THE COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS & ENERGY
Cable Television Division

CTV 05-2 March 22, 2006

Petition of Comcast of Massachusetts, III, Inc. on appeal of decision by Board of Selectmen of the Town of Framingham denying franchise renewal proposal

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INTERLOCUTORY ORDER ON STANDARD OF REVIEW,
ADMINISTRATIVE NOTICE, AND PARTIAL SUMMARY DECISION

APPEARANCES:

Robert G. Scott, Jr., Esq.
Adam S. Caldwell, Esq.
Maria C. Moran, Esq.
William J. Helmstetter, Esq.
Cole, Raywid & Braverman, LLP
1919 Pennsylvania Avenue, N.W., Suite 200
Washington, D.C. 20006
FOR: COMCAST OF MASSACHUSETTS, III, INC.
Petitioner

Christopher J. Petrini, Esq.
Petrini & Associates, P.C.
The Meadows
161 Worcester Road, Suite 304
Framingham, Massachusetts 01701

-and-

Peter J. Epstein, Esq.
Epstein & August, LLP
101 Arch Street, Suite 900
Boston, Massachusetts 02110
FOR: BOARD OF SELECTMEN OF THE TOWN OF FRAMINGHAM
Respondent

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ORDER ON STANDARD OF REVIEW, ADMINISTRATIVE NOTICE, AND PARTIAL SUMMARY DECISION

I. INTRODUCTION

On May 4, 2005, Comcast of Massachusetts III, Inc. ("Comcast") filed with the Cable Television Division ("Cable Division") of the Massachusetts Department of Telecommunications and Energy, a petition of appeal, pursuant to G.L. c. 166A, § 14, from the April 4, 2005, decision of the Board of Selectmen of the Town of Framingham ("Framingham") denying Comcast's franchise renewal proposal. This is a case of first impression, as the Cable Division has not previously been asked to review a denial of a franchise renewal.

The parties ask the Cable Division to determine, as an initial matter, what standard to apply in reviewing Framingham's denial of the franchise renewal proposal.[1] This Order will also address both parties' motions to take administrative notice of various documents that are part of the record of, or were excluded from evidence in, the franchise renewal proceedings

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[1] Comcast Mem. Standard of Review (July 1, 2005); Framingham Mem. Standard of Review (July 7, 2005); Framingham Supp. Mem. Standard of Review (July 25, 2005); Comcast Supp. Mem. Standard of Review (July 25, 2005).

before the Board of Selectmen.[2] Finally, this Order will decide the parties' cross-motions for summary decision.[3]

II. BACKGROUND

After Comcast acquired AT&T Broadband by merger in 2002, Comcast applied for Framingham's approval of the transfer of control of the license, which was deemed approved on or about July 16, 2002.[4] The original term of the existing license expired on March 23, 2003, but during renewal negotiations, Framingham and Comcast twice agreed to extend the license in order to give the parties additional time to agree to the terms of a new renewal license.[5] On December 19, 2002, Framingham conducted an ascertainment hearing to identify future cable-related community needs and interests and to review the performance of

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2 Comcast Mot. Taking of Administrative Notice (May 4, 2005); Framingham Opp. Comcast Mot. Taking of Administrative Notice and Framingham Mot. to Strike (May 31, 2005); Framingham Mot. Taking of Administrative Notice (May 31, 2005); Comcast Opp. Framingham Mot. to Strike (June 13, 2005).

3 Comcast Mot. and Mem. Summ. Decision (July 25, 2005); Framingham Mot. Summ. Decision (July 25, 2005). After the parties filed their motions for summary decision and opposition to those motions, the parties each submitted their own Proposed Decision and Order. There is no provision for such filings under our procedural regulations. 801 C.M.R. § 1.01(7)(a)(1). The parties already had the opportunity to brief the issues in their motions and oppositions. The Cable Division strikes these documents as redundant and improperly filed. Proposed orders or other such supplemental documents should not be submitted in the future in this proceeding unless leave to do so is granted or as otherwise directed.

4 Comcast Pet. at 11; Framingham Answer at 6.

5 Comcast Pet. at 11; Framingham Answer at 6; JX.27, at 5:9–12. Since the term of the license was 5 years, no violation of state law occurred by the extensions.

AT&T Broadband under its current license.[6] On September 24, 2003, Framingham issued a request for proposal ("RFP") that sought information and a renewal proposal from Comcast on or before October 24, 2003.[7]

There is a dispute whether Comcast, on October 23, 2003, reserved the right to make further revisions or amendments to its proposal, which it submitted to Framingham on October 24, 2003.[8] Although the parties initiated the formal renewal process, the parties also engaged in informal negotiations thereafter.[9] There is also a dispute whether during negotiations Framingham produced certain data for the first time in support of its claimed cable-related needs, and whether this data was part of Framingham's ascertainment and available to Comcast before the deadline for submitting its proposal.[10] Comcast submitted a purported amendment to its renewal proposal, which was dated March 8, 2004.[11] Framingham counters that its RFP did not provide for the right to submit an amendment and alleges that the

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6 Comcast Pet. at 11; Framingham Answer at 6.

7 Comcast Pet. at 12; Framingham Answer at 6.

8 Comcast Pet. at 12; Framingham Answer at 6. Because neither party's motion for summary decision relied upon Comcast's purported amendment, this Order does not address the substance of the amendment.

9 Comcast Pet. at 12; Framingham Answer at 6.

10 Comcast Pet. at 12; Framingham Answer at 6.

11 Comcast Pet. at 12.

amendment actually was filed after Framingham issued a Preliminary Assessment of Denial on March 9, 2004.[12]

Framingham conducted ten days of hearings on Comcast's renewal proposal between October 26, 2004 and March 7, 2005.[13] Prior to the hearings, the parties agreed that those hearings would be governed by an informal process, and would not be governed by the Massachusetts Administrative Procedures Act ("APA") or the Massachusetts Rules of Court.[14] On or about April 4, 2005, Framingham issued the "Administrative Proceeding Decision of the Framingham Board of Selectmen, As Issuing Authority" ("Framingham Decision"), which sets forth 22 reasons for its denial of Comcast's Renewal Proposal.[15]

III. STANDARD OF REVIEW

A. Introduction

There are two aspects of the standard of review that we must consider in this proceeding. The first pertains to the procedural stance of this case. Comcast's petition is before us on "appeal," pursuant to G.L. c. 166A, § 14, from the decision of Framingham to deny the franchise renewal proposal. The question before the Cable Division is whether we must give deference to Framingham's findings of fact as traditionally accorded by the courts to

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[12] Framingham Answer at 62. As we discuss below, Comcast concedes that the amendment was not submitted until March 10, 2004.

[13] Comcast Pet. at 13; Framingham Answer at 8.

[14] Framingham Answer at 7; Joint Exh. Vol. I, tab A (Mem. on Hearing Process (Oct. 20, 2004)); see also Comcast Pet. at 13.

[15] Comcast Pet. at 13; Framingham Answer at 8.

administrative determinations or whether we must review those findings de novo. The second pertains to the law applicable to our review of the record compiled from the Framingham hearings and, if review is to be conducted de novo, of the record from additional evidence presented to the Cable Division. The parties agree that Section 626 of the Cable Act is relevant to our review, but they disagree over its application. These disagreements involve whether in reviewing a renewal proposal a franchising authority must consider the reasonableness of the proposal as a whole or whether the entire proposal may be rejected for unreasonable failure to meet any single identified community need; whether Section 626 requires consideration of amended or alternate proposals presented in response to negotiations; and whether certain evidence is relevant to the review of the renewal proposal, such as the effect of cable service competition within the community and the effect of the cost of proposed franchise concessions upon rates.[16]

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[16] Although the parties address these issues in their motions for summary decision, we discuss them separately here in order to highlight the proper standard of review to be applied for the remainder of this proceeding. We will rule on issues of law where partial summary decision is appropriate and issue determinations of fact where there is no genuine dispute of material facts.

B. De Novo Review

1. Positions of the Parties

a. Comcast

Comcast argues that the Cable Division's review of the Framingham Decision is governed entirely by a de novo standard of review.[17] Comcast relies upon MediaOne v. Board of Selectmen of North Andover, CTV 99-2, 99-3, 99-4, 99-5, Order on Motions for Summary Decision/Consolidation (2000) ("MediaOne"), in which the Cable Division found that G.L. c. 166A, § 19 requires the Cable Division to conduct a Section 14 proceeding pursuant to Chapter 30A, and that we must review the issuing authority's decision de novo, because the proceeding is the first proceeding to be conducted under Chapter 30A.[18] Comcast reasons that because the parties specifically agreed that the Framingham proceedings would not be governed by Chapter 30A, the same rationale in MediaOne applies, and the Cable Division is obligated to investigate and evaluate the renewal proposal de novo.[19] Comcast maintains that the exception contained in G.L. c. 30A, § 10, which provides that many of the procedural protections of G.L. c. 30A, § 11 do not apply to an appeal when a party has the opportunity to obtain an agency hearing followed by appeals before the same or different agencies, does not

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17 Comcast Mem. Standard of Review at 1.

18 Id. at 10.

19 Id. at 11.

apply to this case, because Comcast has not yet had a Chapter 30A hearing, and because the Board of Selectmen is not an "agency."[20]

Comcast argues that the use of the terms "appeal" and "review" in statutes expressly providing for state agency review of local board decisions does not preclude the agency from conducting a de novo review of the decision.[21] Comcast notes that the Supreme Judicial Court ("SJC") in Board of Appeals of Hanover v. Housing Appeals Committee, 363 Mass. 339, 369–70 (1973), rejected the plaintiff municipal boards' argument that the use of those words in the relevant appeals statute indicated that a de novo hearing was not intended and held that the Housing Appeals Committee ("HAC") was obligated to make its own decision on the basis of a new evidentiary hearing because the statute required it to find facts, draw conclusions, and state its own reasons for its decision.[22] Comcast also relies upon United Food Corp. v. Alcoholic Beverages Control Comm'n, 375 Mass. 238, 240 (1978), for the proposition that statutes providing for hearing requirements in administrative appeals of local decisions reflect legislative intent that a state agency develop its own record on appeal.[23] Comcast states that in United Food Corp., the SJC noted that Chapter 30A "affords a fresh hearing" on appeals to the Alcoholic Beverages Control Commission ("ABCC") from local licensing board

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20 Id. at 12, citing Konstantopoulos v. Whatley, 384 Mass 123, 134 (1981).

21 Id. at 13.

22 Id.

23 Id. at 13–14.

decisions.[24] Comcast therefore argues that the Cable Division must hold a hearing in which Comcast is permitted to introduce evidence that was not before the Board of Selectmen and to examine and cross-examine witnesses.[25]

Comcast responds to concerns that conducting a de novo hearing may unfairly allow a cable operator to have a "second bite of the apple" to make its case.[26] Comcast argues that this concern is not applicable here, because Comcast has not yet had a "full and fair hearing conducted pursuant to Chapter 30A."[27] Comcast also notes that the SJC considered and rejected the argument that a de novo hearing before the HAC would permit an applicant to make a purely pro forma presentation to the local board, because "[a]n applicant would be unlikely to choose an approach that would require two presentations, with added costs and delays, where one presentation could suffice."[28] Comcast asserts that it attempted to make a full and complete presentation to the Board of Selectmen, but that the Board refused to hear evidence that Comcast now seeks to present to the Cable Division.[29]

Finally, Comcast maintains that the principles of de novo review in the judicial system also apply to the Cable Division's review of this case. Comcast states that conclusions on pure

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24 Id.

25 Id. at 14.

26 Id. at 14–15, citing AT&T v. Board of Selectmen of Westford, CTV 02-5, Interlocutory Order on Motions for Summary Decision at 5 (Sept. 18, 2002).

27 Id. at 15.

28 Id. at 15 n.3, citing Hanover, 363 Mass. at 370–71.

29 Id.

or nearly pure questions of law are judged in virtually all appeals on a de novo standard.[30] Comcast contends that de novo judicial review is appropriate when necessary to maintain control of, and to clarify the legal principles expounded upon by the appellate reviewer.[31] Comcast argues that because the Cable Division is the ultimate authority for licensing matters in Massachusetts, it has a policy reason, in addition to its statutory obligations, to review all elements of Comcast's appeal de novo.[32]

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30 Id. at 6, citing Gonzales v. United States, 284 F.3d 281, 287 (1st Cir. 2002).

31 Id. at 6–7, citing Ornelas v. United States, 517 U.S. 690, 697 (1996); Miller v. Fenton, 474 U.S. 104, 114 (1985).

32 Id. at 7.

b. Framingham

Framingham argues that the proper standard of review is a review based solely on the record of the administrative proceedings before Framingham.[33] Specifically, Framingham argues that Section 626 of the Cable Act states that review by the court is to be "based on the record of the proceedings conducted under subsection (c) of this section" and that subsection (c) refers to a proceeding conducted before the "franchising authority."[34] Framingham

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[33] Framingham Mem. Standard of Review at 1, citing 47 U.S.C. § 546; G.L. c. 166A, § 14. Framingham describes the appropriate standard of review in this proceeding variously as a "substantial evidence" or an "arbitrary or unreasonable" standard (Framingham Supp. Mem. Standard of Review at 5); an "arbitrary or capricious" standard (id. at 1–2, 5.); an "unreasonable, whimsical, capricious or arbitrary" standard (id. at 6); a due process test balancing the "individual interest at stake and the risk of an erroneous deprivation of liberty or property" (Framingham Mem. Standard of Review at 13); a due process test based on the procedural requirements of 47 U.S.C. § 546, G.L. c. 166A, § 14, and G.L. c. 30A, § 11 (Framingham Mem. Standard of Review at 16); a review for "bias or inappropriate influence" (id. at 11); a review of the issuing authority's exercise of "discretion" (Framingham Supp. Mem. Standard of Review at 5); a review whether the issuing authority's decision was based on a "legally untenable ground" (id. at 6); or a "review based upon the record" (Framingham Mem. Standard of Review at 18; Framingham Supp. Mem. Standard of Review at 6). While Framingham does not settle upon any single standard to apply, we discern that Framingham argues that we should apply some standard of review, other than de novo review, limited to the record of the proceedings before Framingham.

