

United States House of Representatives
**Before the Committee on Energy and Commerce and the Subcommittee on
Telecommunications and the Internet**

Wednesday, April 27, 2005

**How Internet Protocol-Enabled Services Are Changing the Face of Communications:
A View from Government Officials**

Summary of Statement of the Honorable Kenneth Fellman

Mayor, Arvada, Colorado

Vice President, Kissinger and Fellman, P.C.

On behalf of

The National Association of Telecommunications Officers and Advisors,

The National League of Cities

The United States Conference of Mayors

The National Association of Counties

Summary Points

- Local governments
 - embrace the technological innovation;
 - welcome real communications competition in video, telephone and broadband services;
 - support a technology-neutral approach;
 - promote broadband deployment and competitive service offerings.
- Working closely with state organizations – NGA and NARUC
 - Unified in our support of state and local authority, public safety, universal access to telecommunications, use of public property and rights of way, consumer protection, competition and taxation.
 - State and local governments' interests are closely aligned on universal service, access to E911, public safety and CALEA.
- Internet protocol is not new, but networks and infrastructure used to deliver IP services is.
- Local governments help ensure broadband deployment
- Management of public property is a core function of local government; and use of public property by private parties requires compensation
- Social obligations of communications providers must continue to apply
 - Public, education, government access capacity
 - Institutional networks
 - Economic redlining prohibited
 - Public safety and community needs
- Franchising is not and never has been a barrier to competition
 - Communications Act provides national framework with local enforcement
 - Local franchising must be fair to all competing providers
 - Local franchising provides for reasonable yet timely deployment
 - Current law is a light touch regulatory approach

Conclusion

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Chairman Upton, Ranking Member Markey, and members of the subcommittee.

Thank you for the opportunity to testify this afternoon. I am the Mayor of Arvada Colorado, a municipality incorporated in 1904, and the site of Colorado's first documented gold strike. We have a population of approximately 104,000, and are located on the northwest side of Denver. I appear today as a representative of local elected leaders and their technical advisors. I play a key role in several national organizations representing local government interests and speak today on behalf of National Association of Telecommunications Officers and Advisors

(“NATOA”), the National League of Cities (“NLC”), the United States Conference of Mayors (“USCM”) and the National Association of Counties (“NACo”).¹

I have the great pleasure today of being authorized to speak here on behalf of all of these prestigious organizations that represent thousands of local elected officials and their advisors throughout the country. I am also here today, like you, as an elected official who looks at new technology with a great deal of excitement. Like you, every day I hear from my constituents who want more choices for communications services with a full range of competitive prices. Like you, I hear from small, medium and large businesses that want to receive communications products and services to enable them to remain competitive or to offer more products and services to their customers. Like you, I hear from my first responders that they lack some essential communications tools to protect public safety. Like you, I hear the concerns of citizens who want technology to improve their interaction with their elected officials and their government. Like many businesses, local governments are significant and sophisticated users of telecommunications technology. And, like all of you, I am seeking the best balance for our citizens, our economy, and our local communities.

Because many local elected officials serve with little or no compensation, I have another job as well. In my professional capacity I am an attorney, and I work with local governments nationally on a wide variety of communications and other issues.

¹ Mayor Fellman is a member of the NATOA Board, and Chair of its Convergence Committee; Chair of the Information Technology and Communications Steering and Advocacy Committee of the National League of Cities and as such represents NLC at the NGA-led tax negotiations; Vice Chair of the Communications Task Force and a member of the Communications and Transportation Standing Committee of the U.S. Conference of Mayors; Local Elected Official Member of the Department of Homeland Security’s SAFECOM Executive Committee; Former Chair of Local State Government Advisory Committee to the FCC; and a practicing attorney representing local governments.

Local governments embrace the technological innovation that this Committee has been hearing about over the last several months. We want and welcome real communications competition in video, telephone and broadband services. And, I am here to commit that we support a technology-neutral approach that promotes broadband deployment and competitive service offerings. Local governments have been managing communications competition for many years now – it is not new. What is exciting is the presence of a few well-funded and dominant players who appear to have finally made a commitment to competition in the video arena. We look forward to developing an even more successful relationship in bringing these competitive services home to America.

