

**TESTIMONY OF DANIEL S. COHEN  
PRINCIPAL, COHEN LAW GROUP**

**Before the House Consumer Affairs Committee Regarding  
House Bill 1490 Pertaining to Statewide Cable Franchising  
February 7, 2008**

Good morning, Chairman Preston and Members of the Committee, and thank you for inviting me to testify before you regarding House Bill 1490 entitled the "Consumer Choice Cable Franchising and High-Speed Broadband Promotion Act". My name is Dan Cohen and I am an attorney with the Cohen Law Group located in Pittsburgh. Our firm represents approximately 250 municipalities in Pennsylvania in cable and telecommunications matters. This morning I am testifying on behalf of the four statewide municipal associations in Pennsylvania, namely the PA League of Cities and Municipalities (PLCM), the PA State Association of Township Supervisors (PSATS), the PA State Association of Boroughs (PSAB), and the PA State Association of Township Commissioners (PSATC).

You may recall that, in 2006, the four statewide municipal associations testified against the last statewide cable franchising bill, House Bill 2880. The reason was that, while municipalities in Pennsylvania embraced cable competition, we did not believe that statewide franchising was the appropriate regulatory framework for achieving it while protecting the consumer and preserving municipal authority over the public rights-of-way. As you know, House Bill 2880 died in Committee.

Today, the argument against statewide franchising is even more compelling than it was two years ago. The reason is that we have two years experience under our belts in granting franchises to competitive cable operators. Verizon, which was the primary promoter of statewide franchising two years ago, is no longer pushing it in Pennsylvania, because municipal franchising is working. Since mid-2006, Verizon has successfully negotiated franchise agreements with 217 municipalities. Verizon has received nearly all the franchises it needs in the Philadelphia and Pittsburgh regions and is commencing negotiations in the Harrisburg area this year. We hope that Verizon will be approaching the cities of Philadelphia and Pittsburgh soon.

The same is true with Comcast and the other incumbent cable operators. Since mid-2006, Comcast alone has received franchise renewals in the form of franchise agreements on behalf of over 200 municipalities. This figure does not include the other incumbent cable operators in Pennsylvania. These Comcast agreements as well as those with Verizon not only protect municipalities, but also protect cable customers. For the

most part, these agreements include strong and enforceable customer service standards; full build-out requirements on the cable operator within negotiated time frames; franchise fee revenue and accountability; legal protections for the municipalities; and strong enforcement measures. On all of these issues, House Bill 1490 falls short.

**Customer Service Standards:** The bill contains no customer service standards. While it states in Section 30A17 that cable operators are subject to customer service standards established by law, as a cable attorney I can tell you that there are no such customer service standards in the law applicable to cable operators. In 1992, Congress gave municipalities the right to establish customer service standards and to enforce those standards. The Federal Communications Commission issued recommendations, but they are not binding unless the municipality adopts them. These standards include everything from how long you have to wait on the telephone to reach a customer service representative to customer notification requirements to credits for service interruptions.

Perhaps even more disturbing is that this bill would take the enforcement of customer service standards out of the hands of local governments and place this function with the Public Utilities Commission. Recognizing that I am testifying before a state body and with no disrespect to the PUC, I think that most people would agree that enforcement of customer service is more effective at the local level than the state level. The process at the local level offers a faster and much more efficient resolution. Moreover, if the cable operator does not adequately resolve a complaint, then the municipality may impose monetary fines.

**Build-Out Requirements:** House Bill 1490 contains certain build-out requirements in Section 30A15. According to its terms, large telephone operators must build out their entire service area for television and internet service within 12 years. Incumbent cable operators are required to upgrade all their facilities within 3 years of when they upgrade any portion of their facilities. Although I commend the good intentions behind this section to require deployment of advanced services throughout the Commonwealth, in my judgment the effect of this section will not fulfill this intention.

