenue neutral manner to compensate for a reduction in switched network access charges. Subsections (6) through (8) that are being repealed provided the process by which service quality requirements and regulatory treatment of retail services would be reduced for certain large local exchange telecommunications companies.

**Section 10** amends s. 364.10, F.S., relating to Lifeline by adding an automatic enrollment requirement. The bill requires if any state agency determines that a person is eligible for Lifeline services, the agency will immediately forward the information to the commission to ensure that the person is automatically enrolled in the program with the appropriate eligible telecommunications carrier. Customers are to have an option to choose subscribership. The commission and the Department of Children and Family Services are required to adopt rules and with the Office of Public Counsel, inter into a memorandum of understanding establishing respective duties.

**Section 11** amends s. 364.163, F.S., relating to network access services to cap the switched network access service rates in effect immediately prior to July 1, 2007, at a level until July 1,

2010. No interexchange telecommunications company shall institute any intrastate connection fee or any similarly named fee. In addition, the provision capping intrastate switched network access rates after implementation of the rebalancing, the requirement for long distance companies to decrease its revenues in the amount that its intrastate switched network access rates are reduced, and the commissions regulatory oversight to verify these provisions implemented are deleted.

**Section 11** amends s. 364.385, F.S., relating to savings clauses to add that the rates and charges for basic local telecommunications service and network access service approved by the commission and that were in effect just prior to July 1, 2007, shall remain in effect and the rates and charges may not be changed after the effective date except in accordance with the provisions of ss. 364.051 and 364.163, F.S. Under s. 364.051, F.S., basic local telecommunications rates may be increased in an amount not to exceed the change in inflation les 1 percent (CPI-1) once in any 12-month period. Non-basic telecommunications services rates may be increased not to exceed 20 percent within a 12-month period where there is another provider in the service area.

Under s. 364.163, F.S., switched network access service rates were scheduled to be reduced to parity, which was defined as the local exchange telecommunications company's intrastate switched network access rate is equal to its interstate switched network access rate in effect in January 1, 2003, for large companies (greater than 1 million access lines in service). According to the commission, that rate was $.0098. One company's 2002 intrastate rate was $.0460 in 2002 and is currently $.0271.

**Section 12** repeals ss. 166.046 and 364.164, F.S. Section 166.046, F.S., is the current cable service franchise law that provides minimum standards for cable television franchises imposed upon municipalities and counties. Section 364.164, F.S., provided the process for the commission to consider petitions for reductions in intrastate switched network access rates.

**Section 13** provides that the act shall take effect upon becoming a law.

## IV. Constitutional Issues:

### A. Municipality/County Mandates Restrictions:

The bill removes the ability of cities and counties to negotiate in-kind benefits associated with cable and video franchise agreements, therefore, decreasing the amount of revenues received by cities and counties.[13] If there is a decrease in revenue, such decrease may be construed as a reduction in the authority that cities and counties have to raise revenues in the aggregate.

The Revenue Estimating Conference met on February 28, 2007, to consider HB529 which has the same provisions relating to PEG channel access and in-kind payments as this bill. The Conferees adopted the low indeterminate negative impact on local governments' in-kind services now received from cable franchises. The Conferees

[13] A municipality or county may exercise its right to require from providers of cable service in-kind requirements, including, but not limited to, institutional networks, and contributions for, or in support of, the use or construction of public, educational, or governmental access facilities to the extent permitted by federal law. S. 337.401(3)(a)2., F.S.

concluded that the value of the lost in-kind services fees would total at least $19 million statewide.

Article VII, s. 18(b), Florida Constitution, provides that any general law which has the anticipated effect of reducing the authority of local government to raise revenues in the aggregate is deemed to be a mandate and must pass by two-thirds of the membership of both houses. The bill eliminates the authority municipalities and counties have to require in-kind payments associated with public, educational and government access channels which may be considered a mandate. It is estimated that these fees generated approximately $19 million in 2005.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Legislation that revises or terminates an existing franchise contract without the voluntary participation of the contracting parties, a challenge may be brought. Laws which impair the obligations of private contracts may be constitutional if they are reasonable and necessary to serve an important public purpose. *Yellow Cab Company of Dade County v Dade County*, 412 So.2d 395 (Fla. 1982). To determine if impairment is reasonable and necessary to serve an important public purpose, the court applies a balancing test to weigh the impact on contract rights against the public purpose and the state's interest. In doing so, the court would consider the following factors:

- Was the law enacted to deal with a broad, generalized economic or social problem?
- Does the law operate in an area which was already subject to state regulation at the time the parties' contractual obligations were originally undertaken, or does it invade an area never before subject to regulation by the state?
- Does the law effect a temporary alteration of the contractual relationships of those within its coverage, or does it work a severe, permanent, and immediate change in those relationships irrevocably and retroactively?

*Pomponio v Clairdge of Pompano Condominium, Inc.*, 378 So.2d 774 (Fla.1980).

## V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

Local governments potentially could lose significant 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 local governments' authority to negotiate for them.

The Revenue Estimating Conference (REC) met on February 28, 2007 to consider HB529, and adopted an indeterminate negative impact on local governments' in-kind services now received from cable franchises. The REC also concluded that the value of the lost in-kind services would total at least $19 million statewide. This bill would prohibit municipalities and counties from charging an in-kind fee.

B. Private Sector Impact:

It is anticipated that this bill will promote competition that results in lower cable prices for consumers. Cable and video providers may realize a reduction in expenses relating to obtaining local franchises.

C. Government Sector Impact:

The Department of State states on March 18, 2007, that it can meet the requirements of this bill with its existing resources.

The Department of Agriculture and Consumer Services states that regulation and handling of consumer calls and complaints will shift from local governments to the state. DACS continues that although the bill allows counties/municipalities with an office or department dedicated to cable service complaints to continue receiving these complaints until July 1, 2009, it will likely receive a significant number of complaints from residents in counties/municipalities without consumer complaint offices/departments, because based on its survey only a small number of these type offices currently exist.

DACS is not able to provide an estimate of recurring and non-recurring revenues but notes that there will be an unknown number of applicants paying a $10,000 initial one time application fee, to be deposited into the General Inspection Trust Fund. An indeterminate amount of recurring revenue will be generated from an application update processing fee of $1,000, due every five years. This revenue, due from successful initial applicants, will be received in FY 2011-12 and every five years thereafter. However, it does not know how many companies will have certificates and, therefore, cannot estimate the revenue that might be generated.

DACS states that its total recurring costs for FY07-08 will be $340,839 and total nonrecurring costs for the same time will be $136,542. DACS estimates its recurring costs for FY08-09 at $469,815 with no non-recurring costs, and for FY 09-10 at $477,860 with no non-recurring costs.

## VI. Technical Deficiencies:

None.

## VII. Related Issues:

None.

## VIII. Summary of Amendments:

None.