I also want to emphasize at the outset the close working relationship and shared views among the national organizations representing local and state government. The local organizations I represent today have been working together with the National Governors Association and National Association of Regulatory Utility Commissioners and are unified in our support of the principles of state and local authority, public safety, universal access to telecommunications, use of public property and rights-of-way, consumer protection, competition and taxation. State and local governments' interests are closely aligned on the topics that NGA and NARUC will cover today, particularly in the area of universal service, access to E911, public safety and CALEA. And, as you've heard (or will hear) from Mayor Billings today on behalf of the public power community, we stand in support of the ability of local governments to serve their constituents' needs and interests by self-provisioning, especially at times when the traditional industry providers are unwilling or unable to do so.

Local Government Asks Three Things of Congress

Today, on behalf of local government, I ask this Committee for three things. First, recognize the inherent police powers of local government including its right to manage and charge for the use of public right-of-way. Second, take a deliberative approach as you consider the appropriate scheme for addressing IP services which recognizes the core social obligations of service providers. And third, appreciate the neighborhood-by-neighborhood expertise local government brings to overseeing these social obligations, including public safety, broadband deployment, and prohibiting economic redlining.

The Use of Internet Protocol to Deliver Services

Internet protocol was developed almost 40 years ago, at the time the original Internet was being developed. Its use today to deliver data, telephone and video, is something that has evolved and improved over time, and is now so prevalent as to warrant congressional attention. The promise of competitive services being delivered through the use of IP is exciting and challenging – it's just not necessarily new. The communications tools we use every day have all evolved under the careful eye of federal, state and local governments, as should the communications tools of the future. These Internet innovations are meaningless if the networks used to deliver them are not widely available to all of our citizens. Deployment of the infrastructure used to deliver these services is of specific interest and concern to those of us who manage the physical property where this infrastructure resides and will be installed. This is why local government has long promoted the efficient and effective deployment of infrastructure within and through our communities.

Local Government Helps Ensure Broadband Deployment

We all share the concern of a lack of broadband access throughout America, in urban and rural areas alike. Regardless of the locality, it is likely that communications technologies will be a driving force in the economic opportunities enjoyed by the communities that have access to advanced services. I believe that the Cable Act has provided significant benefits to consumers and communities alike, and I believe that local government should be applauded for ensuring those benefits were provided in a timely, fair and efficient manner. Under the current regulatory regime, cable enjoys the highest deployment rate of broadband in this nation, with over 105 million homes having access to cable modem service. The cable industry is now reaping the economic benefits of an infrastructure that is capable of providing broadband access to all of our citizens. It is local government's oversight and diligence, through the franchise process, that has ensured that our constituents are not deprived of these services. Local government is the only entity that can adequately monitor and ensure rapid, safe and efficient deployment of these new technologies when they are being installed on a neighborhood-by-neighborhood level in our local rights-of-way.

Management of the Physical Right-of-Way is a Core Function of Local Government

Even as technologies change, certain things remain the same. A central fact remains— most of the infrastructure being installed or improved for the provision of these new services resides in the public right-of-way. Elected officials are the trustees of public property and must manage it for the benefit of all. We play a critical role in promoting competition by ensuring that all competitors have fair access to needed physical space and ensure they do not interfere with each other. In addition, we impose important public safety controls to ensure that communications uses are compatible with water, gas, and electric infrastructure also in the right-of-way.

Keeping track of each street and sidewalk and working to ensure that installation of new facilities do not cause gas leaks, electrical outages, and water main breaks are among the core police powers of local government. And while it seems obvious, these facilities are located over, under or adjacent to property whose primary use is the efficient and safe movement of traffic. It is local government that best manages these competing interests. In any reform of the current law, it is vital that our property rights and interests in the management and control of the public rights-of-way are respected and preserved.