[34] Id. at 5.

argues that under the Cable Act the local municipality is the franchising authority.[35] Framingham suggests that a reviewing body may go outside of the record on appeal only if there is a strong indication that the due process rights of the cable operator have been violated.[36] Framingham reasons that while Section 626(e) pertains to judicial review of a franchising decision rather than agency review of such a decision, the section is relevant to this proceeding, because if a court may not conduct a de novo review, then the state's administrative review also must be limited to a review of the record, absent express statutory support to the contrary.[37] Framingham asserts that the standard of review has been defined by federal law, and therefore, the Cable Division is preempted from establishing a different standard of review.[38]

Moreover, Framingham notes that the legislative history of the Cable Act recognized that the decision of a municipal franchising authority may be subject to "review" or "approval" by the state.[39] Framingham argues that the use of such terms is evidence that Congress

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35 Id. at 6-9, citing H.R. Rep. No. 98-934, at 19, 23–27 (1984); Town of Norwood v. Adams-Russell Co., Inc., 406 Mass. 604, 608 n.6 (1990); Final Report of the Special Commission Established for the Purpose of Making and Investigation and Study Related to the Adequacy and Effectiveness of Existing Licensing and Regulations of the Cable Television Operation by Municipalities and the Commonwealth, Joint Committee on Government Regulations (Dec. 30, 2003).

36 Id. at 11, citing Rolla Cable, 745 F.Supp. at 578.

37 Id. at 5 n.2.

38 Id. at 10.

39 Id. at 11–12, citing H.R. Rep. No. 98-934, at 75.

intended state authorities to perform a review of the decision based on the record and determine whether to approve the decision, not to complete a de novo review.[40]

Framingham argues that under state law, the Cable Division's function is limited to a review of the action of the issuing authority and either "approval" or "disapproval" of the action.[41] Framingham contends that this language clearly indicates that the Cable Division does not have the authority to conduct a de novo review.[42] Framingham argues that the Cable Division cannot supplant its decision for that of the Board of Selectmen, because the Cable Division has no authority to order that a license be issued.[43]

2. Analysis

a. No Federal Preemption of De Novo Review by State Agency

The Cable Division finds unpersuasive Framingham's argument that Section 626(e) of the Cable Act preempts the Cable Division from reviewing the Framingham Decision de novo. Section 626(e)(2)(B) provides that a reviewing court may grant relief if the court finds that a denial is "not supported by a preponderance of the evidence, based on the record of the proceeding conducted [by the franchising authority] under subsection (c)." As Framingham admits, Section 626(e) pertains to judicial review of a final decision of a franchising authority. Nothing in the plain language of this provision expressly preempts de novo review of a

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40 Id. at 12.

41 Id. at 9–10, citing G.L. c. 166A, § 14.

42 Id.

43 Id.

franchising authority's decision by a state agency. In fact, Section 626(f) provides that a decision of the franchising authority is not final "unless all administrative review by the State has occurred or the opportunity therefor has lapsed." We are not convinced that Congress, in discussing the possibility of further state administrative review under Section 626(f), intended to limit such review to the local franchising authority's record by using the terms "review" or "approval" in the legislative history describing such further administrative proceedings.[44] Further, because the findings and determinations of the Framingham Decision are not final and thus are not ripe for judicial review, Section 626(e) is not applicable.

Absent express preemption, state action may be preempted if it conflicts with federal law. Conflict preemption "occurs when compliance with both state and federal law is impossible,"[45] or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[46] Congress's recognition that some state statutes subject municipal franchising decisions to "review, or perhaps formal approval, by the state," demonstrates that de novo review would not frustrate Congress' purposes in assuring that cable systems are "responsive to the needs and interests of the local community."

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[44] Framingham's reliance upon Board of Appeals of Hanover, 363 Mass. at 369, in construing the meaning of "review" or "approval" is unavailing (Framingham Mem. Standard of Review at 12). That case in fact held that the relevant statute did require a de novo proceeding. 363 Mass. at 369. Just as in Board of Appeals of Hanover, the relevant statutes do not merely require review and approval or disapproval, but require the Cable Division to conduct an adjudicatory proceeding in compliance with the procedural requirements of Chapter 30A. G.L. c. 166A, § 19; G.L. c. 30A, § 11.

[45] Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142–43 (1963).

[46] Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

The requirement under Section 626(c) that a franchising authority must issue a written decision based upon the record of the proceeding before it is simply an axiom of procedural due process. It does not, however, demonstrate that de novo review under G.L. c. 166A, § 14 would result in any conflict as Framingham asserts.[47] It does not preclude the evidentiary record of the franchising authority or its written decision from being modified upon administrative review. If the Cable Division approves of Framingham's action, the Cable Division "shall issue notice to [Framingham] to that effect."[48] In such case, Framingham's decision would be final and appealable to the federal district court. If the Cable Division disapproves of Framingham's action, the result would be a written decision issued to Framingham and a remand order to Framingham to conform with the decision.[49] If any appeal is to be taken to the federal district court after the parties have exhausted their state administrative remedies, the record would include Framingham's record on remand and the record of this proceeding. Accordingly, we find that Section 626 of the Cable Act does not preempt the Cable Division from reviewing the Framingham Decision de novo.

b. De Novo Review Required Under Chapter 30A

Finding that federal law does not preempt de novo review by a state agency does not end the inquiry. We must consider the mode of review required by G.L.c. 166A, §§ 14, 19, and G.L. c. 30A, of an issuing authority's franchising decision made pursuant to

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47 Framingham Mem. Standard of Review at 5 n.3, citing 47 U.S.C. § 546(c).

48 G.L. c. 166A, § 14.

49 Id.

G.L. c. 166A, § 13. The Cable Division has stated in the context of reviewing an action of an issuing authority denying consent to the transfer of a license, that because transfer hearings held by an issuing authority are exempt from the procedures required by Chapter 30A, aggrieved parties that appeal to the Cable Division pursuant to G.L. c. 166A, § 14 have not been entitled to the protections of Chapter 30A, and that accordingly, the Cable Division is obligated to hear such appeals de novo.[50] Franchise renewal proceedings before the issuing authority similarly are exempt from the procedural requirements of Chapter 30A.[51] In any event, the Board of Selectmen of the Town of Framingham is not an "agency" subject to Chapter 30A.[52]

Framingham cites to the Community Antenna Television Commission's (predecessor of the Cable Division) prior interpretation of G.L. c. 166A, § 14, limiting review to whether a local board's conclusions are based on substantial evidence, and in the case of license transfer proceedings whether the decision was arbitrary and capricious.[53] In MediaOne, however, the Cable Division expressly ruled that this interpretation of G.L. c. 166A, § 14 was in error and that our review is not confined to the record below.[54]

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50 MediaOne at 5–6.

51 G.L. c. 166A, § 19.

52 See G.L. c. 30A, § 1(2).

53 Framingham Supp. Mem. Standard of Review at 5, citing Inland Bay Cable TV Assoc., CATV Docket No. A-16, at 7 (1981); Rollins Cablevision of Southeast Mass. Inc., CATV Docket No. A-64 (1988).

54 MediaOne at 6 n.5.

Moreover, the Cable Division is persuaded that United Food Corp., and the body of precedent regarding appeals to the ABCC, support a ruling that G.L. c. 166A, § 14 affords a "fresh hearing" under Chapter 30A.[55] General Laws c. 166A, § 14 is parallel in construction to the statute applicable to appeals before the ABCC, G.L. c. 138, § 67.[56] "Sound principles of statutory construction dictate that interpretation of provisions having identical language be uniform."[57] Proceedings before the ABCC reviewing local licensing decisions are de novo. Therefore, the Cable Division determines that our review of an action by an issuing authority denying renewal of a license must be de novo pursuant to G.L. c. 166A, § 14.[58]

C. Application of Section 626 (47 U.S.C. § 546)

1. Statutory Framework

We turn now to the substantive standard to be applied in our de novo review. Under Section 626 of the Cable Act, if a franchising authority has issued a preliminary assessment

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55 See, e.g., United Food Corp., 375 Mass. at 240.

56 General Laws c. 138, § 67 provides: "If the commission approves the action of the local licensing authorities it shall issue notice to them to that effect, but if the commission disapproves of their action it shall issue a decision in writing advising said local authorities of the reasons why it does not approve, and shall then remand the matter to the said local authorities for further action. The commission shall not in any event order a license to be issued to any applicant except after said applicant's application for license has first been granted by the local authorities."

57 Webster v. Board of Appeals of Reading, 349 Mass. 17, 19 (1965).

58 Because the Cable Division's review of the Framingham Decision is de novo, it is unnecessary to rule on Comcast's allegations of procedural errors during the Framingham administrative hearings. We similarly decline to rule on Framingham's request for a ruling that there was no impropriety in the Board of Selectmen acting as presiding officer in the proceedings before it, because the question is not necessary to the disposition of this proceeding. Cf. Framingham Mem. Summ. Decision at 57.

that the cable operator's franchise should not be renewed, the cable operator may request that the franchising authority commence an administrative proceeding to consider whether

> (A) the cable operator has substantially complied with the material terms of the existing franchise and with applicable law;
>
> (B) the quality of the operator's service, including signal quality, response to consumer complaints, and billing practices, but without regard to the mix or quality of cable services or other services provided over the system, has been reasonable in light of community needs;
>
> (C) the operator has the financial, legal, and technical ability to provide the services, facilities, and equipment as set forth in the operator's proposal; and
>
> (D) the operator's proposal is reasonable to meet the future cable-related community needs and interests, taking into account the cost of meeting such needs and interests.[59]

The first three factors are not raised in this proceeding, because Framingham's written decision to deny the proposal is based only upon its finding that the proposal was not reasonable to meet the future cable-related community needs and interests.[60] We review the parties' arguments with respect to Section 626(c)(1)(D) below.

2. Balancing Local Needs Against Cost

a. Positions of the Parties

Framingham maintains that while an issuing authority customarily determines local needs through the use of public hearings, surveys, focus groups, interviews, terms provided in past agreements, and "its own knowledge and experience in its day to day interaction with the

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[59] 47 U.S.C. § 546(c)(1).

[60] Framingham Decision at 2.

local community," it is not required to use all of the foregoing methods.[61] Rather, Framingham argues that it is best able to determine the community's cable-related needs and interests, and that limited, deferential review of its franchising decision is consistent with the Cable Act's purposes in assuring that cable systems are responsible to the needs of the local community.[62] Framingham argues that no statute or case law precisely defines how Framingham must determine local needs, and that review of local ascertainment is limited.[63]

Framingham states that it determined local needs based on an ascertainment hearing, comments received from the public, the Board of Selectmen's own experience and in-depth knowledge of the community, and review and identification of the terms and conditions in the existing franchise agreement that were beneficial to the community.[64] Framingham argues that Comcast had the burden to provide it with reasonable estimates of the costs for each of the proposed needs, and that it was also Comcast's burden to establish that the cost of the services "was so onerous to Comcast that such costs outweighed the value of the services to the Town."[65]

Comcast counters that Congress intended to limit demands that are not justified by community need and by cost, in order to protect the cable operator's investment in the

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61 Framingham Mem. Summ. Decision at 12.

62 Id. at 13.

63 Id. at 12–13, citing Union CATV, Inc. v. City of Sturgis, 107 F.3d 434, 441 (6th Cir. 1997).

64 Id. at 13.

65 Id. at 14.

system.[66] Comcast argues that the governing standard is one of "reasonableness," and that the standards and procedures of the Cable Act are intended to preclude the franchising authority from making demands for "unreasonable requirements.[67] Comcast thus argues that its proposal is entitled to be renewed if it is "reasonable to meet the community needs and interests, taking into account the cost of meeting such needs and interests."[68]

b. Analysis

The formal renewal process is a two-stage process. The first stage involves an "ascertainment" proceeding undertaken by the franchising authority to afford the public notice and participation for the purpose of "identifying the future cable-related community needs and interests" and reviewing the cable operator's performance under the current franchise.[69] At the conclusion of, and not prior to, the ascertainment proceedings, the issuing authority may require the cable operator to submit a proposal for renewal, in the form of an RFP, which sets forth the town's identified cable-related needs and interests and specifies, subject to the limitations of Section 624, the information and proposals to be submitted.[70] The second stage involves the issuing authority's review of a proposal. If the issuing authority issues a preliminary assessment of denial, the issuing authority may conduct an administrative hearing

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66 Comcast Opp. Framingham Mot. Summ. Decision at 8, citing H.R. Rep. No. 98-934, at 25.

67 Id., citing H.R. Rep. No. 98-934, at 72

68 Id. at 9, citing 47 U.S.C. § 546(c)(1)(d).

69 47 U.S.C. § 546(a)(1).

70 47 U.S.C. § 546(b); H.R. Rep. No. 98-934, at 73.

affording the parties the opportunity to submit evidence on the community's cable-related needs and interests and costs of meeting those needs and interests.[71] At the completion of the second proceeding, the franchising authority is required to issue a written decision granting or denying the proposal based upon the record of the second proceeding.[72]

Whether Framingham properly ascertained its cable-related needs and interests is not before us. Pursuant to G.L. c. 166A, § 14, a cable operator that is aggrieved by an issuing authority's denial of its application for renewal of a license may appeal to the Cable Division from the issuing authority's denial of the application. This is not an appeal from the ascertainment stage, but rather, from the second stage of the formal renewal process.

The second stage entails a review of whether, given the issuing authority's identified cable-related needs and interests (subject to Section 624), the cable operator has demonstrated by a preponderance of the evidence that its proposal is reasonable, taking into account the cost of meeting those needs and interests. The burden of proof is on the cable operator to demonstrate that its proposal is reasonable. Because Section 626(c)(1)(D) applies a balancing test of costs against needs, the cable operator must also demonstrate the cost of meeting the ascertained needs and interests. Evidence of the community's cable-related needs and interests that was introduced in the ascertainment proceeding "shall for the purposes of the

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71 47 U.S.C. § 546(c); H.R. Rep. No. 98-934, at 75.

72 47 U.S.C. § 546(c).

administrative proceeding be regarded no differently than any other evidence."[73] The cable operator's "ability to earn a fair rate of return on its investment and the impact of such costs on subscriber rates" are considerations in evaluating costs.[74] Finally, given the level of subscriber interest in the identified cable-related needs and interests, the cable operator must show that it is not in the community's interests to receive such facilities and services in view of the costs, and that therefore its renewal proposal is reasonable.[75]

3. Whether the Proposal Must Be Considered as a Whole

a. Positions of the Parties

(1) Framingham

Framingham contends that if a decision of an Issuing authority is based on considerations that in and of themselves would not furnish a legally tenable ground for denial, such improper considerations do not invalidate the decision if it is based on any legally tenable ground and is not unreasonable, whimsical, capricious or arbitrary.[76] Thus, Framingham

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73 H.R. Rep. 98-934, at 73.

74 Id.

75 Id. The standard is not whether the cost is "onerous," as Framingham argues, but rather, whether the cost is unreasonable.

