

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF TEXAS  
AUSTIN DIVISION

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Texas Cable & Telecommunications Association,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No.: _____
	)	
Rick Perry, in His Official Capacity as Governor of Texas,	)	
	)	
Paul Hudson, in His Official Capacity as Chairman of the Public Utility Commission of Texas,	)	
	)	
Julie Parsley, in Her Official Capacity as Commissioner of the Public Utility Commission of Texas, and	)	
	)	
Barry Smitherman, in His Official Capacity as Commissioner of the Public Utility Commission of Texas,	)	
	)	
Defendants.	)	

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**COMPLAINT**

Plaintiff Texas Cable & Telecommunications Association (“TCTA”), by its attorneys, alleges as follows:

**NATURE OF THE ACTION**

1. This lawsuit challenges the “Act Relating to Furthering Competition in the Communications Industry,” S.B. 5, 79th Leg., 2d Sess. (Texas 2005) (“the Act”), an Act of the Texas Legislature that went into effect yesterday, September 7, 2005.

As shown herein, the Act denies cable operators rights that are protected by federal and state law. In particular, the Act without justification and in violation of federal and state constitutional and statutory law discriminates against existing cable operators. In addition, the Act violates federal law relating to so-called “redlining” (discrimination against consumers on the basis of their income). Plaintiff requests that the Court grant declaratory and injunctive relief.

### **PARTIES**

2. Plaintiff TCTA is the main trade organization for cable operators in Texas. Based in Austin, TCTA has represented the cable industry in Texas for the past 45 years, providing its member companies with a unified voice on issues that affect the Texas cable industry. Each of TCTA’s members is a cable operator providing cable service in one or more service areas within Texas.

3. Defendant Rick Perry is the Governor of Texas. Defendant Paul Hudson is the Chairman of the Public Utility Commission of Texas (“PUC”). Defendants Julie Parsley and Barry Smitherman are Commissioners of the PUC. Defendants are responsible for the enforcement and execution and enforcement of the Act. Defendants have been, are currently, and will be acting under color of authority and law of the state of Texas. Defendants are sued only in their official capacity.

### **JURISDICTION AND VENUE**

4. Although some of plaintiff’s claims arise under state law, most arise under federal law, including the Supremacy Clause of Article VI of the United States Constitution, the Freedom of Speech and Press Clauses of the First Amendment to the

United States Constitution, the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution, various provisions of the Federal Communications Act, 47 U.S.C. §§ 151, *et seq.*, and 42 U.S.C. § 1983. The Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1343, and 2201. Declaratory relief is warranted pursuant to 28 U.S.C. §§ 2201 and 2202.

5. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b). This is so because all Defendants maintain offices within the State of Texas, all Defendants reside within the State of Texas, and at least one Defendant resides within this District. Moreover, because both Governor Perry and the PUC conduct business from offices in Austin, Texas, a substantial part of the events giving rise to plaintiff's claims occurred in this District. Finally, a substantial part of the cable systems and other property that are the subject of this action are situated within this District.

### **BACKGROUND**

6. For a full understanding of the Act's illegality, it is necessary to describe: (a) the way in which cable operators have traditionally received franchises; (b) recent and imminent entry into the video business by telephone companies; (c) the Act's adoption and content; and (d) the harm that the Act inflicts.

#### **A. Traditional Cable Franchising.**

7. Cable operators use cable systems to provide video programming, primarily to residential customers. Cable operators transmit various kinds of video-programming signals, including the signals of local broadcast stations (*e.g.*, KXAN (NBC), KEYE (CBS), and KVUE (ABC)), national non-broadcast programming

services (*e.g.*, HBO and ESPN), and programming that they produce themselves (*e.g.*, News 8 Austin). Both by originating programming that they produce themselves and by selecting programming that is produced by others, cable operators engage in constitutionally protected speech.

8. Cable operators are subject to vigorous competition from, among others, DBS operators (companies like DirecTV, which provide video service via so-called Direct Broadcast Service satellites) and “overbuilders” (companies like Grande, which build cable systems in areas that are already served by another cable operator). During the past decade, most cable operators have made substantial investments in upgrading their systems, which has enabled them to provide more and better video service, and also to provide non-video service, such as high-speed Internet service and telephone service.