To Properly Exercise Its Fiduciary Obligations, Government Must Have the Right to Obtain Compensation for Public Property Used for Private Gain

At the same time that we manage the public right-of-way, local government, acting as trustees on behalf of our constituents, must ensure the community is appropriately compensated for use of the public space. In the same way that we charge rent when private companies use a public building to make a profit, and the federal government auctions spectrum for the use of public airwaves or requires compensation when communications towers are located on federal lands, we ensure that the public's assets are not wasted by charging reasonable compensation for use of the right-of-way. Local government has the right to require payment of just and reasonable compensation for the private use of this public property – and our ability to continue to charge rent as a landlord over our tenants must be protected and preserved.

Social Obligations Remain Critical Regardless of Technological Innovation

Communications companies are nothing if not innovative. When you think back over the course of just the past 100 years, the changes in technology are mind-boggling. At the same time, the social obligations developed over the last 60 years have endured. I strongly urge the Committee

to engage in a deliberative process, and take the time necessary to engage in dialogue and debate, to ensure that any legislative changes adopted this year will be as meaningful 20 years from now as two years from now.

While last year some questioned the need for any regulation of Voice over Internet Protocol services, this year the Committee heard the chilling story of a family who could not use E911 to reach the police on their VoIP phone while a gunman prowled their home. The Committee's understanding of the need for regulations has evolved based on experience with the technology and careful study and deliberation. The same careful study and deliberation is needed with respect to video services. Local government believes that federalization of all IP services would not serve the public interest, and would violate the principle of technology neutrality. Such action would create disparate treatment of entities premised solely upon the nature of the service being provided, and create an entirely new form of regulatory arbitrage. Rather, we believe that like services should be treated alike and certainly services that compete with one another in the eyes of the consumer should face the same government obligations. Local governments want to ensure that we can continue to require that social obligations of providers be met, and that consumers are protected.

Congress Must Take the Time to Consider the New Social Obligations in an IP World

In the past, we have determined that those who use public property for private commercial purposes have an obligation to the "public interest" in exchange for this privilege. As a result, a sort of social contract has evolved with each such entity, based on the particular service or technology being utilized. For voice, we recognize that E911, universal service, law enforcement access through CALEA, are social obligations to be required of companies

providing voice services. As consideration for the otherwise free use of the public spectrum, broadcasters are obligated to serve their communities' interests and to provide critical safety of life information on demand. For direct broadcast satellite, there is payment for the use of the spectrum and a public interest set-aside of 4% of capacity. For video, a public interest set aside designates capacity for community channels, institutional networks and a requirement to pay rent for the use of the public's property. Compliance with these obligations is not appropriately left to the marketplace.

Historical and Current Role of Social Obligations

Thus, I welcome this opportunity to discuss with you the important social obligations inherent in current video regulation, and to explain why these core functions must be preserved, no matter the technology used to provide them. These include the allocation of capacity for the provision of public, education and government access channels, prohibitions on economic redlining, and a basic obligation that local government evaluates and the provider meets the needs of the community, including public safety needs.

PEG Channels

Historically and today, locally produced video programming performs an important civic function by providing essential local news and information. Under the existing law, local government can require that a certain amount of cable system capacity and financial support for that capacity be set aside for the local community's use. This capacity is most often used in the form of channels carried on the cable system and are referred to as PEG for public, educational and governmental channels. Once the local franchise authority has established the required number of channels and amount of financial support required to meet community needs, they then determine the nature of the use, which may be mixed between any of the three categories.

Public channels are set aside for the public and are most often run by a free-standing non-profit entity. Educational channels are typically reserved for and are managed by various educational institutions. Government channels allow citizens to view city and county council meetings, and watch a wide variety of programming about their local community that would otherwise never be offered on commercial or public television. Whether it is video coverage of the governmental meetings, information about government services or special programs, school lunch menus, homework assignments or classroom instruction, the video programming used to disseminate this information allows all of us to better serve and interact with our constituents. Government continues to make innovative uses of this programming capacity as new interactive technology allows even better information to be available to our constituents.

But this is information that many of you know quite personally – for instance Congressman Markey has appeared many times as a featured guest on access programming on a regular basis throughout the State of Massachusetts. And many other members, including Representative Dingell, represent communities whose PEG programming has won national acclaim. And my own Congressman Bob Beauprez has his own show “Washington Report” distributed on many of the government access channels throughout Colorado’s 7th Congressional District. Many of you and your peers use this vital resource as a means to report back and to interact with your constituents at home. Local and state officials also use this important medium, and we want to ensure that it continues to be available now and in the future.