76 Framingham Mem. Summ. Decision at 50, citing Marr v. Back Bay Architectural Commission, 23 Mass. App. Ct. 679, 684 (1987); MacGibbon v. Issuing Authority of Appeals of Duxbury, 369 Mass. 512, 519 (1976); Roberts v. Southwestern Bell Mobile Systems, Inc., 429 Mass. 478, 486 (1999); Metheny v. Becker, 352 F.3d 458, 461 (2003); Union CATV, Inc. v. City of Sturgis, 107 F.3d 434 (6th Cir. 1997).

argues that if any of the 22 reasons stated in the Framingham Decision are found to be justified, then the decision must be upheld.[77]

(2) Comcast

Comcast maintains that the standard is "reasonableness" to "protect cable operators against unfair denials of renewals," and does not permit the Town's "letter-perfect" standard.[78] Comcast states that the Cable Division has recognized that the federal standards and processes for renewal of a cable license create a presumption of renewal.[79] Comcast argues that Congress intended to limit demands that are not justified by community need and by cost, and preclude the franchising authority from making demands for "unreasonable requirements."[80] Comcast argues that in discussing the "reasonableness" of a proposal, Congress stated, "[I]t is not intended that this criteria requires the operator to respond to every person or group that expresses an interest in any particular capability or service."[81] Comcast argues that this passage means that a cable operator need not meet every need or interest identified by the Town, so long as the proposal as a whole is "reasonable to meet the community needs and interests, taking into account the cost of meeting such needs and interests."[82] Comcast argues

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77 Id. at 50–51.

78 Comcast Opp. Framingham Mot. Summ. Decision at 8, citing 47 U.S.C. § 521(5).

79 Id. at 8, citing C.T.V. 03-3, at 12.

80 Id. at 8–9, citing H.R. Rep. No. 98-934, at 25, 72.

81 Id. at 9, citing H.R. Rep. 98-934, at 74.

82 Id., citing 47 U.S.C. § 546(c)(1)(D).

for such a reading of the standard, because the statute does not specify that "each element" of a proposal is to be reviewed for reasonableness, but rather, the statute discusses "needs and interests" in the conjunctive sense. Further, Comcast argues that the "cost" at issue is the "cost of meeting such needs and interests" as a whole, not the cost of each requirement in a vacuum, although Comcast concedes that it is useful to understand the cost of certain elements that may be quantified.[83]

Comcast contends that the court decisions to which Framingham cites are not relevant to cable television licensing under federal or state laws applicable to Massachusetts.[84] Further, Comcast contends that Framingham misreads Sturgis, because the court rejected Framingham's argument, holding that its "task is not limited solely to deciding whether the operator's proposal, in fact, met all the cable-related needs and interests identified" but rather whether the "operator has demonstrated that its proposal is 'reasonable' despite its failure to meet certain identified community needs and interests."[85]

b. Analysis

The question that the parties ask us to consider is whether we must consider Comcast's renewal proposal as a whole in determining whether it was proper to reject the proposal, or whether the failure by Comcast to meet any single identified cable-related community need or interest is a sufficient ground for rejecting the entire proposal. With the exception of the

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83 Id. at 10 n.3.

84 Id. at 11.

85 Id. at 12, citing Sturgis, 107 F.3d at 440.

United States Sixth Circuit Court of Appeals' decision in Sturgis,[86] none of the cases to which Framingham cites are relevant to this question. The cases cited refer to the judicial standard of review of administrative decisions standing for the principle that the fact that a board has relied upon a legally untenable ground does not invalidate the decision if the board had a legally tenable ground for the decision. The cases do not answer the question whether the treatment of every single identified need may be the basis of a separate "ground" for a decision under 47 U.S.C. § 546(c)(1)(D).

We begin with an analysis of the language of 47 U.S.C. § 546(c)(1)(D). The plain language of the statute provides that the applicable standard is one of "reasonableness." We agree with Comcast that the statute directs us to consider "needs and interests" in the conjunctive sense in considering whether the proposal is reasonable. This interpretation is consistent with the legislative history, in which Congress stated that the standard

> does not mean that the operator must demonstrate that each factual element which led the franchise authority to make an adverse finding with regard to one of the considerations (A) through (D) is not supported by a preponderance of the evidence, but the operator must make such a demonstration with regard to an adverse finding on each of the standards asserted by the franchising authority as a basis for denial, in order for the court to grant relief.[87]

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[86] We are not convinced that Sturgis answers the question before us, because that case involved a situation where the cable operator provided no evidence in support of its claim on the issues presented. As Framingham points out, the Sturgis court upheld the municipality's denial based on several elements of the cable operator's proposal, where the operator failed to submit evidence. Framingham's citation of this case does not logically support its contention that we must uphold the decision if only one ground for the decision is legally tenable.

[87] H.R. Rep. 98-934, at 75.

That is, Comcast must demonstrate in this proceeding that the preponderance of the evidence does not support Framingham's finding that Comcast's entire proposal was not reasonable to meet the future cable-related community needs and interests, taking into account the cost of meeting such needs and interests, rather than demonstrate that Framingham's findings with respect to each element of the proposal found to be unreasonable were not supported by a preponderance of the evidence. Thus, we reject Framingham's argument that the Framingham Decision must be upheld if even only one of its findings with respect to the proposed terms is sustainable.[88]

We also find that the clause, "taking into account the cost of meeting such needs and interests" modifies the reasonableness test such that the cost is one factor in determining reasonableness. While we find that the appropriate standard requires us to consider the reasonableness of the proposal as a whole, and not simply to review each factual element independently, we are not, however, convinced that this clause clearly establishes that we are limited to evaluating the "cost" of meeting all cable-related community needs as a whole, rather than reviewing the cost of each identified need or interest. The legislative history suggests that we are to assess the cost of each need and interest:

> [I]n assessing the costs under this criteria, the cable operator's ability to earn a fair rate of return on its investment and the impact of such costs on subscriber rates are important considerations. Finally, it is not intended that this criteria requires the operator to respond to every person or group that expresses an interest in any particular capability or service. Rather, the operator's

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[88] We do not preclude the possibility that a single proposed term could be so unreasonable as to make the entire proposal unreasonable, but Framingham does not make that argument here, and no facts supporting such a finding have been alleged in this case.

> responsibility is to provide those facilities and services which can be shown to be in the interests of the community to receive in view of the costs thereof.[89]

That is, an operator need not meet a particular interest if a particular capability or service cannot be shown to be in the interests of the community given the effect of the cost on subscriber rates or if the operator cannot earn a fair rate of return as a result of the cost. Thus, we must assess the cost of each need and interest as a factor in determining whether the preponderance of the evidence demonstrates whether or not the proposal as a whole is reasonable.

4. Whether the Proposal May Be Amended

a. Positions of the Parties

(1) Framingham

Framingham argues that Comcast did not have the unilateral right to amend its renewal proposal. Framingham states that the RFP provided an explicit deadline for submitting a renewal proposal, and there was no provision for filing documents related to the RFP responses or an amendment later than October 24, 2003.[90] Framingham argues that Comcast's position that it may submit an amendment to a formal renewal proposal at any time after the deadline contradicts the statutory provision that "[t]he franchising authority may establish a date by which such proposal shall be submitted."[91] Framingham also argues that the language

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89 Id. at 74.

90 Framingham Mem. Summ. Decision at 46–47, citing JX.8, at Bates No. 2948.

91 Id. at 47, citing 47 U.S.C. § 546(b)(3).

of 47 U.S.C. § 546(c)(1) unambiguously gives it a full 120 days to make a decision regarding a formal renewal proposal.[92] Framingham argues that Comcast's position could leave it in a situation where it has one or two days to consider a substantially changed renewal proposal in order to meet the statutory deadline.[93]

Moreover, Framingham contends that Comcast did not dispute the RFP deadline and did not "reserve the right to amend" the proposal when it submitted its formal renewal proposal.[94] Framingham also contends that the purported amendment was submitted to Framingham, not on March 8, 2004, as Comcast claims, but not until March 10, 2004, after it had already issued a preliminary denial of the proposal on March 9, 2004.[95]

Framingham disputes Comcast's interpretation of 47 U.S.C. § 546(b)(1), providing that an operator may submit a proposal for renewal "on its own initiative."[96] Framingham points out that 47 U.S.C. § 546(b)(1) provides:

> Upon completion of a proceeding under subsection (a), a cable operator seeking renewal of a franchise may, on its own initiative or at the request of a franchising authority, submit a proposal for renewal.

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92 Id. at 47.

93 Id. at 48.

94 Id. at 47.

95 Id. at 48, citing JX.39 at 13. Comcast concedes in its Opposition that the amended proposal was submitted on March 10, 2004, so there is no dispute as to this fact. Comcast Opp. Framingham Mot. Summ. Decision at 55.

96 Framingham Mem. Summ. Decision at 49.

Framingham states that it sent an RFP to Comcast first, and Comcast submitted a renewal proposal pursuant to the RFP.[97] Framingham maintains that 47 U.S.C. § 546(b)(1) refers to one renewal proposal being submitted at the end of the subsection (a)(1) proceedings, and that Comcast submitted that renewal proposal.[98] Framingham contends that no rational reading of 47 U.S.C. § 546 gives Comcast the right to submit multiple subsequent renewal proposals at any point that it decides to do so.[99]

Finally, Framingham disputes the validity of Comcast's rationale for submitting the purported amendment. Although Comcast argues that it submitted the amendment because it learned of additional facts during informal negotiations with the Town, Framingham maintains that the purpose of informal negotiations is to encourage a frank and candid exchange of views and proposals between parties, "unencumbered by the possibility that a cable operator will use the process for 'free discovery' to then facilitate subsequent amendment of the operator's formal proposal."[100] Framingham argues that permitting Comcast to submit a late filing will "impermissibly blur the distinction" between the formal process and informal negotiations to the detriment of both cable operators and issuing authorities.[101]

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97 Id.

98 Id.

99 Id.

100 Id.

101 Id.

(2) Comcast

Comcast responds that the Cable Division should take into account Comcast's amended proposal.[102] Comcast maintains that after it submitted its initial proposal in October 2003, Framingham presented it with additional information not presented during the ascertainment process.[103] Comcast asserts that this information received for the first time detailed information concerning the need for funding for access studio equipment and schools.[104] Comcast contends that the amended proposal did not make substantial changes but would increase the value by $195,000.[105]

Comcast counters Framingham's argument regarding the deadline set for submitting a response to the RFP, arguing that the RFP itself contemplates amendments to the proposal. Comcast points out that the RFP states that the "four-month negotiation period, mandated by Section 626(c)(1) . . . will commence on October 24, 2003."[106] Comcast maintains that this negotiation period is necessary because the RFP requires that certain details be determined through negotiations, such as the length of the license term.[107] Moreover, Comcast states that the RFP provides that Framingham "reserves the right to discuss such additional/or more

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102 Comcast Opp. Framingham Mot. Summ. Decision at 53. Note, however, that Comcast does not raise this issue as part of its own motion for summary judgment.

103 Id.

104 Id., citing Tr.X, at 25:9–13, 26:24–27:6.

105 Id.

106 Id. at 54, citing JX.8, at Bates No. 2948.

107 Id., citing JX.8, at Bates No. 2950.

specific services and community needs during negotiations with Comcast," and that "if agreement is reached, the Issuing authority will have a renewal license drafted, the contents of which will be based on the agreements made during negotiations, as well as on the proposals and commitments contained in the renewal proposal."[108] Comcast argues that it could not have possibly addressed or satisfied all of Framingham's needs when it did not disclose all of its specific needs in the RFP.[109]

Comcast argues that while 47 U.S.C. § 546(b)(3) provides that "the franchising authority may establish a date by which such proposal shall be submitted," Framingham waived any rights allegedly created by that section by leaving components of the RFP open for further negotiation.[110] Comcast argues that Framingham has not claimed that it has been prejudiced by Comcast's amended proposal, which was submitted on March 10, 2004.[111] Comcast maintains that Framingham had six months to assess the amendment, before Framingham held any hearing in the matter, and one year before Framingham issued its final decision.[112]

Comcast claims that nowhere in 47 U.S.C. § 546 is a cable operator limited to a single proposal in response to an RFP. Comcast highlights that the statute provides that "a cable

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108 Id., citing JX.8, at Bates No. 2949, 2951.

109 Id.

110 Id. at 54–55.

111 Id. at 55.

112 Id.

operator . . . may, on its own initiative or at the request of a franchising authority, submit a proposal for renewal."[113] Comcast asserts that the plain language of the statute gives Comcast a right to submit a proposal on its own initiative, and that the only restriction placed upon the cable operator is that the proposal cannot be submitted before the completion of the ascertainment process.[114]

Finally, Comcast contends that Framingham has not provided evidence of harm that would arise from accepting the amended proposal that would "blur the distinction between the formal process and informal negotiation process to the detriment of cable operators and issuing authorities throughout the Commonwealth."[115] Comcast cites to our own review of the requirements of Form 100 for the proposition that it may amend its franchise renewal proposal during formal proceedings.

b. Analysis

While the formal renewal process of Section 626 of the Cable Act is not mandatory,[116] once a party has invoked the procedural protections of the process, the timetable and deadlines established in Section 626 must be satisfied. In this matter, the question of when a proposal may be submitted is raised. Where a municipality has issued an RFP, as Framingham did, the RFP should establish the deadline for submissions. There is no question that Comcast filed a

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113 Id. at 56.

114 Id., citing 47 U.S.C. § 546(a).

115 Id., citing Framingham Mem. Summ. Decision at 49.

116 Parties may always engage in negotiations without regard to Section 626. 47 U.S.C. § 546(h).

timely proposal in response to the RFP. The question is whether Comcast could later amend that proposal.

Comcast claims that it sought to amend its proposal to address community needs with respect to access studio equipment and schools not identified by Framingham until after Framingham had issued its RFP. Under the formal renewal process, a renewal proposal may be filed, or may be required to be filed, upon completion of the ascertainment phase.[117] Significantly, the franchising authority may not require the cable operator to submit a proposal prior to the completion of this first stage of the process.[118] In this way, the cable operator is protected from denial of a renewal license based on its failure to meet a community need or interest of which it was not aware. While Comcast contends that it proposed to increase the value of its proposal in response to later presented needs, if these needs were not identified when the ascertainment stage was complete, Comcast was not required to address them as part of its formal renewal proposal or to amend its proposal to do so. Similarly, the RFP leaves certain terms open for negotiation and purportedly reserves to Framingham the right to "discuss" additional terms to be incorporated in a final renewal license. Thus, with respect to these terms, Framingham does not identify any specific need or interest that Comcast was obligated to address in its formal renewal proposal. Since these needs and interests were not identified, Framingham cannot find that Comcast's proposals regarding these terms are

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117 47 U.S.C. § 546(b)(1).