9. Cable operators cannot provide service without using public rights-of-way to deploy their underground and aerial cable plant. When cable operators first began constructing cable systems in the 1950s, 1960s, and 1970s, they did so pursuant to permission from municipalities. These municipalities often used their ability to withhold such permission to extract cable operators’ agreement to wide-ranging regulatory obligations relating to, among other things, public-access channels and “franchise fees.” In Texas and most other states, there has been little or no cable regulation at the state level.

10. In 1984, however, the United States Congress added a new Title VI to the Federal Communications Act to regulate the cable-franchising process. *See*

*generally* 47 U.S.C. § 521, *et seq.* Title VI generally (though not exclusively) addresses “cable service” provided by a “cable operator” over a “cable system,” each of which is a defined term. *See id.* § 522. Congress’s primary objective was to “establish guidelines for the exercise of Federal, State, and local authority with respect to the regulation of cable systems.” *Id.* § 521(3). In particular, Congress sought to “establish a national policy concerning cable communications” under which local governments would operate within uniform federal standards. *Id.* § 521(1); *see also* H.R. Rep. No. 98-934, at 19 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655 (“*1984 House Report*”) (goal of Title VI was to create a “national policy that clarifies the current system of local, state and Federal regulation of cable television”).

11. Title VI reaffirmed local authorities’ right to grant franchises; indeed, it provided that “a cable operator may not provide cable service without a franchise.” 47 U.S.C. § 541(b)(1). But, in light of the interstate nature of cable service, Congress recognized that local authorities would be allowed to exercise their powers only in accordance with “certain important uniform Federal standards.” *1984 House Report* at 24. To implement this national franchising scheme, Title VI (as enacted and as later amended) creates a federal framework to guide and constrain the franchising process.

12. For example, Title VI provides that franchising authorities must ensure that cable operators do not engage in so-called “redlining” (*i.e.*, that they do not refuse to construct facilities in low-income or minority areas that they may view as less profitable): “[i]n awarding a franchise or franchises, a franchising authority shall

assure that access to cable service is not denied to any group of potential residential cable subscribers because of the income of the residents of the local area in which such group resides.” 47 U.S.C. § 541(a)(3). “Under this provision, a franchising authority in the franchising process shall require the wiring of all areas of the franchise area to avoid this type of practice.” *1984 House Report at 59.*

13. Title VI also prohibits franchising authorities from granting “exclusive franchise[s]”: franchising authorities “may not unreasonably refuse to award an additional competitive franchise.” *Id.* § 541(a)(1). Thus, local franchising authorities may not grant cable operators a *de jure* monopoly in providing cable service, and may not deny franchises to overbuilders. More generally, Congress wished to “promote competition in cable communications” through even-handed regulation. *Id.* § 521(6). Where Congress wished to deviate from its uniform federal scheme, and intended competition to occur on other than a level-playing-field basis, it specifically provided for it. *See, e.g., id.* § 543(a)(2) (exempting overbuilders from rate regulation); *id.* §§ 571, 573 (exempting certain common carriers providing video service from specifically enumerated kinds of cable regulation); *id.* § 572(d)(3) (permitting overbuilders to be acquired where incumbent cable operators would not be).

**B. Video Entry by Incumbent Local Exchange Carriers.**

14. Companies like Verizon and SBC provide local telephone service and are known as “incumbent local exchange carriers” or “ILECs.” Local telephone service for residential customers has long been viewed as a natural monopoly. As a result, ILECs have long enjoyed unchallenged market power in their service areas.

Through mergers, some ILECs have become corporate behemoths. For example, Verizon and SBC are two of the largest companies in the world, with annual revenues of more than \$70 billion and \$40 billion, respectively.

15. Although ILECs used to be prohibited from providing video service, *see* 47 U.S.C. § 533(b)(1) (1996), Congress repealed that ban in 1996, *see Telecommunications Act of 1996*, Pub. L. No. 104-104, 110 Stat. 56, § 302(b)(1) (1996). To date, most ILECs have not taken advantage of the opportunity, but, recently, some ILECs have announced plans to upgrade their facilities to provide video service. Verizon has stated that it can begin providing video service later this year. SBC has stated that it expects that, by 2007, it will offer video service to half of its existing customers (or 18 million households).

