



**SOUTH EAST ASSOCIATION OF TELECOMMUNICATIONS OFFICERS & ADVISORS**  
**GEORGIA – NORTH CAROLINA – SOUTH CAROLINA – TENNESSEE**  
**A REGIONAL CHAPTER OF NATOA**

April 29, 2010

To: Heather Fennell, Staff Attorney, Research Division

From: Catharine Rice, SEATOA President

Subj: Request on Impact of Video Service Competition Act

2010 - EXECUTIVE TEAM

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SEATOA learned on or around April 23, 2010, that the Revenue Laws Study Committee planned to report on impact of the Video Service Competition Act on May 5, 2010, and was given until April 29, 2010 to report on the issues outlined in Section 21 of that law, including 1) competition in video programming services; 2) the number of cable service subscribers, the price of cable service by service tier, and the technology used to deliver the service; and 3) the deployment of broadband in the State. Section 21 requires that in reviewing the effect of the law on these areas, it should determine if any changes to the law are needed.

The SEATOA Board of Directors voted on April 27, 2010 that I should provide the following feedback to the Committee:

Based on the industry's promise that the VSCA would lead to increased competition, consumer choice, lower cable rates, maintained and strengthened PEG channels, improved customer service and accountability, and that local governments would be kept financially whole through the replacement of their local cable franchise fees with a video programming tax, the experience of local communities has been:

- 1) That the Video Service Competition Act has failed; after four years, it has produced no discernable or significant evidence of video competition but instead has allowed monopoly operators to continue unchecked with no real level of government consumer protection oversight;
- 2) That in the absence of any data collected by the state, the largest indicator of a lack of competition is that cable rates have increased every year since enactment of the Act except in communities with municipally owned cable systems;
- 3) That in some places in the state, state franchising has led to less consumer video choice, as deregulated companies have reduced the size of the service areas previously served under local cable franchises;
- 4) That the deregulation of the state's cable industry has led to underfunding of public, educational and government (PEG) channels which were previously funded by cable operators as a negotiated requirement in local cable franchise, the termination of PEG channels and the stifling of the development of PEG channels;

- 5) That the VSCA it has led to less consumer accountability than prior to the VSCA due to the absence of competition, substantive reporting requirements, and enforcement by the Secretary of State's office of the existing, de minimus reporting requirements;
- 6) That no evidence has been produced that local governments were kept financially whole through the replacement of their franchise fees with a video programming tax.

The SEATO Board recommends that the General Assembly require a careful and comprehensive investigation of the level (and lack) of video competition in North Carolina, (and devote more than one week to this effort). That additionally cable service rates be tracked over time to measure whether they are increasing or decreasing. That new reporting requirements be established, and public access be provided the following data, broken out by local community: a) the names of the cable operators serving that community; b) the exact service areas of those operators graphically displayed with detailed maps; and c) the number of cable subscribers, and pricing by level of service. That the General Assembly re-establish local government cable oversight due to a lack video competition and not remove local consumer oversight until effective competition is clearly established, as measured by long term reduction in service prices. That in light of the significant role cable broadband systems play in the economic growth of local communities, the General Assembly reinstate the right of local communities to require build-out standards, along with financial penalties for non-compliance.

The Board also recommends that a careful analysis be done of local public, educational and government channels, and the reasons behind the absence of new channels developing. That an investigation be done of reports that current cable operators are refusing to provide local public, educational and government channels on their cable systems in local communities despite proper requests for those channels according to Section 66.357.

The Board also recommends that the Secretary of State's (SOS) office be required to publicly the Notice of Franchises on its web site. That the Notice of Service forms be amended to detail the provision of the law under which an operator is claiming to be subject to a state franchise (and not to a local franchise.) That that office post on its website color maps of the state franchise applicant's service area, instead of black and white maps. That the Attorney General's office track both written and phone call cable consumer complaints.

## BACKGROUND

Only July 21, 2006, during the short session of the North Carolina General Assembly, the Video Service Competition Act (VSCA) was signed into law, in essence removing thirty-years of local government cable franchising and associated consumer protection and oversight. Prior to this law, North Carolina's local governments protected consumers through local cable franchises which contained consumer protections, build-out, construction and transfer of ownership requirements, requirements that local public, education and government channels be carried on the local cable system and funded by the cable operator, and financial penalty provisions for cable operator non-compliance. Federal law prevented communities from granting monopoly cable franchises, but local cable operators reached "gentlemen's agreements" not to compete. The VSCA in essence deregulated these monopoly operations without any minimum requirement that competition be present, shifted consumer oversight to the Attorney General but limited the terms

of that oversight and permitted the Secretary of State's office to restrict FCC's cable consumer protection obligations which the Attorney General would then enforce, removed all public oversight or evaluation when cable systems are bought and sold, and established no penalty provisions for failure to meet FCC customer protection standards or state franchise reporting requirements. Consumers and communities were relegated to the single, unaffordable remedy of suing a cable operator who was in breach of the VSCA's minimum requirements.