118 47 U.S.C. § 546(b)(1); H.R. Rep. 98-934, at 73.

unreasonable and, therefore, cannot base its denial on Comcast's failure to meet these previously unidentified needs.

The formal renewal process also protects municipalities. As an initial matter, Section 626 contemplates a finite process of renewal, a three-year period often referred to as the "renewal window." Further, Section 626 provides a 120-day period during which a municipality may review a proposal.[119] If an operator were permitted continually to amend a proposal, the overall statutory scheme could be frustrated. The language of Section 626 does not contemplate the filing of amended formal proposals. Subsection (b)(1) speaks of the filing of a proposal in the singular. The clause, "on its own initiative or at the request of a franchising authority," modifies "may." It does not create the opportunity to submit more than "a" proposal for renewal. Sound policy also dictates a finding that a cable operator may not unilaterally amend its formal proposal. A contrary finding would shift the balance of interests unduly in the cable operator's favor. A cable operator could "float" its most conservative proposal, and, if it were not well received, modify it. Cable operators are not permitted to game the process in this manner.

Comcast in support of its position that it is permitted to amend its formal proposal refers to a statement by the Cable Division in CTV 03-3. There, the Cable Division recognized, but in no way condoned, the practice of many cable operators and municipal

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[119] This 120-day period assumes that other timetables within the three-year renewal window have been satisfied. In Massachusetts, most licenses are limited to 10-year terms. If a proposal is filed less than 120 days before a license expires, the review period is condensed.

consultants to continue informal negotiations even after the formal process has been invoked. In CTV 03-3, municipalities in particular raised concerns that they not lose their ability to continue such negotiations. Our statement that an operator may revise its proposal during the course of negotiations referred to the fact that if the parties continue negotiations, the cable operator is not bound to the formal proposal, but may offer terms in response to negotiations. Those revised terms, however, are not part of the formal renewal process of Section 626 and affect neither the relevant deadlines nor the formal renewal proposal under review.

Accordingly, we grant Framingham's motion in part and hold that Comcast was not permitted to amend its formal renewal proposal in this instance. Therefore, in this proceeding we will consider whether the proposal that Comcast submitted on October 24, 2003, is reasonable to meet Framingham's needs and interests identified in its RFP issued on September 24, 2003.

5. Effects of Competition

a. Positions of the Parties

(1) Comcast

Comcast argues that, as a matter of law, Framingham should have considered evidence regarding Comcast's competition in Framingham in the proceedings before it.[120] Comcast maintains that Congress instructed that "in assessing the costs under [47 U.S.C. § 546(c)(1)(D)], the cable operator's ability to earn a fair rate of return on its investment and

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120 Comcast Mot. Summ. Decision at 62.

the impact of such costs on subscriber rates are important considerations."[121] Comcast argues that it is axiomatic that the ability of a cable operator to earn a fair rate of return under any proposal for future operations depends on the effects of competition.[122] Comcast asserts that it currently competes with RCN-BecoCom, L.L.C., as well as providers of direct broadcast satellite ("DBS") services, and that Verizon Communications, Inc. ("Verizon") has announced that it is wiring part of Framingham so that it can offer video and other advanced services.[123] Comcast states that Framingham would not allow Comcast to question the Town Manager on the subject of competition, and that Framingham did not offer any evidence to indicate that it ever analyzed the role of competition in consideration of Comcast's proposal.[124] Therefore, Comcast argues "that error infects and invalidates the Town's decision to deny."[125]

(2) Framingham

Framingham contends that Comcast has cited to no legal source that supports its argument.[126] Framingham claims that applicable law does not require it to analyze the effect of

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121 Id. at 62–63, citing H.R. Rep. 98-934, at 74.

122 Id. at 63, citing In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, MB Docket No. 04-227, FCC 05-13, Eleventh Annual Report, 20 FCC Rcd. 2755, 2772–73 (rel. Jan. 14, 2005).

123 Id. at 63, citing CX.5; CX.19. Note, however, that Framingham excluded these documents from the proceeding before it, and we must still determine their admissibility in this proceeding.

124 Id. at 63–64, citing Tr.I, at 95:9–96:9.

125 Id. at 64.

126 Framingham Opp. Comcast Mot. Summ. Decision at 50.

competition.[127] Framingham objects that "[t]here is no way that the Town could have effectively estimated or evaluated the impact that these [competitive] services would have on Comcast," and that it "is not in the business of service as a cable operator."[128] Thus, Framingham argues, it was required pursuant to Section 626 only "to ascertain the needs of the Town and to weigh the costs of those needs as specifically shown by Comcast to be unreasonable and against the benefit of the need."[129]

b. Analysis

Comcast correctly notes that its ability to earn a fair rate of return is a factor in determining whether the proposal is reasonable given the cost of meeting a community's cable-related needs and interests.[130] The existence and extent of the effect of competition in Framingham is relevant to Comcast's ability to earn a fair rate of return. Framingham's objection that it lacks the expertise to evaluate the effects of market competition is no grounds for excluding relevant evidence. Nevertheless, we are unable to rule as a matter of law that excluding the evidence infected Framingham's entire decision with error, because the existence and extent of the effect of competition is a material question of fact that must be tried. Because we have determined that this proceeding is to be conducted de novo, Comcast will have the

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127 Id.

128 Id. at 50–51.

129 Id. at 51.

130 H.R. Rep. 98-934, at 74.

opportunity, and has the burden of proof, to demonstrate in this proceeding the effect of competition on its ability to earn a fair rate of return.

IV. MOTIONS TO TAKE ADMINISTRATIVE NOTICE

A. Positions of the Parties

Comcast asks the Cable Division to take administrative notice, pursuant to 801 C.M.R. § 1.01(10)(h), of exhibits and transcripts from the Framingham hearings, deposition exhibits that were not entered into as evidence in the Framingham hearings, the Framingham Decision itself, and a proposed order submitted to the Board of Selectmen by Framingham's special counsel prior to the issuance of the Framingham Decision.[131] Comcast argues that the Cable Division may take administrative notice if the parties are "notified of the material so noticed" and given an opportunity to contest the noticed facts.[132]

Framingham opposes Comcast's motion only with respect to: Comcast's March 8, 2005 amendment to its renewal proposal, which Framingham argues was excluded from evidence from the Framingham hearings and therefore should not be considered by the Cable Division; the August 20, 2003, and the February 9, 2004, amendments to the Framingham Cable Television License, which Framingham claims are not relevant; and the letters and special magistrate's report regarding the Cablevision/AT&T Broadband transfer

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131 Comcast Mot. Taking Administrative Notice at 1-2.

132 Id. at 2; 801 C.M.R. § 1.01(11)(h); G.L. c. 30A, § 11(5).

from the year 2000, which Framingham also argues are not relevant.[133] Framingham additionally moves that the Cable Division take administrative notice of the Post-Hearing Brief of the Town of Framingham (March 21, 2005) and Comcast's proposed Order Granting Renewal License (March 28, 2005).[134]

B. Analysis

The Cable Division's authority to take administrative notice of facts is limited. The Cable Division may only take notice of (1) facts that may be judicially noticed by the courts, or (2) general, technical or scientific facts within the Cable Division's specialized knowledge.[135] While "administrative notice" is not the appropriate vehicle for entering the documents in question into evidence, as Comcast suggests, there is no dispute between the parties as to the authenticity of the documents. Because both parties in their motions have argued that the same documents should be entered into evidence, we treat these motions as a stipulation of

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133 Framingham Opp. Comcast Mot. Taking Administrative Notice and Framingham Mot. to Strike at 2.

134 Framingham Mot. Taking of Administrative Notice at 1.

135 G.L. c. 30A, § 11(5).

documents to be entered into evidence.[136] As for the materials to which Framingham objects, since we cannot consider the parties to have stipulated to their use as evidence, we will rule on their admissibility once they are offered as evidence. In order to avoid unnecessary litigation, the parties may stipulate in writing additional documents which shall be entered into evidence. Moreover, the parties may also stipulate facts at any time.[137]

V. MOTIONS FOR SUMMARY DECISION

A. Introduction

Both parties have filed motions for summary decision. Comcast argues that the majority of the issues presented are pure issues of law and there is no genuine dispute on the facts material to the remaining issues, which may be resolved in its favor. Framingham maintains that summary decision is not appropriate, but in the alternative argues that it is entitled to summary decision as a matter of law on 16 of the 22 reasons for the Framingham Decision, specifically, reasons nos. 1–3, 7–9, 11–16, and 19–22. As for the reasons nos. 4–6, 10, 17, and 18, Framingham argues that such decisions are so fact-intensive that summary

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136 The Framingham Decision and associated briefs are admitted for the limited purpose of showing what arguments were presented by the parties and what findings of law or fact were made by Framingham, but not for the purpose of showing the validity of the findings themselves. "As a general rule the concept of a hearing de novo precludes giving evidentiary weight to the findings of the tribunal from whose decision an appeal was claimed." Dolphino v. ABCC, 29 Mass. App. Ct. at 955; cf. Board of Assessors of Boston v. Ogden Suffolk Downs, Inc., 398 Mass. 604, 606 (1986) ("A prior agency opinion or decision is not normally admissible to prove some factual issue in dispute or, barring some statutorily directed consequence . . . to shift the burden of persuasion or to create a presumption with which the agency must deal.")

137 801 C.M.R. § 1.01(10)(b).

decision in its favor is not appropriate. Because we determine below that we are unable to render judgment on the whole case upon Comcast's motion, and because Framingham's motion is a motion for partial summary decision, we enter partial summary decision only.[138] The issues and arguments in both motions overlap extensively. We consider both motions together below.

B. Summary Decision Standard of Review

The Standard Adjudicatory Rules of Practice and Procedure, which govern the conduct of formal proceedings of agencies subject to Chapter 30A, authorize the use of full or partial summary decision in agency decisions.[139] The rule specifically provides that "[w]hen a Party is of the opinion there is no genuine issue of fact relating to all or part of a claim or defense and he is entitled to prevail as a matter of law, the Party may move, with or without supporting affidavits, for summary decision on the claim or defense."[140] Summary decision may be granted by an administrative agency where the pleadings and filings conclusively show that the absence of a hearing could not affect the decision.[141] The Cable Division reviews motions for

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138 See Mass. R. Civ. P. 56(d).

139 801 C.M.R. § 1.01(7)(h).

140 Id.

141 Massachusetts Outdoor Advertising Council v. Outdoor Advertising Bd., 9 Mass. App. Ct. 775, 785–86 (1980).

summary decision according to the same standard applied by the courts in reviewing motions for summary judgment.[142]

Summary judgment is appropriate where there are no genuine issues of material fact and where the moving party is entitled to judgment as a matter of law.[143] The moving party bears the burden of demonstrating affirmatively the absence of a triable issue and that the summary judgment record entitles the moving party to judgment as a matter of law.[144] The moving party may satisfy this burden either by submitting affirmative evidence that negates an essential element of the opposing party's case or by demonstrating that the opposing party has no reasonable expectation of proving an essential element of its case at trial.[145] "A complete failure of proof concerning an essential element of the nonmoving party's case renders all other facts immaterial."[146] Mere contradictions of factual allegations, without evidentiary support, are insufficient to raise questions of material fact sufficient to defeat a summary judgment motion.[147]

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142 See, e.g., Belmont Cable Associates v. Belmont, CATV Docket No. A-65, at 3 (1988).

143 Mass. R. Civ. P. 56(c); see Cassesso v. Commissioner of Correction, 390 Mass. 419, 422 (1983); Community Nat'l Bank v. Dawes, 369 Mass. 550, 553 (1976); Allstate Ins. Co. v. Reynolds, 43 Mass. App. Ct. 927, 929 (1997).

144 Pederson v. Time, Inc., 404 Mass. 14, 16–17 (1989).

145 Flesner v. Technical Communications Corp., 410 Mass. 805, 809 (1991); Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716(1991).

146 O'Sullivan v. Shaw, 431 Mass. 201, 203 (2000) (citing Kourouvacilis, at 711; Celotex Corp. v. Catrett, 477 U.S. 317, 323(1986)).

147 Madsen v. Erwin, 395 Mass. 715, 721 (1985).

There is no merit to Framingham's alternative argument that the Cable Division may not entertain motions for summary decision in this proceeding.[148] The argument is based on Framingham's assertion that the use of the word "hearing," in G.L. c. 166A, §§ 14 and 19, as opposed to "administrative proceedings," limits the Cable Division's action to permitting the parties to state their cases and then approving or disapproving the Framingham Decision, and does not subject this proceeding to Chapter 30A, other than in the conduct of the hearing itself.[149] There is, however, no such distinction in Chapter 30A.[150] Framingham further argues that insofar as summary decision does not require the Cable Division to review the entire record of the Framingham proceedings, granting summary decision would amount to procedural error, because, according to Framingham, G.L. c. 166A, § 14 requires the Cable Division to review the entire record before Framingham.[151] The regulation providing for summary decision is well-established.[152] A hearing is not required for matters that are not in genuine dispute or where the pleadings and papers filed conclusively show that a hearing on such matters will not affect the decision.

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148 Framingham Mem. Summ. Dec. at 7–10.

149 Id. at 9.

150 See G.L. c. 30A, §§ 10, 11.

151 Framingham Mem. Summ. Decision at 9–10.

152 801 C.M.R. § 1.01(7)(h).

C. Specific Reasons for Denial of the Renewal Proposal

1. Customer Service Office (Reason 1)

a. Positions of the Parties

Framingham denied the renewal proposal, because Comcast refused to agree "to continue staffing and operating a customer service office in Framingham, as currently required by the 1999 Renewal License during a subsequent renewal term."[153] Comcast argues as a preliminary matter that Framingham's denial on this ground is based on a mistake of fact, because Comcast did not propose to close the existing customer service office, but rather it stated that it would keep a local customer service office either in Framingham or in a contiguous community.[154] Comcast states that it offered to "comply with all customer service regulations of the FCC (47 C.F.R. § 76) as they exist or as they may be amended from time to time," as well as the regulations of the Cable Division.[155] Comcast maintains that its proposal meets the FCC's requirement that customer service offices be "conveniently located."[156] Comcast claims that Framingham never offered evidence that the community had an interest in, or need for, a customer service office located "within Town limits."[157]

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153 Framingham Mem. Summ. Decision at 16.