It may be possible that through deliberative processes such as this hearing, we will identify new technological opportunities to assist us in our outreach to our citizens, but I suggest to the Committee today that these public interest obligations continue to serve an important purpose

and must be preserved, regardless of the technology that allows us to make the programming available. I hope that you'll join with me in calling for the continuation of such opportunities in the new technologies that are evolving today. Certainly I should hope that you would not follow the tantalizing concept of reducing obligations on providers without careful consideration.

Economic Redlining

One of the primary interests of local government is to ensure that services provided over the cable system are made available to all residential subscribers in a reasonable period of time. These franchise obligations are minimal in light of the significant economic benefits that inure to these businesses making private use of public property. While there may be those who find this provision unreasonable – we find it to be essential. Those who are least likely to be served, as a result of their economic status, are those who we need most to protect. This deployment helps to ensure that our citizens, young and old alike, are provided the best opportunities to enjoy the highest quality of life – regardless of income. The capacity that broadband deployment offers to our communities is the ability of an urban teen to become enriched by distance education opportunities that until recently couldn't possibly capture and maintain the interest of a teen (much less many adults). And, that's just the beginning – the possibilities are endless, as is the creativity of those in local government on making the most they can with the least they have.

Public Safety & Community Needs

Local leaders often focus on the needs of their first responders when evaluating community needs. The current law provides that local governments may require the development of institutional networks as part of the grant of a franchise. This network is specifically for the purpose of serving non-residential areas such as government facilities including police, fire,

schools, libraries and other government buildings. This infrastructure is typically designed to use state of art technology for data, voice, video and other advanced communications services. It has proven effective not only for day to day training and operations – but essential in emergencies, including the events of September 11, 2001.

For example, the City of New York uses an INET for distance learning among city educational institutions, for city-wide computer network connectivity, for criminal justice applications (video arraignments), for employee training including first responder training, and for ensuring redundant intelligent communications capabilities for all of its police, fire and first responder needs. This network is constantly being improved upon, but functioned in many important capacities during the losses suffered on September 11, 2001. This network not only offers capacity for the city all year round, but redundancy in times of an emergency.

Again, many Members of Congress live in communities that have required the deployment of these services, and are planning and using this infrastructure and the services to protect and serve the needs of their citizens. For instance the communities of Palo Alto, California, Marquette, Michigan, Laredo, Texas and Fairfax County, Virginia are all examples where the local government has determined that use of an institutional network is in the best interests of their community.

Neither Franchising, Nor Current Regulation, is a Barrier to Competition

The concept of franchising is to manage and facilitate in an orderly and timely fashion the use of property. For local governments, this is true regardless of whether we are franchising for the provision of gas or electric service, or whether we are providing for multiple competing

communications services – all of which use public property. As the franchisor – we have a fiduciary responsibility that we take seriously, and for which we are held accountable.

I began my testimony commiserating with you about constituent demands for better services at competitive prices. As you are no doubt aware, our constituents demand real competition to increase their options and improve the quality of services. As you know, a GAO study showed that in markets where there is a wire-line based competitor to cable that cable rates were, on average, 15% lower. Please understand that local governments are under plenty of pressure every day to get these agreements in place and not just from the companies seeking to offer service. I know this committee has heard some unflattering descriptions of the franchise process. I would like to discuss with you the reality of that process.

Franchising is a National Framework with an Essential Local Component

Franchising is essentially a light touch national regulatory framework with local implementation. The 1992 Cable Act authorizes local governments to negotiate for a relatively limited range of obligations that are imposed upon cable operators. Virtually none of these obligations are mandatory. Each one is subject to decision-making at a local level. The current legal structure provides for something I hope we would all agree is important in this nation – local decisions about local community needs are made locally. While some communities will require significant capacity for education, government and public channels or INET use, others will seek little or none. The ideologies and the values of each local community guide their elected leaders. And, in many cases, even where the state has determined that a state-wide franchise process is appropriate, they require the local community and the provider to work out the details, consistent with the state guidelines. This is because a one-size fits all approach is not the most efficient or

reasonable means of achieving deployment of communications services. Moreover, a one-size fits all approach can penalize communities with differing needs. For example, no one would claim that the community of Ann Arbor, MI needs the exact same services as Detroit or Kalamazoo, or Mackinaw City in the Upper Peninsula. Neither would impose on the other each other's desires – and yet, both should have the ability to ascertain their individual needs and work with the providers accordingly. Further, in some states where home rule has been adopted, the state doesn't have the authority to address these issues, as that authority resides at the local level.