16. As noted, federal law provides that “a cable operator may not provide cable service without a franchise.” 47 U.S.C. § 541(b)(1). Accordingly, Verizon and SBC may not implement their video plans until they have obtained franchises. Verizon has acknowledged as much, and has obtained franchises in numerous municipalities, including Keller, Wylie, Sachse, and Westlake in Texas. SBC has sometimes asserted that its video service would not qualify as a “cable service” or that its networks would not be “cable systems,” but that argument is plainly wrong and apparently provides only cold comfort to SBC itself.

17. This is obvious from SBC’s campaign to lobby state legislatures to obliterate local franchising and to award companies like SBC and Verizon a single franchise at the state level. Unwilling to negotiate franchises with municipalities,

these companies have pressed for statutes under which they would receive state-issued franchises that would allow them to offer video service anywhere in the state where they want to, subject to only minimal regulation that does not include anti-redlining and build-out requirements. At the same time, these corporate giants have brought to bear their lobbying clout to jockey for unfair competitive advantage by seeking to deny the same advantageous treatment to existing cable operators.

18. Texas has been no exception. According to a watchdog group, SBC has been “Austin’s leading lobby force by far,” with an “army of 123 lobbyists who reported up to \$6.8 million in SBC fees.” Texans for Public Justice, *Lobby Watch* (Aug. 18, 2005), available at [http://www.tpj.org/page\\_view.jsp?pageid=886&pubid=649](http://www.tpj.org/page_view.jsp?pageid=886&pubid=649). “Verizon . . . paid 38 lobbyists another \$1.8 million. As such, SBC and Verizon lobbyists outnumbered the 150-member Texas House.” *Id.* As one of the group’s officials put it, “[t]he only way to adequately recognize this feat is to rename the Capitol ‘SBC Arena.’” Claudia Grisales, *Phone Industry Outlobbied, Outspent Cable Rivals in Legislative Fight*, Austin American-Statesman, Aug. 18, 2005, available at [http://www.statesman.com/search/content/shared/money/stories/0508/TELECOM\\_TEXAS\\_0818\\_COX.html](http://www.statesman.com/search/content/shared/money/stories/0508/TELECOM_TEXAS_0818_COX.html).

**C. The Act.**

19. SBC and Verizon got the statute they wanted. The Act amends Subtitle C, Title 2, of the Texas Utilities Code by adding a new Chapter 66 (of which a copy is attached to this Complaint) entitled “State-Issued Cable and Video Franchise.” The Act generally authorizes (indeed, requires) the PUC to issue certificates of franchise

authority where an applicant makes a few rudimentary self-certifications. *See* Tex. Util. Code Ann. § 66.003(b), (c).

20. While the bill makes new entrants eligible for a state-issued franchise, *see id.* §§ 66.003(a), 66.004(a), it expressly makes most existing cable operators ineligible “until the expiration date of the[ir] existing franchise agreement,” *id.* § 66.004(a). Thus, the bill specifically perpetuates obligations imposed by existing municipal franchise agreements. One might think that the Legislature so provided lest it upset settled expectations grounded in existing franchise agreements. But the Act specifically permits overbuilders (defined as providers that are “not the incumbent cable service provider and serv[e] fewer than 40 percent of the total cable customers in a particular municipal franchise area”) to “elect to terminate [their] municipal franchise and seek a state-issued certificate of franchise authority.” *Id.* § 66.004(b).

21. Although the Act does impose some obligations on holders of state-issued franchises, those obligations are significantly less onerous than the burdens that municipal franchises generally impose on cable operators. Municipal franchise agreements tend to be lengthy and comprehensive and include significant regulation of a cable operator’s business. By contrast, the Act contains only a few pages addressing obligations applicable to holders of state-issued franchises. And many of those pages are devoted to making clear that particular kinds of obligations may *not* be imposed. For example, the Act in many cases excuses holders of state-issued franchises from complying with customer-service standards. *See id.* § 66.008.

22. Moreover, the Act specifically precludes the PUC from imposing the kinds of anti-redlining protections commonly found in franchise agreements. The Act permits new entrants themselves to define the “footprint to be served within the municipality” without any regulatory oversight. *Id.* § 66.003(b)(4). By making issuance of franchises mandatory when an applicant makes the required self-certifications, *see id.* § 66.003(b), the Act does not allow the PUC to take any protective steps. To the contrary, the Act specifically prohibits the PUC from imposing build-out requirements (requirements compelling cable operators to build facilities in particular areas by a particular date that municipalities commonly impose to combat redlining). *See id.* § 66.007. Even within the service footprint that entrants may themselves define, they need not provide service on a uniform basis: the Act allows them to provide service “through the use of an alternative technology that provides comparable content, service, and functionality.” *Id.* § 66.014(d).