154 Id. at 60.

155 Comcast Mot. Summ. Decision at 60.

156 Id. at 62.

157 Id. at 61.

Framingham argues that it has the right to require continuation of the Framingham customer service office. Framingham maintains that the Cable Act, 47 U.S.C. § 552(d)(2), specifically singles out customer service as an area where municipalities may adopt regulations that exceed the FCC's standards.[158] In addition, Framingham notes that G.L. c. 166A, § 5(o) specifically provides that such conditions may be imposed with respect to customer service offices.[159] Framingham asserts that it is undisputed that Comcast's renewal proposal did not provide for the continuation of such an office, and that at no time did Comcast demonstrate that the costs of continuing to operate the office were either unreasonable, unfair, or adverse to the interests of its subscribers.[160] Framingham states that prior cable licenses have always required a customer service office to be located in Framingham.[161] Framingham notes that Comcast's survey indicated that customers were satisfied with Comcast's predecessor's, AT&T Broadband's, local payment center customer service and that approximately 4,200 subscribers had visited the office.

b. Analysis

Although the federal standard requires only that customer service offices be "conveniently located," state law requires Comcast to agree to "[t]he maintenance of local

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158 Framingham Mem. Summ. Decision at 16.

159 Id. at 17.

160 Id.

161 Id. at 18.

offices or local telephone connections in the communities served."[162] The Cable Act does not preclude the establishment or enforcement of state law concerning customer service requirements that exceed the federal standard.[163] Nevertheless, G.L. c. 166A, § 5(o) is not a grant of power to the issuing authority to require a local office; the cable operator has the option simply to maintain a local telephone connection in the communities served. Maintaining a telephone connection to a customer service office in a contiguous town would satisfy the local telephone connection requirement should Comcast choose to relocate the current Framingham customer service office.

If the issuing authority requires the cable operator to maintain a local customer service office in an RFP, that requirement is subject to Section 626(c)(1)(D) of the Cable Act. Framingham ascertained the need for a local customer service office. Comcast therefore had the burden to demonstrate that the omission of a proposal to maintain a Framingham office was reasonable, given the level of interest of Framingham subscribers and the cost of meeting that need. Comcast makes no showing in its motion for summary decision that the cost of continuing to operate the Framingham office would be unreasonable. Therefore Comcast's motion is denied on this issue. Framingham, however, has the burden to demonstrate in its motion for summary decision that Comcast would be unable to demonstrate in this de novo proceeding that its proposal is reasonable given the cost. Although Framingham points to evidence that Framingham subscribers are satisfied with the local office, this does not negate a

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162 G.L. c. 166A, § 5(*o*).

163 47 U.S.C. § 552(d)(2).

showing in this proceeding that they would be unwilling to pay for the cost of the office; nor does Framingham demonstrate that Comcast cannot demonstrate the cost of the office in this proceeding. Because Framingham did not meet its initial burden on summary decision, Framingham's motion is denied on this point.

2. Public, Educational, or Government Access (Reasons 2–7, 17)

a. Introduction

The RFP contained a number of requests regarding local programming, studio facilities, and funding requirements. Under the current franchise, Comcast operates a public access studio and produces local origination ("LO") programming in Framingham, and maintains channel capacity for public access, educational, and governmental ("PEG") programming.[164]

Framingham's RFP required Comcast to "continue to produce a minimum of sixteen (16) hours of unduplicated Framingham-based LO/Public Access programming each week of interest to Framingham subscribers."[165] The RFP further specified that "[t]he Public Access programming produced shall cover the arts, senior citizens, sports, children, health, Town events as well as other community topics and matters."[166] The RFP required Comcast to "cablecast its LO programming on a channel that will be separate from the three (3) PEG Access channels . . . ."[167]

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164 JX.1, at Bates Nos. 13877–81.

165 JX.8, at Bates No. 2954.

166 Id.

167 Id.; see also id. at Bates No. 2957.

The RFP required Comcast to continue operating and staffing the "LO/Public Access studio,"[168] operate a mobile production van,[169] and provide public access training courses to be taught by the studio staff.[170] The RFP required Comcast to provide equipment for the studio, as well as an equipment replacement schedule.[171]

To support public access studio equipment requirements, the RFP requested a capital expenditure of at least $225,000. The RFP also required Comcast to "provide annual funding for PEG Access and LO programming use only," the amount of which would be determined after negotiation between the parties.[172] To support educational access programming, the RFP required Comcast to pay 1 percent of its gross annual revenues to the Framingham School District, provide $100,000 in equipment funding, and matching grants of two dollars for every one dollar expenditure by the school district for capital upgrades to the educational access studio up to $100,000.[173] To support governmental access programming, the RFP further required Comcast to pay 1 percent of its gross annual revenues to the issuing authority and

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168 Id. at Bates Nos. 2955–56.

169 Id. at Bates No. 2957.

170 Id. at Bates No. 2958.

171 The RFP required Comcast to "own, maintain and repair all such equipment." Id. at Bates No. 2955.

172 Id. at Bates No. 2955.

173 Id. at Bates No. 2956.

provide $100,000 in equipment funding.[174] Finally, the RFP prohibited Comcast from charging subscribers for any existing costs related to PEG access costs.[175]

Comcast's response to the RFP proposed to provide "capital and operating financial support so as to allow PEG access programming to continue under the auspices of a non-profit PEG Access corporation" and proposed to transfer the existing studio production van and equipment to an access corporation.[176] Comcast also proposed that the access corporation would be responsible for conducting training classes.[177] With respect to LO programming, the proposal left LO programming and the allocation of any LO channels to Comcast's sole discretion.[178] Comcast's proposal reserved the right to pass through the operational costs of the PEG access studio "in accordance with applicable law."[179] Comcast's funding offer included a total capital grant of $130,000 for the purchase of PEG equipment or facilities, plus 2.5 percent of gross cable services revenues for public access programming, 1 percent for educational programming, and 1 percent for government programming.[180]

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174 Id. at Bates Nos. 2956–57.

175 Id. at Bates No. 2958.

176 JX.9, at Bates No. 3233.

177 Id. at Bates No. 3242.

178 Id. at Bates No. 3241.

179 Id. at Bates No. 3242.

180 Id. at Bates Nos. 3290–92.

Framingham's stated reasons for denial with respect to these matters were that Comcast "refused to continue staffing, managing, operating and maintaining the existing Comcast Public Access studio in Framingham;" that Comcast "insisted upon passing-through to subscribers all Public Access-related costs as if all of such costs were entirely new costs;" that Comcast proposed that Framingham or a designee assume responsibility for providing Public Access programming to subscribers and that Framingham believes that this would "increase costs to Framingham subscribers;" that Comcast would not agree to continue to operate and make available a mobile production van; that Comcast would not agree to provide public access training classes; and that Comcast would not agree to produce and cablecast local origination and public access programming.[181] With regard to funding, Framingham stated as grounds for denial of the renewal proposal that Comcast refused to provide $100,000 for educational access equipment, matching grants for capital upgrades to the educational access studio, and $100,000 for governmental access equipment.[182]

b. Positions of the Parties

(1) Comcast

Comcast argues that Framingham has no legal authority to require Comcast to produce public access and LO programming or to operate a public access studio. Comcast argues that because a cable operator is "under no federal mandate to provide public access programming,"

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[181] Framingham Decision at 2–3, 5 (Reasons Second, Third, Sixth, Seventh, Seventeenth).

[182] Framingham Decision at 3.

it follows that Framingham may not require Comcast to provide such programming.[183] Comcast asserts that federal law preempts local requirements that are "inconsistent with Comcast's rights under the Cable Act."[184] Therefore, Comcast argues, Reasons 2, 3, 7, and 17 for the Framingham Decision must be rejected as a matter of law because they are inconsistent with the Cable Act.[185]

Comcast acknowledges that the Cable Act allows a franchising authority to require a cable operator to set aside channel capacity for PEG Access.[186] Comcast also does not contest Framingham's authority to request equipment and capital for public access.[187] Rather, Comcast contends that Framingham does not have authority to require Comcast to operate a public access studio and produce programming, because Section 611(b) does not enumerate such powers and provides only that franchising authorities may demand no more than the designation of channel capacity for PEG use.[188] Comcast argues that nothing prevents a cable operator from exceeding in its renewal proposal the issuing authorities' renewal requirements,

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183 Comcast Mot. Summ. Decision at 9, citing Glendora v. Malone, 101 F.3d 1393 (2nd Cir. July 25, 1996) (unpublished opinion). Comcast also raises a number of arguments based on its First Amendment rights. We omit discussion of these arguments, because we rule on this matter on statutory grounds.

184 Id., citing 47 U.S.C. § 556(c).

185 Id.

186 Id. According to Comcast, it has proposed to set aside the channel capacity requested by Framingham, and the town has not challenged that element of the proposal. Id., citing JX.9, at Bates No. 3289.

187 Comcast Opp. Framingham Mot. for Summ. Decision at 27.

188 Comcast Reply Framingham Opp. Mot. Summ. Decision at 10.

and that franchising authorities have the power to enforce such franchise requirements only when the cable operator "offered and agreed" to operate a public access studio and produce programming.[189] Comcast argues that Section 611(c) does nothing more than provide a statutory basis for a local government to enforce PEG access commitments voluntarily made in excess of the requirements that may be established by an RFP.[190]

In addition, Comcast argues that Framingham impermissibly based its denial on the grounds that Comcast would pass-through its public access-related costs.[191] Comcast argues that this is a form of rate regulation that the Town is prohibited from considering.[192] Comcast argues that state or local requirements governing the rates for cable service are permissible only to the extent that they are consistent with the FCC's rate rules and that cable operators and local franchising authorities may not even voluntarily enter into franchises that regulate rates in a manner that contravenes the Cable Act.[193]

Comcast argues that its proposal to transfer responsibility for public access programming to a public access corporation meets community needs as a matter of law.[194] Comcast contends that it has produced evidence that a public access corporation is better suited

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189 Id. at 10–11.

190 Id. at 11, citing H.R. Rep. No. 98-934, at 46.

191 Comcast Mot. Summ. Decision at 11–12, citing Framingham Decision (Reasons 2, 3).

192 Id. at 12, citing 47 U.S.C. §§ 543(a)(1), 556(c); G.L. c. 166A, § 15.

193 Id. at 13, citing Town of Norwood v. Adams-Russell Co., 406 Mass. 604, 611–12 (1990).

194 Id. at 14.

to meet the community's needs with respect to local programming than Comcast.[195] Comcast argues that Framingham did not rebut its showing with expert testimony or other evidence, and that the Town's witnesses have no knowledge of the operations of access corporations.[196]

Comcast claims that Framingham presented no evidence to show that its proposed funding would be inadequate.[197] Comcast further claims that Framingham presented no evidence that the money that the Town requested in its RFP was necessary to meet any community cable-related need or interest.[198] Comcast states that it has given Framingham $233,000 over the past five years to support PEG access, PEG access services, and equipment, and that it already purchased new equipment for the studio less than three years ago.[199] Comcast claims that the proposed funding will increase funding, or, at a minimum, will be cost-neutral.[200] Comcast states that its poll indicates that 75 percent of customers either

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195 Id. at 14–15.

196 Id. at 15-16, citing JX.40 at 53:11–12, 54:25–55:4, 105:9–15; Tr.II, at 73:20–23, 51:9–22, 77:17–24.

197 Id. at 22, citing Tr. II at 101:17.

198 Id. at 21.

199 Id. at 23, citing JX.33 at 13:16-21, 14:1-6. Comcast also claims that RCN pays Framingham a fee equal to 5 percent of its annual gross revenues to support PEG access, PEG access services, and equipment. This assertion is not currently in the record, and no affidavits or other supporting documents in support of this assertion were attached to Comcast's motion. Therefore, we do not consider this assertion in our Order.

200 Comcast Reply to Framingham Opp. to Comcast Mot. Summ. Decision at 16, citing JX. 27, at 19; JX.33, at 12.

moderately or strongly oppose an increase in their bill to provide support for PEG access equipment and facilities.[201] Thus, Comcast argues that the proposed funding was reasonable.

(2) Framingham

Framingham acknowledges that the Cable Act does not "require" the cable operator to provide public access programming.[202] Conversely, according to Framingham, there is nothing in the Cable Act that prohibits an issuing authority from seeking to have its cable operator continue to operate a public access studio.[203] Framingham states that local governments may require channels for PEG access use, pursuant to Section 611(a).[204] Framingham then states that Section 611(b) designates the local franchising authority, not the cable operator, as the party with the key role in determining the particulars of how such PEG access uses will be implemented.[205] Framingham argues that this "broad delegation" of authority to make rules about the governance of PEG access channels must also include the power to determine whether company staff or non-company staff should maintain and oversee the use of the

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201 Id., citing JX.31 at 6.

202 Framingham Opp. to Comcast Mot. for Summ. Decision at 12.

203 Id., citing Denver Area Educational Telecommunications Consortium, Inc. v. FCC, 518 U.S. 727, 734 (1996); Demarest v. Athol/Orange Community Television, Inc., 188 F.Supp. 3d 82, 84 (2002).

204 Framingham Mem. Summ. Decision at 22.

205 Id. at 22–23.

channels.[206] Framingham states that through public hearings, it "ascertained" community needs and interests in Comcast's continued management, operation, and staffing of the Framingham public access studio.[207]

Framingham counters Comcast's claim that a cable operator is "under no federal mandate to provide public access programming," noting that Comcast omits the initial part of the Second Circuit's opinion in Glendora v. Malone, which stated that "because they are created by franchise agreements between municipalities and cable operators, 'public access' channels such as Channel 8 are not creatures of federal law."[208] Framingham argues that Section 611(c) grants it the authority to enforce "any provisions of the franchise for services, facilities, or equipment," and therefore the Cable Act envisioned that the licensing agreement could require the services at issue.[209] Framingham argues that Comcast's position is not supported by law, because franchise licenses typically include provisions for cable operators to provide PEG access equipment, financial support, personnel to operate the PEG access

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206 Id., citing Erie Telecommunications, Inc., 659 F.Supp. 580 (W.D.Pa. 1987); Communications Sys. v. Town of Danville, 880 F.2d 887, 891 (6th Cir. 1989).