Local Franchising is Comparatively Efficient, and Must Be Fair to Protect All Competitors

Franchising need not be a complex or time-consuming process. In some communities the operator brings a proposed agreement to the government based on either the existing incumbent's agreement or a request for proposals, and with little negotiation at all an agreement can be adopted. In other communities, where the elected officials have reason to do so, a community needs assessment is conducted to ascertain exactly what an acceptable proposal should include. Once that determination is made, it's up to the operator to demonstrate that they can provide the services needed over the course of the agreement.

Furthermore, while some of the new entrants have asserted that franchise negotiations have not proceeded as fast as they would like, it is important to recognize that every negotiation has two parties at the table. Some new entrants have proposed franchise agreements that violate the current state or federal law and open local franchise authorities to liability for unfair treatment of the incumbent cable operator vis-à-vis new providers. Some also seek waiver of police powers

as a standard term of their agreement. Local government can no more waive its police powers to a private entity than the federal government can waive the constitutional rights its citizens.

As far as I know, everywhere that Verizon has applied for a franchise it insists that the community use Verizon's own model franchise, without regard to the terms and conditions of the community's incumbent franchise agreement. In other words, Verizon is seeking unilaterally to impose its own very aggressive nationwide franchise on all local communities. While Verizon may have the right to attempt such an approach, it can't fairly complain about delays resulting from its own, self-interested negotiating strategy. Rather, if Verizon would simply work from the community's existing franchises that actually reflect the community's needs and interests, I believe they'd find it much faster and easier to obtain a franchise agreement. And I can speak from personal experience that this is what Qwest is doing in Colorado, and the franchise negotiating process has been both easy and timely. Unlike other business contracts that are confidential or proprietary, local government franchise agreements are readily available as public record documents, so a new provider knows the terms of the incumbent's agreement well before they approach a local government about a competitive franchise.

Many states have level playing field statutes, and even more cable franchises contain these provisions as contractual obligations on the local government. So when a new provider comes in and seeks a competitive cable franchise, there is not much to negotiate about. If the new competitor is seriously committed to providing as high a quality of service as the incumbent, the franchise negotiations will be neither complicated nor unreasonably time consuming. Indeed, I recently negotiated a competitive cable franchise for the City of Lone Tree, Colorado. Qwest Broadband sought a franchise to provide competitive video programming through its fiber to the home architecture. Because Lone Tree has an existing cable franchise with Comcast, and the

City cannot grant a competitive franchise that on the whole is more favorable to the new entrant, we had a very short and relatively simple negotiation.

Moreover, local government has absolutely no desire to make new entrants change their current network topologies to meet the cable infrastructure design. Local government's most significant concern is that it treat all providers fairly, as required by current franchising agreements and by federal law.

Franchising Provides for Reasonable Deployment Schedules

Nothing in franchising or current federal law requires a new video entrant to deploy to an entire community immediately. Local government has been negotiating franchise agreements with new entrants for many years. In these cases, greenfield developments may have one schedule while existing areas are built out over a period of time ranging from eighteen months to five years. These same standards apply when an incumbent provider is seeking a renewal and needs to upgrade the capacity of its system to provide new services.

By managing the deployment as we do, we protect the incumbent's investment in existing infrastructure, we protect the public from unnecessary disruption to private business and to their safe use and enjoyment of the public right-of-way, and we ensure that new entrants are provided with unfettered access in a reasonable and timely fashion, while ensuring that they comply with all safety requirements. This system has worked well for cable, traditional phone and other providers for many years, and is necessarily performed by the local government. Congressmen Barton and Stupak successfully fought to maintain the federalist, decentralized partnership that has served our country well for 200 years when they authored the provisions of the Act which

preserve to local government this authority. We trust that under their continued leadership and guidance these important principles of federalism will be maintained.