23. These provisions caused one legislator to lament that she was “saddened today that we are in such a rush to do such damage to our communities and to the citizens that we represent.” S.B. 5 on Third Reading, Address by Rep. Y. Davis on a Matter of Personal Privilege, at 2, *available at* <http://www.txcable.com/News/Davis.asp>. Unfortunately, there is evidence that her concern is justified: last year, an SBC presentation to investors proudly proclaimed that, while SBC’s video service will reach approximately 90% of “high-value” customers and 70% of “medium-value” customers, it will reach only 5% of “low-value” customers. *See* [http://media.corporate-ir.net/media\\_files/irol/11/113088/111104\\_color.pdf](http://media.corporate-ir.net/media_files/irol/11/113088/111104_color.pdf), at 14.

**D. Harm Inflicted.**

24. As a result of the Act's passage, TCTA's cable-operator members have suffered and will suffer injury, including, but not limited to, actual and potential loss of revenues, damage to reputation and goodwill, and other harm. In particular, state-issued franchises will result in an uneven competitive playing field, thereby unfairly and unlawfully impairing incumbent cable operators' ability to compete. In addition, the Act imposes various obligations that entail additional out-of-pocket costs.

25. As a trade association, TCTA has standing to sue because its members would have standing to sue in their own right, because the injury of which TCTA complains is germane to TCTA's purpose, and because the instant litigation does not require the participation of individual TCTA members.

26. There is no adequate remedy at law.

**COUNT I**

**(Discrimination in Violation of U.S. and Texas Constitutions)**

27. Plaintiff repeats and realleges all of the allegations set forth above as if fully set forth herein.

28. The Act is discriminatory: it applies little, if any, regulation with respect to new entrants and overbuilders, while specifically perpetuating and re-affirming more onerous regulation with respect to incumbent cable operators, even while allowing overbuilders to opt out. These distinctions are not tailored to any legitimate justification.

29. The discrimination effected by the Act violates cable operators' rights under the Freedom of Speech and Press Clauses of the First Amendment to the United

States Constitution; the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution; the Due Process and Equal Protection Clauses of Article I, Sections 3 and 19 of the Texas Constitution; the Special Laws Clause of Article III, Section 56 of the Texas Constitution; and the Liberty of Speech and Press Clauses of Article I, Section 8 of the Texas Constitution.

30. Insofar as the Act conflicts with the Federal Constitution, the Act is pre-empted and superseded by the Supremacy Clause. Insofar as the Act conflicts with the Texas Constitution, it is null and void for that reason.

## **COUNT II**

### **(Discrimination in Violation of the Federal Communications Act)**

31. Plaintiff repeats and realleges all of the allegations set forth above as if fully set forth herein.

32. Title VI of the Federal Communications Act establishes a uniform national regulatory scheme for providers offering a “cable service” over a “cable system” (as those terms are defined in the Federal Communications Act). Congress created this scheme because it had long recognized the inherently interstate nature of video programming delivery, the benefits to consumers and competition that flow from uniform national regulation of interstate services, and the resulting need to avoid a patchwork of inconsistent local regulations applicable to video programming.

33. The new Texas Act establishes different sub-classifications of providers (new and overbuilding cable and video service providers, on the one hand, and incumbent cable service providers, on the other) and subjects them to differential

regulatory treatment even if their service offering falls within the definition of a “cable service” under the Federal Communications Act.

34. Congress, however, adopted a federal policy even-handedly to “promote competition in cable communications.” 47 U.S.C. § 521(6). Where Congress wished to deviate from its uniform federal scheme, and intended competition to occur on other than a level-playing-field basis, it specifically provided for it. *See, e.g., id.* § 543(a)(2) (exempting overbuilders from rate regulation); *id.* §§ 571, 573 (exempting certain common carriers providing video service from specifically enumerated kinds of cable regulation); *id.* § 572(d)(3) (permitting overbuilders to be acquired where incumbent cable operators would not be).