207 Id. at 24, citing 47 U.S.C. § 546(a), (c).

208 Framingham Opp. to Comcast Mot. Summ. Decision at 13, quoting Glendora v. Malone, 101 F.3d 1393.

209 Id. at 13-14, citing Chicago Cable Communications v. Chicago Cable Comm'n, 678 F. Supp. 734 (N.D. Ill. 1988), aff'd 879 F.2d 1540 (7th Cir. 1989), cert. denied, 493 U.S. 1044 (1990); Glendora v. Cablevision, 893 F.Supp. 264 (S.D. N.Y. July 19, 1995).

production facilities, promotion of the programs by means of a cable guide, or video production course training.[210]

Framingham does not move for summary judgment on the issue of the reasonableness of funding levels, because, according to Framingham, the issues are so fact-intensive as to be unreviewable on summary judgment.[211] Framingham asserts that Comcast's survey was developed to produce responses that would support Comcast's position.[212] Framingham contends that Comcast merely asserts without basis that Framingham does not need the funding level requested. Thus, Framingham argues that Comcast has not established that the cost of meeting the terms of the RFP outweighs the local need.[213]

c. Analysis

(1) Services, Facilities, and Equipment

With respect to the operation of local access studio, access studio staff training, and the mobile production van and other public access studio equipment, the question before the Cable Division is whether an issuing authority can mandate such requirements in its RFP. Section 624(a) provides a general proscription against franchise regulation of "services, facilities, and equipment provided by a cable operator except to the extent consistent with [the

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210 Id. at 13.

211 Framingham Mot. Summ. Decision at 5.

212 Framingham Opp. to Comcast Mot. Summ. Decision at 23–24, citing JX.39, at 40–41; Tr. VIII at 37–57.

213 Id.

Cable Act]."[214] Section 611(a) provides that a franchise authority may establish PEG access requirements in a franchise "only to the extent provided [in Section 611]."[215] Thus, contrary to Framingham's position, the authority to impose franchise requirements regarding PEG access must arise from the issuing authority's enumerated powers and not merely from the absence of a provision prohibiting an issuing authority from requiring its cable operator to consent to such requirements.

We determine that no provision of the Cable Act grants Framingham the authority to impose requirements for the operation of a local access studio, access studio staff training, or a mobile production van or other public access studio facilities or equipment in an RFP.[216] Section 611(b) provides only that a franchise authority may require that "channel capacity" be designated for PEG use and require "rules and procedures for the use of the channel capacity designated."[217]

The provision permitting a franchising authority to "require rules and procedures for the use of the channel capacity designated" does not expand Framingham's authority to impose services, facilities, or equipment requirements. Congress' explanation of this term suggests that the term "rules and procedures for the use of channel capacity" was intended to refer to rules that allocate the use of the channel capacity and establish programming requirements,

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214 47 U.S.C. § 544(a).

215 47 U.S.C. § 531(a).

216 State law also does not impose such requirements. Cf. G.L. c. 166A, § 5.

217 47 U.S.C. § 531(b).

rather than rules that would establish services, facilities, or equipment requirements.[218] Further, the term similarly appears in subsection (d), which provides that the local franchising authority may prescribe "rules and procedures under which the cable operator is permitted to use such channel capacity for the provision of other services if such channel capacity is not being used for the purposes designated" and "rules and procedures under which such permitted use shall cease."[219] Such rules and procedures under subsection (d) similarly were intended to have an allocative role.[220] Thus, we conclude that Section 611(b) does not grant a local franchising authority the power to impose a requirement for services, facilities, or equipment beyond cable system-related requirements necessary to provide the designated channel capacity.

We also are not convinced that Framingham may derive authority to impose such requirements from Section 611(c). Under Section 611(c), a local franchising authority "may enforce any requirement in any franchise . . . [including] any provisions of the franchise for services, facilities, or equipment . . . ."[221] Significantly, this section provides only enforcement authority and not the authority to require such provisions, as Framingham claims. The remainder of the passage, which Framingham does not highlight, clarifies that this

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218 See, e.g., H.R. Rep. 98-934 at 46 ("Franchising authorities may require a portion of a channel to be set aside for a certain access use, rather than an entire channel.").

219 47 U.S.C. § 531(d).

220 See, e.g., H.R. Rep. 98-934 at 47 ("Such rules might, but need not, involve combining different access functions on the same channel on a temporary basis until need of the channel capacity designated for each of the functions more fully develops.").

221 47 U.S.C. § 531(c).

enforcement authority applies to provisions that are "proposed by the cable operator which relate to public, educational, or governmental use of channel capacity, whether or not required by the franchising authority pursuant to subsection (b)."[222] Section 611(c) therefore permits the local franchising authority to enforce requirements included in the franchise that a cable operator offers "in excess of minimum requirements that might be established in an RFP."[223] Subsections (b) and (c) are not coextensive.

The only provision that grants authority to a franchising authority to impose requirements for facilities or equipment is Section 624(b), which grants such authority only "to the extent related to the establishment or operation of a cable system."[224] The Cable Act defines the term "cable system" as "a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community . . . ."[225] A "cable service" in turn is defined as "one-way transmission to subscribers" or "subscriber interaction" that may be required to select video programming.[226] Thus, the Cable Act grants to the local franchising authority the power to impose cable-related facilities and equipment requirements that pertain to facilities and equipment for the

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222 Id.

223 H.R. Rep. 98-934, at 46.

224 47 U.S.C. § 544(b). Section 611(c) applies to licenses in effect on the effective date of the Act. 47 U.S.C. § 544(c).

225 47 U.S.C. § 522(7).

226 47 U.S.C. § 522(6).

transmission of video programming. There is no genuine dispute between the parties about the nature and purpose of the facilities and equipment that Framingham demanded. Framingham's purpose in requiring Comcast to provide a staffed and equipped public access production studio and a mobile production van was to address what Framingham claims is the public's need for facilities to produce public access programming. Save for the transmission paths and equipment necessary to transport a signal from the studio to subscribers, we find that the public access production studio and equipment, training courses, and mobile production van cannot be characterized as related to the operation of a "cable system."[227]

We note that Section 624(b)(2) has a similar construction to Section 611(c). Thus, we read Section 624(b)(2) as providing statutory authority to enforce terms for facilities and equipment whether or not related to the establishment or operation of a cable system, if voluntarily offered by the cable operator and reduced to the franchise agreement. That is, Comcast may voluntarily offer terms to operate a PEG access studio, but it has no obligation to do so. Comcast may voluntarily offer to provide PEG studio equipment and facilities to the issuing authority or to an access corporation, but it has no obligation to do so.

Thus, as a matter of law, Framingham has no authority to require Comcast to operate or staff a public access studio, to provide public access studio training, or to provide a mobile

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[227] It should be noted that Framingham had the power to enforce terms for non-cable related facilities and equipment that Comcast offered to provide under the existing franchise agreement. 47 U.S.C. § 544(b)(2). As discussed above, however, this franchise enforcement power does not expand Framingham's power to establish requirements in an RFP.

production van or other public access studio equipment.[228] The Cable Division determines that Comcast's refusal to continue operating the local access studio, provide studio training, or provide studio equipment cannot be a factor in denying its renewal proposal as a matter of law.

We turn to the question of Comcast's obligations with respect to LO. LO is programming which is developed by the cable operator specifically for the community it serves. LO programming is not PEG programming. Indeed, Framingham's RFP treats LO differently, requiring Comcast to air such programming on a separate channel. Therefore, Section 611 is inapplicable to our analysis.

Section 624, however, addresses a franchising authority's role with respect to programming services provided by a cable operator. Section 624(b)(1) provides that in a request for a franchise renewal proposal, the local franchising authority may not "establish requirements for video programming or other information services," other than certain notice

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[228] None of the cases cited by the Framingham provide guidance on this issue. In Denver Area Educational Telecommunications Consortium, Inc. v. FCC, 518 U.S. 727, 734 (1996), while the Supreme Court observed that under the Cable Act, local governments have required cable operators to set aside "channels" for PEG use in consideration for permission to install cables under city streets and across public rights-of-way, the Court did not discuss whether a local franchising authority could impose services, facilities, or equipment requirements beyond what is necessary to provide access to the channels. Framingham's reliance upon Chicago Cable Communications, 678 F. Supp. 734 and Glendora v. Cablevision, 893 F.Supp. 264, is similarly misplaced. Demarest provides no counsel, because the entity providing public access studio services in that case was an independent public access corporation, precisely what Comcast proposes to establish in Framingham. Finally, neither Erie Telecommunications nor Danville provide any support to Framingham's argument that it may require continued cable operator staffing of the public access studio in a renewal proposal.

requirements under Section 624(h), which are not relevant.[229] Where the Cable Act grants the franchising authority the power to enforce programming requirements, the grant is narrowly defined to include only "broad categories of video programming." Framingham argues that LO should be considered such a broad category of programming. We disagree, and, more importantly, we find that Framingham's claimed authority under Section 624(b)(2) to "enforce any requirements contained within the franchise . . . for broad categories of video programming or other services" cannot be read to grant Framingham the authority in its RFP to impose LO requirements upon Comcast, because that would be contrary to the plain meaning of Section 624(b)(1). The local franchising authority's power to "enforce" the provision of broad categories of programming is only relevant if the cable operator has made a voluntary commitment to provide such programming as a bargained-for term during the course of its negotiations with the local franchising authority. Thus, the Cable Division determines that Framingham does not have the authority to establish an LO programming requirement in the RFP. The Cable Division determines that Comcast's refusal to commit to providing LO programming cannot be a factor in denying its renewal proposal as a matter of law.

(2) Pass-Through

With respect to the pass-through of operational costs related to public access, we agree with Comcast that whether, and to what extent, Comcast may pass through such costs in rates

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229 47 U.S.C. § 544(h).

is a ratemaking issue subject to the Cable Division's jurisdiction.[230] Framingham may not prohibit Comcast from passing approved costs through to subscribers. The Cable Division determines that Comcast's assertion of its right to pass through such costs in accordance with applicable law may not be a factor in Framingham's denying the renewal proposal.

(3) PEG Funding and Public Access Corporation

Although we have determined that Framingham was precluded, as a matter of law, from mandating terms relative to the operation of the public access studio, there nonetheless remains a question of fact as to the reasonableness of Comcast's PEG access funding proposals for operational costs and capital. Thus, we must determine whether Framingham's funding needs can be shown in this proceeding to be in the interests of the community in view of the costs.[231]

Framingham did not move for summary decision on this issue as it claimed that it was so fact-intensive as to preclude summary decision. As for the level of funding that Comcast has offered to provide for the operation of the PEG access studio, Comcast cites to evidence that demonstrates that its proposal is cost-neutral.[232] Framingham admits that its Town Manager and Assistant Manager had no experience with access corporations, nor did they have

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230 G.L. c. 166A, § 15.

231 See H.R. Rep. 98-934, at 72.

232 Comcast Mot. Summ. Decision at 17, citing JX.33, at 12; JX. 27, at 19; JX.9, Bates No. 3291.

any way to determine what the cost of operating the studio would be.[233] Thus, Framingham is unable to dispute in this proceeding that the estimated yearly expense to operate a public access studio, based on 2002 costs, would be $137,000, and the proposed 2.5 percent of gross annual cable service revenues would yield $224,000 during the first year to approximately $320,000 in a tenth year, if the franchise were granted for that period.[234] Comcast, however, did not demonstrate in its motion for summary decision the operational cost to provide educational or governmental programming. Thus, there remains a material question of fact whether Comcast's offer to provide 1 percent of its annual cable service revenues to support educational programming, and 1 percent to support government programming, is sufficient. Moreover, the only substantive discussion in the motions of the capital improvement costs necessary to continue the same level of operation of the studio is Comcast's assertion that the equipment "should be relatively new and will not need replacing for some time," based on the fact that Framingham has received, and currently receives, capital support from Comcast.[235] We find that this statement is insufficient to establish a lack of a genuine material dispute as to the necessary capital support. The actual expected capital costs have not been established. Whether Comcast's total offer to support operations and capital upgrades is reasonable remains a question of fact to be tried. Accordingly, we deny Comcast's motion for summary decision

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233 Framingham Opp. to Comcast Mot. Summ. Decision at 18; see Comcast Mot. Summ. Decision at 16, 18.

234 JX.27, at 19; JX.33, at 12.

235 JX.33, at 13–14.

in part on the issue of the reasonableness of its proposal for PEG access corporation and funding.

3. Emergency Alert Services (Reason 8)

a. Introduction

The RFP required Comcast to "continue to provide the current required Emergency Alert Override Capability for the Town, to be controlled by the Issuing authority. (See Renewal License, Section 3.22). At a minimum, such a system should include over-ride [*sic.*] capacity authorized by a remote-control telephone code."[236] Comcast proposed to comply with all federal regulations relative to Emergency Alert Systems at 47 C.F.R. Part 11.[237] Framingham rejected the renewal proposal on this issue, because "Comcast would not agree to continue to make available to the Issuing Authority or its designee(s) the capability for emergency override messages over the Cable System."[238]

b. Positions of the Parties

(1) Comcast

Comcast maintains that it has not proposed to make any changes from the emergency alert system ("EAS") currently in place under the existing license.[239] According to Comcast, the existing license provides that the Framingham system

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236 JX.8, at Bates No. 2952.

237 JX.9, Bates No. 3230.

238 Framingham Decision at 3 (Reason 8).

239 Comcast Mot. Summ. Decision at 43, citing JX.39, at 60:4–18.

> shall have an activated Emergency Alert System . . . that will override the audio and video Signal(s) carried on the Framingham Subscriber Network. The EAS will switch-off Cable Television Signals at the local Hub site and automatically insert video and audio messages that will alert and instruct Subscribers to follow specific emergency related instructions. The Licensee shall meet all FCC EAS requirements.[240]

Thus, Comcast argues, the existing license does not require Comcast to provide emergency alert override capability to Framingham.[241]

Moreover, Comcast contends that local EAS override is inconsistent with FCC EAS requirements and the Massachusetts State EAS Plan.[242] Comcast claims that only four agencies may activate the EAS under the Massachusetts plan: the Governor, the state police, the National Weather Service, and the Massachusetts Emergency Management Agency ("MEMA"). Further, Comcast asserts, MEMA is responsible for disseminating emergency information to the public, and under the current plan, local authorities must contact MEMA to request activation of the system.[243] Comcast contends that any separate local insertion capability must be specifically approved by state officials.[244] Comcast contends that it has

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240 Id., citing JX.1, at 20–21.

241 Id.

242 Id., citing 47 C.F.R. § 11.55(b); CX.17, EAS Plan, 1. While Comcast cites to the EAS Plan as part of its exhibit, CX.17, we note that this exhibit, as provided by the parties to the Cable Division, does not contain a copy of the Massachusetts EAS Plan.

243 Id. at 43–44, citing CX.17, EAS Plan, 1; CX.17, Massachusetts Emergency Support Function No. 14 ("MAESF14"); JX.27, at 39:15–20; Tr. IV, at 11:25–12:17.