The Current Framework Safeguards Against Abuse and Protects Competition

The current framework ensures that all competitors face the same obligations and receive the same benefits, ensuring a fair playing field. Federal safeguards protect against abuse. Local government is generally prohibited from requiring a provider to use any particular technology or infrastructure such as demanding fiber or coaxial cable. They can require that certain minimum technical standards be adhered to and that systems are installed in a safe and efficient manner. Local government ensures compliance with the National Electric Safety Code to protect against threat of electrocution or other property damage. Local rules can also require that signal quality be up to federal standards, and that systems are maintained to provide subscribers with state of the art transmissions. Similarly, it is local government that inspects the physical plant and ensures compliance on all aspects of operations. We work closely with our federal partners and cable operators to ensure that cable signal leaks are quickly repaired before there is disruption or interference with air traffic safety or with other public safety uses of spectrum.

Current Law Provides Light Touch Economic Regulation for Cable Services

While there may be limited regulation of cable rates on the books today, telephone companies should celebrate entering the cable business, which utilizes the light touch economic regulation they seek. That regulation, which is employed in relatively few communities, is now purely a consumer protection tool to retard abuse of overcharging on basic service and equipment. As limited as the current regime is, a recent review of one company's national FCC rate filing disclosed overcharges in the amount of \$5 million in equipment charges in one year to the one

million subscribers covered by the review. While the regulations may be minimal, their use in protecting subscribers should not be lightly tossed aside – and the role of the local government in uncovering and prosecuting such protections should be applauded, not undermined.

Finally, where cable operators are subject to effective competition, currently defined as 15% DBS penetration, they can use a very simple process to petition the FCC to remove themselves from the extremely limited rate regulation currently in place. While we do not think that the current standard contained in the law and enforced by the FCC is adequate, nonetheless, Title VI does not impose anything like the regulatory structure applied to telephone services.

Conclusion

Local government is enthusiastic about the benefits that Internet protocol may offer our constituents. We strongly support competition, the rollout of new services, and the economic growth that accompanies new technological developments. The history of the Communications Act is in some ways, a success story. In a dynamically changing world of technology, the Act has restrained monopoly power, extended services, required socially responsible actions by providers and supported the fundamental democratic and economic underpinnings of our democracy. Certainly the importance of choice, competition and opportunity of our citizens demands a well conceived and thoughtful deliberative process, and not a rush to cure an illness that is yet unproven.

We also believe that any new national communications policy should preserve local government's authority to ensure public health, safety and welfare; allow local governments to support important policy goals as described here; and enable local governments to serve its community's communications needs. What this means is that we are here today asking you to

preserve our police powers, our ability to control and manage of our rights-of-way, and our ability to impose and collect taxes and fees necessary to fund our essential services. We ask that you continue to support our goals of enhanced economic development through the use of new technologies, competitive access to products and services and the assurances that all of our citizens and businesses will be provided the opportunity to participate in this technological revolution. We ask that you remember the important social obligations that fall uniquely on the shoulders of local governments to provide for homeland security and emergency communications services to and for our citizens. To facilitate our communications with our citizens we seek legislation that authorizes locally adopted capacity requirements on new communications technologies. Finally, while others will speak more specifically to this point, we support the ability of local government and the citizens they serve to have self determination of their communications needs and infrastructure. Where markets fail or providers refuse, local governments must have the ability to ensure that all of our citizens are served, even when it means that we have to do it ourselves.

In our rush to embrace technological innovation, we, as elected leaders, are deeply cognizant of our responsibility to ensure that the citizens of our communities are protected and public resources are preserved. We engage in deliberative processes, such as this hearing today, to be sure that we are accumulating verifiable data and are making informed decisions. Local control and oversight has served us well in the past and should not be tossed out simply as the “old way.” This year as the discussion of the delivery of services over the Internet includes not just voice but video and other potential services, I strongly encourage this Committee to proceed carefully. The Committee should continue to continue its excellent work thus far of

accumulating information and ensuring a strong record in support of any decisions to change to the law.

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