Municipalities already have the legal right established by the Cable Act of 1984 to require cable operators to perform a full build-out of the municipality. Municipalities across Pennsylvania have used this legal tool to require Verizon to fully build out their areas for video within reasonable time frames. They have not permitted Verizon, for example, to “cherry pick” certain neighborhoods while ignoring others. Moreover, the time frames for these build-outs are shorter than the time frame in House Bill 1490. Most of the build-out time frames in Verizon agreements that we have negotiated have been 5 years. The longest time frame is 10 years. This bill, however, allows for a 12-year build-out. Ironically, this bill could slow the process of deployment rather than accelerate it. The other major problem with this section, in my judgment, is that it requires incumbent

cable operators to upgrade their facilities, but it gives no specific or even general standards for what the upgrade should look like.

**Franchise Fee Revenue and Accountability:** While House Bill 1490 allows a municipality to assess a franchise fee of up to 5% of the cable operator's "gross revenues" for cable services, the definition of "gross revenues" in Section 30A03 of the bill is narrowly drawn and therefore would result in a significant decrease in revenue to municipalities in Pennsylvania. Specifically, the bill does not include several key cable revenue sources, including video-on-demand, which is the fastest growing revenue source in the cable industry, and fee-on-fee, which is also a significant revenue source.

In addition to a decrease in franchise fee revenue, the bill would weaken cable operator accountability with respect to franchise fees. Section 30A12 requires the cable operator to accompany each payment with a "summary explaining the basis for the calculation of the franchise fee", but it does not require the report to include a line item for every applicable revenue source. This is a critical tool to ensure that cable operators are making accurate payments. While the municipality may perform a franchise fee audit under the bill, it limits the time period of the audit to 3 years. A federal court in PA held last year that there is no limitations period on franchise fee audits by municipalities, so this bill conflicts with federal law on this point.

**Indemnification:** An important provision in cable franchise agreements is protecting the municipality from erroneous lawsuits. As such, every well-negotiated cable franchise agreement contains an indemnification section that fully and completely protects the municipality from any accidents in the public rights-of-way that are related to the cable system. If a municipality is sued over such an accident, then the cable operator must defend the case on its behalf, thus saving taxpayer revenue. Section 30A10(e) of the bill includes an indemnification section, but it provides limited rather than full protection. This would result in potential exposure of municipalities to significant legal risk.

**Enforcement:** Finally with respect to specific issues in the bill, the enforcement section is, in my judgment, very weak. Not only would this bill eliminate local enforcement of cable operator obligations, but it fails to replace it with any effective statewide enforcement mechanism. The bill simply states that enforcement lies with the PUC. It contains no fines or penalties. The only stated enforcement mechanism is termination of the franchise, which is not a practical enforcement tool. Moreover, it states in Section 30A05(a) that the Commission must use "existing permanent staff" to fulfill its cable franchising responsibilities. This is the exact language used in the prior statewide franchising bill that failed. It ensures that there will be no effective enforcement, because the Commission is prohibited from hiring anyone to perform the enforcement function.

By contrast, municipalities have strong enforcement mechanisms. Well-negotiated cable franchise agreements with both incumbent and competitive cable operators include predetermined monetary fines (known as “liquidated damages”) and a performance bond in addition to termination. Municipalities have been performing this enforcement function for decades and I have yet to hear a complaint about municipalities’ performance of this function.

In short, House Bill 1490 in its present form would undermine municipal franchising authority, eliminate customer service standards, potentially decelerate the build-out of competitive networks, reduce franchise fee revenue and accountability for municipalities, increase municipalities’ legal exposure, and weaken enforcement of cable operator violations. While I believe that this was not the intention of the bill’s author, it will be the result. One of the stated policy declarations in Section 30A01 of the bill is to “protect the municipalities of this Commonwealth...” In fact, the opposite will be the case.

The truth is that the current regulatory framework for franchising cable companies works and works well. There is no compelling reason to radically alter this framework that has been in place for over 30 years. The system isn’t broken so it doesn’t need to be fixed. It is based on a fundamental principle evident in the constitutional history of Pennsylvania. That is the principle of local autonomy. It is a principle that has promoted strong communities and has ensured that local needs are addressed. On behalf of the statewide municipal associations in Pennsylvania, I ask that this Committee uphold this enduring principle and reject this legislation. In the meantime, we would be happy to work with the Committee on this issue in whatever manner the Committee requests. Thank you.