### IMPACT OF THE VSCA

#### *1) Failure to Create Competition, leading to increased cable rates, less consumer video choice:*

The VSCA provides no mechanism for the State to document the level of local community cable competition, cable prices, service levels or technologies used to deliver service. SEATO Board members, who represent Raleigh, Charlotte, Cary, Salisbury and Asheville, report no sign or no significant presence of competition. AT&T, the largest potential competitor in the state, began offering U-verse service in the state a full three years after the VSCA was enacted, and while publicly claiming to offer service in the state, refuses to provide subscriber totals or maps of actual areas served. According to AT&T's 2009 Annual Report, it only serves 16% of homes passed in its service area. AT&T's 2008 and 2009 state franchise notices reveal that its potential U-verse service areas will now only cover slightly more than half its telephone service area; with that telephone service area only covering 25% of the state. (See attachment 1). The net result of the VSCA has been to deregulate the state's cable operators, who are subject to no competition, leading to increased cable rates across the state (except in those areas facing competition from municipal cable operators).

The Triangle J Council of Government's Broadband Consortium's cable consultant reports that Triangle area cable rates have increased every year since the VSCA was enacted. 2008 cable rate data collected by the Triangle J Council of Government Cable/Broadband Consortium, reveals that Time Warner Cable's rates for 15 communities including Raleigh increased between 5-50% depending on service tier, in contrast to Time Warner Cable customers living in Wilson and served from the same headend as the Triangle, with the same programming as the Triangle, experienced no change in rates during 2007 or 2008. Time Warner Cable faces competition from Greenlight in Wilson, a municipally-owned system. (See Attachment 2).

Nash County's cable consultant reports that Time Warner Cable used the VSCA to terminate its locate franchise which contained build-out and upgrade requirements, and in turn reduced the size of its Nash County cable service area, likely due to the rural, low density, low income nature of those areas.

#### *2) Failure to stimulate increased broadband deployment in the State*

The VSCA provides mechanisms for the early termination of existing local cable franchises and for their complete termination upon local cable franchise expirations. Local cable franchises traditionally included "build-out" provisions requiring operators to build areas of the community that met a certain agreed-upon household density. The VSCA contains no build-out requirements for state franchised operators, nor any market mechanism, that would lead to increased broadband deployments. Increased broadband and cable deployments have only been reported in communities who continue to exercise local cable franchising authority (e.g., Chatham County), where financial penalty provisions and the threat of rejecting the sale of the

cable system to a new operator were used to convince the incumbent cable operator to serve areas that met franchise household density build out requirements but were not being served.

No accurate measurements of broadband adoption in the state exists. No state law even requires the reporting of broadband subscriber numbers and no known state census has requested this information. e-NC has received an NTIA mapping grant to map broadband subscriptions in the state; but various incumbent providers have insisted on confidentiality of this data, meaning such data will likely never be reported at the local community level. Many communities are of the opinion that earlier broadband mapping data from e-NC over-reported broadband availability levels due to "averaging" of measurements across counties or wireline service areas, or incorrect households totals, and equating low levels of internet speeds with the term "broadband." (e.g., Chatham County, Yancey County.) e-NC provided incentive grants to Embarq in the recent past to build DSLAMS in a number of underserved areas in North Carolina, but the actual deployment of these DSLAMS was never verified (nor actual increase in broadband subscriptions). Local communities lack the funds to survey their own residents for broadband use and availability.

### *3) Decreased Consumer Accountability*

Prior to the VSCA, federal law provided local communities the authority to enforce provisions in local cable franchises that met or exceeded the FCC cable consumer protection requirements through financial penalty provisions in local cable franchises. The VSCA has led to reduced consumer accountability by first preempting these local obligations and replacing them with no substantive consumer protections. First, the VSCA redefined the Secretary of State (SOS) as the State's exclusive cable franchising authority for state franchised operators, but the SOS took the position that it did not have the authority to utilize the franchising authority provided it under federal law. Under §66-356(b), any state franchised operator must comply with the FCC's customer service requirements pursuant to 47 C.F.R Part 76. Nevertheless, the SOS reduced those obligations to a subset of the FCC's consumer protection provisions in a rulemaking in late 2007. Under §66-356(c) the VSCA provides the Attorney General the authority to enforce compliance with the FCC's customer service requirements, but limited its enforcement authority by requiring as a pre-requisite for non-compliance, a "pattern or practice" of violations of these rules, and establishing a series of factors which the Attorney must consider when evaluating a consumer protection violation to the extent that an operator can deny a person cable service based on race or income during the first year of state franchised service. (§66-356(a)(1).

The VSCA has also reduced consumer accountability in other ways, including by failing to require the state franchised operator to state the legal basis on which it is filing for a state franchise. This has led to the inability of a community to confirm the validity of the basis of a state franchise filing when it is used to prematurely terminate a local cable franchise. The VSCA also failed to require the SOS to require service area maps be submitted with sufficient detail to discern where the service area was located in a community. State franchise applicants are generally filing maps that fail to detail the service area within a community, making it impossible to verify that the pre-requisites for a state franchise have been met. The VSCA also failed to require the SOS to publicly post the State franchise Notice of Service or the maps of the actual service area, making it impossible for members of the public to verify if the requirements for a state franchise had been met. The SOS is not posting the Notice of Service on its website,

but is only posting a black and white version of a state franchise applicant's service area map, who typically mark their service areas in color (something not discernable on a black and white map.) (See Attachment 3)

The VSCA also failed to provide penalty provisions for cable operators who do not file their Annual Service Reports, or penalty provisions for the SOS's failure to enforce this requirement, which results in denying the public data on how many households each state franchised operator has actually passed under deregulation.