35. By applying little, if any, regulation to new entrants and overbuilders while perpetuating more onerous regulation for incumbent cable operators, the Act interferes with Congress’s goal of uniform national regulation and contravenes the federal policy favoring level-playing-field competition, and so stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Title VI.

36. Accordingly, the Act conflicts with a federal statute. Under the Supremacy Clause of the United States Constitution, therefore, the Act is pre-empted and superseded.

### **COUNT III**

#### **(Violation of Federal Prohibition on Exclusive Franchises)**

37. Plaintiff repeats and realleges all of the allegations set forth above as if fully set forth herein.

38. Section 621(a)(1) of the Federal Communications Act provides that “a franchising authority may not grant an exclusive franchise and may not unreasonably refuse to award an additional competitive franchise.” 47 U.S.C. § 541(a)(1). “[F]ranchising authority’ means any governmental entity empowered by Federal, State, or local law to grant a franchise.” *Id.* § 522(10). The Act provides that “the [PUC] shall be designated as the franchising authority for a state-issued franchise.” Tex. Util. Code Ann. § 66.001. Thus, under federal law, the PUC may not “unreasonably refuse to award an additional competitive franchise.”

39. Yet, the Act instructs the PUC to refuse to award a franchise to any incumbent cable operator that has a municipal franchise. *See id.* § 66.004(a). At the same time, the Act instructs the PUC to grant a franchise to any overbuilder that elects to renounce its municipal franchises. Thus, the refusal is not reasonable: if overbuilders with existing franchise agreements may renounce their contracts, there is no justification for denying incumbent cable operators that same right.

40. Accordingly, the Act conflicts with a federal statute. Under the Supremacy Clause of the United States Constitution, therefore, the Act is pre-empted and superseded.

#### **COUNT IV**

##### **(Violation of Federal Duty to Guard Against Redlining)**

41. Plaintiff repeats and realleges all of the allegations set forth above as if fully set forth herein.

42. Section 621(a)(3) of the Federal Communications Act provides that, “[i]n awarding a franchise or franchises, a franchising authority shall assure that

access to cable service is not denied to any group of potential residential cable subscribers because of the income of the residents of the local area in which such group resides.” 47 U.S.C. § 541(a)(3). As mentioned, the Act renders the PUC a franchising authority. *See* Tex. Util. Code Ann. § 66.001. Thus, federal law requires the PUC, in awarding a franchise, to make the required assurances.

43. The Act does not permit the PUC to do so. The Act permits entrants to define their own service areas. *See id.* § 66.003(b)(4). Even within those self-defined service areas, entrants are not required to provide service over their cable system. *See id.* § 66.014(d). The Act requires the PUC to issue a franchise upon fulfillment of certain requirements, none of which protect against redlining. *See id.* § 66.003(a), (b). Moreover, the Act specifically states that the PUC may not impose build-out requirements. *See id.* § 66.007.

44. Accordingly, the Act conflicts with a federal statute. Under the Supremacy Clause of the United States Constitution, therefore, the Act is pre-empted and superseded.

### **PRAYER FOR RELIEF**

WHEREFORE, plaintiff requests the following relief:

(1) a declaration that the Act is unlawful and inconsistent with federal and state law insofar as, among other things:

- (a) it empowers and requires the PUC to grant franchises at all;
- (b) it denies incumbent cable operators the right to renounce their municipal franchises and obtain a state-issued franchise;

(c) it requires the PUC to grant franchises without assuring that access to cable service is not denied to any group of potential residential cable subscribers because of the income of the residents of the local area in which such group resides;

(2) an injunction prohibiting Defendants (as well as their agents, assistants, successors, employees, attorneys, and all others persons acting in concert or cooperation with them or under their discretion or control) from enforcing any part of the Act that this Court determines to be unlawful;

(3) an award of costs and reasonable attorney's fees under 42 U.S.C. § 1988; and

(4) such other and further relief as this Court may deem just and proper.

Respectfully submitted,

GEORGE & BROTHERS, L.L.P.

By: \_\_\_\_\_

R. James George, Jr.  
State Bar No. 07810000  
114 West Seventh Street  
Suite 1100  
Austin, Texas 78701  
(512) 495-1400  
(512) 499-0094 (facsimile)

Dated: September 8, 2005

*Counsel for Plaintiff TCTA*