244 Id. at 44, citing JX.27, at 39:20–21.

offered uncontradicted evidence that local override capability would be less effective than the EAS mandated by federal law and could interfere with federal and state plans.[245]

Comcast argues that Framingham offered no evidence of a need for local insertion capability.[246] Finally, Comcast argues that in light of the cost, which Comcast claims is excessive, required to install the technology that would permit Framingham to override the entire system, and in the absence of data supporting Framingham's need for override capability, "it is apparent from the evidence that when costs are taken into account, Comcast's proposal is adequate to meet Framingham's EAS needs and interests."[247]

(2) Framingham

Framingham cites to the same provision in Section 3.22 of the 1999 Renewal License, claiming that the license required emergency communications capabilities that enable local safety officials to override television programming in the event of a local emergency.[248] Framingham states that the FCC's rules on EAS are "merely permissive—and not mandatory—regarding local emergency participation."[249] Framingham argues that simply because the Massachusetts EAS Plan identifies four state agencies that are authorized to

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245 Id. at 44–45, citing JX.27, at 41:16–20; JX.39, at 154:15–17.

246 Id., citing JX.27, at 44:15–19; Tr.I, at 90:12–15; JX.40, at 110:10–14.

247 Id. at 46, citing JX.27, at 46; CX.17 at 3; Tr.X, at 46:6–49:12.

248 Framingham Mem. Summ. Decision at 27, citing JX.1 at 20–21.

249 Id. at 28, citing In the Matter of Review of the Emergency Alert System, Notice of Proposed Rulemaking, EB Docket No. 04-296, ¶¶ 2–3 (rel. Aug. 12, 2004); 47 C.F.R. § 11.55(b).

activate the EAS at the state level does not necessarily mean that local communities are forbidden from doing so.[250] Therefore, Framingham contends, the provision of local overrides is left to local negotiations.[251] In its motion for summary decision, Framingham asserts that it is a "commonly known fact" that local safety officials are the "first responders" in most emergencies, and that "municipal officials felt that after September 11, 2001, local override technology was more important than ever."[252] Moreover, Framingham asserts that most emergencies occur at the local level and that 47 percent of all emergency broadcast system alerts were generated locally.[253]

c. Analysis

Framingham mischaracterizes the nature of Comcast's obligations with respect to local emergency alert participation in claiming that it may require Comcast to provide it with a local override capability as a matter of law. Under the FCC's current regulations, EAS participants are required to transmit national emergency messages, and may, but are not required to,

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250 Framingham Opp. Comcast Mot. Summ. Decision at 37, citing Tr.VI, at 21–22.

251 Framingham Mem. Summ. Decision at 28.

252 Id. Framingham provides no citation to the record or supporting documents for these statements.

253 Framingham Opp. Comcast Mot. Summ. Decision at 37. Framingham provides no citation to the record or supporting documents for these statements, but rather cites to a website, the authenticity and reliability of which we cannot determine. It is not clear that this material would be admissible as evidence. Because this material is not of the type of document that may support an opposition to a motion for summary decision, and in any event was not submitted with the opposition, we decline to consider it. See Mass. R. Civ. P. 56.

participate in State and Local EAS plans.[254] This does not open the provision of local override capability to the discretion of local franchising authorities, because participation in state and local plans is at the discretion of the cable system.[255]

Moreover, cable systems that do choose to participate in State and Local EAS plans must conduct EAS operations "as specified in State or Local Area EAS Plans."[256] State or Local Area plans must be reviewed and approved by the Department of Homeland Security prior to implementation to ensure that they are consistent with national plans, FCC regulations, and EAS operation.[257] Unless such a plan exists, Framingham may not require Comcast to provide it with the capability to override the cable system as a matter of law. Framingham's claim of need for such a capability as a "first responder" does not overcome the prerequisite of a specific and coordinated plan. Framingham has not alleged the existence of an approved plan specifically granting Framingham the authority to activate EAS.[258] Thus, as a matter of law,

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254 47 C.F.R. § 11.55(a). The FCC is currently reviewing whether to require EAS participants to transmit EAS messages issued by state governors, but this does not affect the question presented today. In the Matter of Review of the Emergency Alert System, EB Docket No. 04-296, First Report and Order and Further Notice of Proposed Rulemaking, FCC 05-191 (rel. Nov. 10, 2005).

255 47 C.F.R. § 11.55(a).

256 47 C.F.R. § 11.55(b).

257 47 C.F.R. § 11.21.

258 The statement by Frank Foss, to which Framingham cites, suggests at best that it is technically feasible to provide Framingham the capability to send emergency override messages over the cable system, Tr.VI, at 21–22, but this does not demonstrate that Framingham is authorized to activate EAS.

Framingham may not require a cable operator to provide it with the capability to activate EAS. Therefore, we grant Comcast's motion and deny Framingham's motion on the EAS issue.

4. Institutional Network (Reason 9)

a. Introduction

The RFP required Comcast "to operate and maintain the current Institutional Network ("I-Net"), in order to continue providing the Town with bandwidth for municipal, educational and institutional use . . . ."[259] Comcast offered

> to provide the Town with a Fifty Thousand Dollar ($50,000) Technology Grant to be used towards procuring other forms of technology to satisfy the Town's data needs, rather than continue to maintain the existing I-Net through the term of the renewal license. In addition, the Licensee will provide the Town with an annual grant of one-quarter percent (0.25%) of its gross annual revenues to be used to fund such other technologies.[260]

Although the parties have briefed the Cable Division on a number of additional obligations requested in the RFP pertaining to the I-Net, namely, providing drops to additional locations, the installation of fiber optics, and annual funding, Framingham states that its only grounds for its denial of Comcast's proposal with respect to the I-Net was related to Comcast's failure to continue to maintain the existing data capability on the I-Net.[261] Therefore, because Framingham does not object to the other aspects of Comcast's proposal with respect to the I-Net, we review the parties' arguments only regarding existing data capability below.

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259 JX.8, at Bates No. 2960.

260 JX.9, at Bates No. 3244.

261 Framingham Opp. Comcast Mot. Summ. Decision at 34; Framingham Decision at 4 (Reason 9).

b. Positions of the Parties

Comcast states that the Cable Act authorizes the Town to request capacity on an I-Net that the company constructs or operates to serve only non-residential subscribers, but does not require Comcast to build an I-Net.[262] Comcast contends that it did not propose to discontinue the operation of, or disable the functionality of, data transmission services on the existing I-Net.[263] Rather, Comcast states that it proposed only to disclaim responsibility for maintaining the current I-Net for data transmissions, based on its experience that technical problems with data transmission typically arise from equipment failure at the user end, and because the parts required to support the current I-Net data functionality are no longer being manufactured.[264] Comcast suggests that Framingham does not need Comcast to provide an I-Net since RCN operates a newly constructed I-Net in the town, and that a coaxial I-Net is not a technically practical or financially feasible back-up system.[265] Comcast contends that its proposal meets Framingham's I-Net related needs and interests, when the cost of meeting those needs and interests are taken into account.[266]

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262 Comcast Mot. Summ. Decision at 35, citing 47 U.S.C. § 531(b), (f); Comcast Opp. Framingham Mot. Summ Decision at 36, citing Tr.IX 60:10–62:7.

263 Comcast Mot. Summ. Decision at 36, citing JX.33, at 6:16–20; Tr.IX at 60:10–62:7.

264 Comcast Mot. Summ. Decision, at 36, citing JX.33, at 6:21–7:7; id. at 39 n.12, citing Tr.X at 54:23–57:4.

265 Id. at 37.

266 Id. at 41.

Framingham states that the current and prior cable licenses have required an I-Net with data capabilities and that the Town relies on it.[267] Framingham argues that it has the right to require continuation of the use of the I-Net for data transmission.[268] Framingham claims that it found strong support for Comcast's continuing to maintain the I-Net's existing data capabilities.[269] Framingham claims that Comcast refused to continue to allow it to use the I-Net for data transmission purposes and did not respond in any manner to the Town's request that the I-Net continue to be capable of providing data transmissions.[270]

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267 Framingham Mem. Summ. Decision at 29–30, citing JX.1, at 15 (1999 Renewal License, § 3.2(a)).

268 Id. at 29, citing 47 U.S.C. § 531(b).

269 Id. at 30, citing JX.5, at 30 (testimony of Kathleen McCarthy, Framingham Director of Technology Services); Framingham Opp. Comcast Mot. Summ. Decision at 34, citing JX.5, at 29–33 (testimony of Kathleen McCarthy), 52–53 (testimony of Tim Lundy, Framingham School Department Director of Technology); Tr.V at 49–50. (testimony of Kathleen McCarthy).

270 Framingham Opp. Comcast Mot. Summ. Decision at 34.

c. Analysis

The issue is not whether Framingham may require Comcast to build an I-Net or provide certain data transmission capability, but rather concerns the maintenance of the existing I-Net. Comcast's argument with respect to the cost focuses on a false point by demonstrating the cost of building a new, fiber-based I-Net. Although there may be evidence that Framingham's data needs exceed the capacity of Comcast's I-Net, Framingham's RFP only required Comcast to maintain the current data capability. Therefore, Comcast has no obligation to build a higher capacity fiber-based I-Net. Further, Comcast did not propose discontinuing Framingham's use of the I-Net for data transmission purposes as Framingham claims. Rather, Comcast proposed that it would stop maintaining the data transmission capability of the I-Net, and instead offered a capital grant to Framingham to be used to procure an alternative data technology. Therefore, we must determine whether Comcast's proposal to provide a capital grant is reasonable to meet Framingham's ascertained need, i.e. continued maintenance of the current data capability of the I-Net, balanced against the cost of having Comcast maintain that capability.

Comcast did not demonstrate the cost of maintaining the current capability, so we cannot determine that the cost is unreasonable; nor did Comcast demonstrate that the proposed capital grant was sufficient to meet Framingham's need to maintain the current data capability by procuring an alternate technology. Framingham also did not meet its burden on summary decision to demonstrate that Comcast would be unable to make such a demonstration of cost if this case were tried. Therefore, both motions are denied on the I-Net issue.

5. Cable System Extensions and Line Extension Charges (Reason 10)

a. Introduction

The RFP included a build-out requirement to all residents "without additional installation charges."[271] Comcast proposed a build-out obligation with a dwelling density limit: "[t]he Licensee shall not be obligated to extend the Cable Communications System into any area where there are fewer than thirty (30) dwelling units per areal strand mile and sixty (60) dwelling units per underground mile of cable, calculated from the nearest trunk line."[272] With respect to installation costs, Comcast proposed that installations within 125 feet of the existing cable system plant would be entitled to "standard" installation rates, and installations over 125 feet from existing plant would be provided at actual cost plus a reasonable rate of return.[273] Framingham denied the proposal in this regard on the grounds that "Comcast would not agree to continue to make its cable service available to all Framingham residents without additional so-called line-extension charges (other than customary installation costs), as currently required by the Renewal License."[274]

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271 JX.8, at Bates No. 2961.

272 JX.9, at Bates No. 3276.

273 Id. at Bates Nos. 3276–77.

274 Framingham Decision at 4.

b. Positions of the Parties

(1) Comcast

Comcast argues, as an initial matter, that Framingham does not have legal authority to require Comcast to accept a license requirement to build additional cable system facilities while foregoing its legal right to recover the costs of such construction through customer payments.[275] Comcast argues that it is permitted by law to recover the costs of extending its cable system plant and to impose standard charges for connections within 125 feet of the existing plant.[276] Comcast notes that the 1999 Renewal License allowed Comcast to recover actual costs to extend the cable system to within 150 feet for aerial installations and 100 feet for underground installation.[277] With respect to the density terms, Comcast notes that the 1987 license only required the cable system to be built in areas with an average density of 70 residential units per mile or 35 subscribing customers per mile.[278] Comcast states that its proposal would exclude homes only in new subdivisions built in the less dense, northern part of Framingham, where the developer did not put conduit in the ground for cable services.[279] Comcast argues that the cost of installation in such areas would be prohibitive.[280]

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275 Comcast Mot. Summ. Decision at 28.

276 Id., citing 47 C.F.R. § 76.309(c)(2)(i).

277 Id. at 31, citing JX.1 at 17–18 (§ 3.8(c)).

278 Id. at 30–31, citing CX.18, at 5–6 (§ 4(b)).

279 Id. at 29, citing JX.27, at 34:3–4; JX.33, at 22:19–22.

280 Id., citing JX.33, at 23:6–13.

(2) Framingham

Framingham does not move for summary decision on this point, because it argues that the question is so fact intensive as to be unreviewable on summary decision.[281] Framingham argues that Comcast failed to establish that it is entitled to prevail as a matter of law. In response to Comcast's motion, Framingham argues that 47 C.F.R. § 76.309(c)(2)(i) does not support Comcast's argument that it has a legal right to recover the cost of construction through customer payments, because that section deals with customer service obligations.[282]

c. Analysis

Although Framingham is correct that 47 C.F.R. § 76.309(c)(2)(i) is a customer service standard, Comcast's right to pass through the cost of installations to extend the cable system to within 125 feet of a dwelling arises from 47 C.F.R. § 76.925. That is, a requirement to include in the definition of standard installation those installations that are at a distance beyond 125 feet from the existing distribution system would be a franchise requirement that exceeds federal customer service standards at 47 C.F.R. § 76.309, and thus, the costs of compliance of which would be treated as a franchise related cost and recoverable.[283] Framingham has no authority to require any particular rate treatment be accorded to these costs.[284] Accordingly,

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281 Framingham Mot. Summ. Decision at 5; Framingham Opp. Comcast Mot. Summ. Decision at 29. We note, however, that Framingham does not cite to any facts that are in dispute with respect to this issue.

282 Framingham Opp. Comcast Mot. Summ. Decision at 29.

283 47 C.F.R. § 76.925(a)(3).

284 G.L. c. 166A, § 15.

Framingham's stated reason for denying Comcast's proposal on this issue is unreasonable as a matter of law.

Nevertheless, we are unable on the record before us to determine whether Comcast's proposal was reasonable given that Framingham excluded all evidence of competition from the proceeding below. The reasonableness of a build-out requirement is dependent upon an analysis of the company's ability to earn a return on its investment. The presence, if any, and the extent of competition would be relevant factors in that analysis. Moreover, Comcast did not demonstrate the cost is unreasonable or that Framingham's subscribers are unwilling to pay for the cost of extending service to such areas of Framingham. These remain questions of fact to be tried.

6. Senior Discounts (Reason 11)

a. Introduction

The RFP required Comcast to provide a discount to senior citizens over the age of 62.[285] Comcast responded by offering to continue to provide a senior discount outside of the licensing process.[286] In support, Comcast argued that while it is not prohibited from providing such a discount, the Town cannot mandate one.[287]

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285 JX.8, at Bates No. 2963.