The VSCA's general lack of detailed reporting or penalty provisions has led to the filing of a number of invalid state franchises and the improper termination of local cable franchises which contain strong penalty enforcement provisions and concrete consumer protection standards (e.g. Chatham County, Broadway, Mecklenburg, Mt. Holly, Pitt County, Rowan County).

The VSCA has reduced consumer accountability of cable operators by also failing to stimulate competition in the state (*i.e.*, permitting monopoly providers to be deregulated without any pre-requisite evidence that a community was subject to competition) that allegedly should have resulted in more responsiveness to consumers who would have the choice to switch to another provider. In the absence of competition, consumers have no alternative except turning off their cable service, which is not an option with the conversion of free over-the-air broadcasting to digital only spectrum.

For all intents and purposes, the VSCA has led to less consumer accountability because it lacks any enforcement mechanisms. The VSCA establishes only the right of a consumer or a community to sue if a state franchised operator fails to meet the terms of the law. North Carolina's cable operators are well aware that this is an unaffordable remedy for the average resident or community in North Carolina.

#### *4) The slow dismantling and stifled development local Public, Education and Government Channels*

The VSCA has led to the slow dismantling of existing local public, educational and government channels (channels which feature students, Boards of Education and local town council meetings and community events), and the stifling of their development. Cable operators who file for a state franchise terminate local cable franchise obligations which require them to provide and fund local PEG channels (negotiated in local franchises in exchange for the right to use public rights of way). (For example, Time Warner Cable initially provided the City of Durham two weeks notice that it was ending its coverage of Durham's City Council meetings, and simply placed a note on the door of its public access studio that the studio was closed for public access productions.) The VSCA has replaced local cable PEG funding, typically \$100-\$200,000 annually, to a state allocation of about \$18,000 per channel for up to three channels. The VSCA's net effect is that cable operators have experienced a long-term windfall by no longer having to fund these PEG channels, while few new local community channels have developed beyond those that were in existence when the VSCA was enacted, while those that exist function at anemic levels and are forced to find new, less secure, sources of funding.

Additionally, the lack of penalty provisions in the law has of late permitted various cable operators to begin refusing to provide PEG channels to local communities, despite the requirements of §66-357 through 358. For example, Time Warner Cable has refused to transmit Durham's public access programming from its origination site, forcing the production contractor to physically bicycle the tapes to its Chapel Hill office for transmission over the cable system;

Time Warner Cable has refused to transmit the government access channel in Bailey, NC arguing it is not required to provide the equipment that transmits the PEG signal, it is required to only transmit the signal. Durham County sued Time Warner Cable who had refused to provide it the minimum number of PEG channels allowed under the VSCA, a case which finally reach settlement out of court.

The VSCA has also permitted new state franchised operators (namely AT&T) to denigrate the quality of PEG signals and reduce the viewing of these locally-produced channels, by changing their transmission protocols. Raleigh, Chapel Hill, and Charlotte-Mecklenburg report that, rather than place each PEG channel on its own 6 MHz channel comparable to a commercial channel, AT&T has placed all PEG channels on a single channel (99) and forces viewers to use their remotes in an entirely new way to view these channels. Consumer must scroll through numerous sub-menus and wait for extended periods of time for these PEG channels to build on the screen. AT&T has also concluded that its obligation to transmit PEG signals only exists for three months. AT&T has informed those North Carolina communities where it provides U-verse that despite the requirements of the VSCA specifying that it bears the responsibility for transmitting PEG signals from their origination sites, after three months, it no longer will be responsible for the maintenance of the equipment that is required to transmit PEG signals from the PEG origination site. (This means that if the local government does not have the funds to maintain the equipment and it breaks down, the channels is no longer transmitted.) Finally, Charlotte-Mecklenburg and Chapel Hill PEG channel operators have reported that they are unable to see whether their PEG channels are being transmitted over the U-verse system. This is because AT&T is not providing U-verse service in the location where the PEG signals originate so no U-verse cable service can be connected to the origination site to view the channels running over the U-verse system.

##### *5) Failure to keep local government financially whole?*

The VSCA replaced local cable franchise fees with video programming sales tax. In the first year after enactment, an evaluation by NCLM reported that more than 70% of local communities in North Carolina received less in video programming taxes than they had received the year prior in local franchise fees and that cable operators had paid less to the state than anticipated. Although cable operators have raised their cable rates around the state every year, it is unclear that local government video programming taxes have increased in equal measure. The VSCA does not require state auditors to ensure annually that proper video programming sales taxes are paid by the state franchised cable operators, or that state franchise cable operators are audited regularly.