286 JX.33, at 17.

287 JX.9, at Bates No. 3251.

b. Positions of the Parties

(1) Comcast

Comcast argues that requiring a senior discount constitutes rate regulation.[288] Comcast notes that the Cable Division has stated that "no state law or regulation requires an operator to offer such a discount and thus, the issue is left to license negotiations."[289] Comcast states that state and local requirements governing rates are permissible only to the extent that they are consistent with the FCC's rate rules.[290]

Comcast urges the Cable Division to reject Framingham's argument that Section 623(e)(1) grants it the power to require a senior discount.[291] Comcast argues that this section provides only that senior discounts are discretionary for a cable operator. Comcast states that Section 623(d) establishes a general requirement for cable operators to maintain a "uniform rate structure."[292] Comcast then argues that Section 623(e) grants the Cable Division the power to prohibit rate discrimination, but that Section 623(e)(1) provides that no government "may prohibit a cable operator from offering reasonable discounts to senior

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288 Comcast Mot. Summ. Decision at 27.

289 Id., citing Investigation and Study Relative to the Adequacy and Effectiveness of Existing Licensing and Regulation of Cable Television Operations in the Commonwealth of Massachusetts (Cable Division, submitted to Massachusetts General Court, Joint Committee on Government Relations, January 1999).

290 Id., citing City of New York v. FCC, 486 U.S. 57, 64 (1988); Time Warner Entertainment, Co. v. FCC, 56 F.3d 151, 197, 188 (D.C. Cir. 1995); Town of Norwood v. Adams-Russell Co., 406 Mass. 604, 611–12 (1990).

291 Comcast Opp. Framingham Mot. Summ. Decision at 37.

292 Id. at 39.

citizens or other economically disadvantaged group discounts."[293] Comcast argues that while this section limits a franchising authority's ability to preclude voluntary senior discounts, it nowhere implies a right to compel such discounts. Comcast maintains that this section should be read in contrast with Section 623(e)(2), which permits franchising authorities to "requir[e] and regulat[e] the installation or rental of equipment which facilitates the reception of cable service by hearing impaired individuals."[294] Comcast argues that had Congress intended to leave local regulators with the authority to "require and regulate" senior discounts, it would have drafted subsection (e)(1) consistently with subsection (e)(2).[295]

(2) Framingham

Framingham asserts that negotiating a senior discount is allowable under federal law and does not constitute rate regulation.[296] Framingham claims that its legal right to require such a discount arises from Section 623(e)(1).[297] Framingham argues that the FCC has repeatedly found that "the specific senior rate provisions in the agreement are solely within the purview of local law."[298] According to Framingham, the FCC held, in Matter of Harron Communications Corp., that "[a]lthough the senior citizen discounts are required in Harron's

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293 Id.

294 Id.

295 Id.

296 Framingham Mem. Summ. Decision at 34.

297 Id. at 32.

298 Id., quoting In the Matter of City of Antioch, California, No. CSR-5239-R, ¶ 12 (FCC Feb. 2, 1999).

Rockland system franchises and may not have been offered . . . without a franchise requirement, the mere presence of a franchise requirement does not automatically result in a cable operator's right to recover its value as an external cost."[299] Framingham states that the Cable Division has recognized that such discounts are allowed under federal law.[300]

Framingham claims that a senior discount is a local need that Comcast refused to address or provide explanation for its discontinuance.[301] Framingham contends that the fact that senior discounts were included in prior licenses for over 20 years demonstrates that the cost of such discounts is reasonable.[302] Framingham maintains that although Comcast has stated that it intends to continue the senior discount, it should not be permitted to excise the term from the franchise without a showing of hardship.[303] Framingham contends that it is not required to renew a cable license agreement based on an unenforceable letter of intent.[304]

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299 Id. at 33, quoting In the Matter of Harron Communications Corp., 15 FCC Rcd. 7901, DA 00-1002, CSB-A-0622, ¶ 9 (FCC May 5, 2000).

300 Framingham Opp. Comcast Mot. Summ. Decision at 27, citing Investigation and Study Relative to the Adequacy and Effectiveness of Existing Licensing and Regulation of Cable Television Operations in the Commonwealth of Massachusetts (Cable Division, submitted to Massachusetts General Court, Joint Committee on Government Relations, January 1999).

301 Framingham Mem. Summ. Decision at 31; see also id. at 33, citing Tr.III at 54–55.

302 Id. at 31.

303 Framingham Mem. Summ. Decision Id. at 34

304 Framingham Opp. Comcast Mot. Summ. Decision at 26.

c. Analysis

Each party relies on its interpretation of Section 623 to support its position with respect to discounts provided to senior citizens. Section 623(d) contains the general requirement that cable operators maintain an "uniform rate structure." Section 623 allows an exception to the general rule by deeming reasonable discounts to senior citizens nondiscriminatory. The subsection creates no obligations, and preserves existing state jurisdiction,[305] except that the Cable Division may not prohibit a cable operator from offering reasonable discounts to senior citizens or other disadvantaged groups.

We contrast Section 623 (e)(1) with Section 623(e)(2), which permits franchising authorities to "requir[e] and regulat[e] the installation or rental of equipment which facilitates the reception of cable service by hearing impaired individuals." As Comcast argues, had Congress intended to leave local regulators with the authority to "require and regulate" senior discounts, it would have drafted subsection (e)(1) consistently with subsection (e)(2). Thus, the import of Section 623(e)(1) is only that a reasonable senior rate discount, if offered by the cable operator, must be accepted by the franchising authority.

In further support of its position, Framingham also relies on prior statements of the Cable Division. Framingham gives too much meaning to the Cable Division's recognition that some operators voluntarily offer senior discounts and that such offers are occasionally made during license negotiations. The Cable Division's statement that the issue of senior discounts is left to license negotiations was not intended to create a legal right of local franchising

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[305] G.L. c. 166A, § 15.

authorities to require senior discounts as a condition of approving a franchise. Rather, it was an observation that there is no federal or state law requirement to provide such a discount, and that such a term, like many other franchise terms that we address in this Order, may be offered by the cable operator as a bargained-for term during negotiations.

Moreover, as Harron demonstrates, senior discounts are not eligible for external cost treatment, but rather are simply discounts from established rates that may not be recovered from other ratepayers by charging a rate exceeding the maximum permitted rate established under the FCC's rules.[306] Harron further states that senior citizen discounts are not the kinds of costs recoverable through a cost-of-service showing.[307] The imposition of a senior citizen discount by an issuing authority would thus reduce a cable operator's revenues. It therefore follows that if a cable operator is to forgo such revenues, it must be voluntary and may not be imposed by an issuing authority. Thus, the refusal to offer a senior citizen discount may not be a factor in denying a license renewal as a matter of law. Nevertheless, we encourage the continuation of senior citizen discounts whether offered in the course of license negotiations or as a separate agreement, and we expect cable operators to honor all agreements to provide such discounts.

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306 Harron at ¶¶ 9–10.

307 Id. at ¶¶ 9–11.

7. Enforcement Provisions: Performance Bond, Determination of Breach, and Liquidated Damages (Reason 12); Security Fund (Reason 22)

The RFP required a proposal to provide a performance bond in the amount of $250,000, a security fund of $30,000, and liquidated damages terms for certain events.[308] Comcast offered to maintain a performance bond of $25,000, but no security fund, and did not propose liquidated damages language.[309] Framingham denied the proposal on the grounds that Comcast would not agree to provide a performance bond and security fund in the amounts currently required under the 1999 Renewal License, and did not provide a determination of breach process and liquidated damages language.[310] Except with regard to the issue of a determination of breach process, neither motion demonstrates a lack of a genuine issue of fact as to whether or not Comcast's proposals were reasonable. We describe the general weaknesses in both motions below.

Comcast's arguments with respect to the performance bond and security fund rest generally on its assertions that no town has ever taken recourse against Comcast under a performance bond, that Comcast's performance record is "unblemished," and that Framingham has not made Comcast's performance an issue in the renewal.[311] From these assertions, Comcast apparently calls on the Cable Division to determine that its proposals for the performance bond and security fund are "reasonable." These arguments, however, require

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308 JX.8, at Bates Nos. 2965–66.

309 JX.9, at Bates No. 3303.

310 Framingham Decision at 4–5.

311 Comcast Mot. Summ. Decision at 47–51.

the Cable Division to weigh Comcast's performance against the costs of the risk of nonperformance, an exercise that is entirely unsuited for summary decision. Comcast did not establish a lack of a genuine dispute as to the appropriate level of security, nor did Comcast establish that Framingham will be unable to demonstrate its case.

Framingham provides no factual support for its motion other than the fact that Comcast has now offered performance bond and security fund amounts significantly less than Comcast's predecessors in prior licenses.[312] Framingham failed to address why the proposed amounts are insufficient to cover the risk of default today. Without proof of the risk of default, Framingham has identified no basis for the Cable Division to determine that Comcast's refusal to meet the RFP terms was unreasonable given the cost to cover that risk.

With regard to liquidated damages, Comcast's argument that such damages would only serve to penalize Comcast rather than compensate for actual loss would still require us to weigh the potential losses against the liquidated damages. Comcast has not established sufficient facts for the Cable Division to rule in its favor on summary judgment. Framingham's argument, relying upon 47 U.S.C. § 542(g)(2)(D) begs the question whether the liquidated damages provisions of the 1999 Renewal License are still reasonable and necessary to meet its cable-related needs. At best, this provision indicates that the Cable Act contemplates some level of liquidated damages that is not included in the franchise fee cap, but Framingham may not rest on this section to establish facts on summary decision regarding what level of liquidated damages would be reasonable.

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312 Framingham Mem. Summ. Decision at 35–37.

Finally, with respect to the determination of breach procedures, Comcast argues that Framingham did not ascertain any need for precise remedies and the RFP did not require it to propose any determination of breach procedures; therefore, Comcast argues, those procedures should have been subject to negotiation, and it was unreasonable for Framingham to deny its proposal that the issuing authority "may determine to pursue any lawful remedy available to it."[313] Framingham states simply that the proposed procedures lacked the specificity of the language contained in the 1999 Renewal License.[314] We find no terms in the RFP mandating specific determination of breach language.[315] Therefore, the parties chose to leave these terms to negotiation,[316] and, as a matter of law, it was improper for Framingham to deny the renewal on this basis.

8. Reports (Reason 13)

a. Introduction

The RFP required Comcast to propose to submit to Framingham certain reports pertaining to Comcast's operation of the cable system in Framingham:

> including, but not limited to, quarterly complaint reports, quarterly outage reports, detailed financial reports, performance test reports, quarterly LO programming logs, telephone reports, construction reports, annual number of

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313 Comcast Mot. Summ. Decision at 48–49, citing JX.9, at Bates Nos. 3307–08.

314 Framingham Mem. Summ. Decision at 36.

315 See JX.8, at Bates Nos. 2965–66.

316 See id. at Bates No. 2951.

> subscribers, etc. all of said reports must be specific to the Framingham cable system alone.[317]

Comcast responded that it would provide financial statements and records of customer complaints as required by the Cable Division, as well as records required by the FCC to be maintained for public inspection.[318] Framingham cited Comcast's failure to agree to continue to provide certain reports that it states are currently required by the 1999 Renewal License as a ground for denying the renewal proposal.

b. Positions of the Parties

Comcast argues that Framingham failed to introduce evidence to demonstrate that it has a need for the reports requested, and that it has proposed to provide all reports that the Town needs to fulfill its duties as a franchising authority.[319] Comcast asserts that Framingham's reporting requirements would have subjected Comcast to increased costs and diverted resources away from providing service.[320] Framingham counters that the RFP did not request new reports, but only a continuation of reports previously provided.[321] Framingham claims that Comcast did not provide evidence of any increased costs and that Comcast did not previously

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317 Id. at Bates No. 2966.

318 JX.9, at Bates No. 3305. Comcast's response to the RFP contains an erroneous cite to the FCC regulations. The FCC's regulations on records maintenance are codified at 47 C.F.R. §§ 76.1700 – 76.1717.

319 Comcast Mot. Summ. Decision at 59.

320 Id., citing JX.27, at 53:12–23.

321 Framingham Mem. Summ. Decision at 37.

object to supplying such reports.[322] Framingham also counters that the documents are necessary to ensure compliance with the licensing agreement.[323]

c. Analysis

Framingham's motion on this point simply makes bare assertions without any citation to the record or legal support for its claim of right. Therefore, Framingham's motion is denied in part on this point.

Comcast's motion rests on the assertion that Framingham has not demonstrated a need for the documents requested; but Comcast has not demonstrated a lack of a material issue as to whether those documents are necessary to ensure compliance with the licensing agreement, or that Framingham will be unable to demonstrate that need. That the reports were provided under previous licenses, however, does not demonstrate that the costs are justified, and Framingham will have to demonstrate that continued need in this proceeding. Further, the mere fact that reporting requirements will subject Comcast to increased costs does not establish that Comcast is entitled to summary decision, because Comcast must demonstrate that the increased cost is unreasonable given Framingham's claimed need for the reports. This too remains a question of fact to be tried. Therefore, Comcast's motion for summary decision is denied in part on this point.

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322 Id. at 37–38.

323 Framingham Opp. Comcast Mot. Summ. Decision at 48, citing JX.32.

9. Definition of Cable System (Reason 14)

a. Introduction

Comcast proposed to define its "cable system" as follows:

> The cable television system owned, constructed, installed, operated and maintained by Licensee in the Town of Framingham for the provision of broadband telecommunications services capable of operating as a fully addressable system of antennas, cables, wires, lines, fiber-optic cables, towers, wave guides or other conductors, converters, equipment or facilities, designed to provide telecommunications services, with includes, but is not limited to distributing video programming and technologies to Subscribers, and/or producing, receiving, amplifying, storing, processing, or distributing audio, video, digital or other forms of signals to Subscribers and in accordance with the terms and conditions in this Renewal License.[324]

Framingham rejected the proposal on the grounds that "Comcast would not agree to continue using the federal definition of 'Cable System' pursuant to the 1999 Renewal License . . . ."[325] Framingham's objection was that the proposed definition "would have potentially given Comcast the right to provide services other than Cable Services, notwithstanding the fact that a new renewal license would only be a grant to provide Cable Services."[326]

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[324] JX.9, at Bates No. 3269.

[325] Framingham Decision at 4.

[326] Id. at 4–5.

b. Positions of the Parties

Comcast argues that it proposed a definition that accurately describes the Framingham system, "which is a broadband system that provides video, digital [telephone] and high speed Internet service to subscribers."[327] Comcast asserts that there is no requirement that cable licenses must incorporate the federal definition.[328] Comcast argues that the federal definition of "cable system" was enacted before broadband technology had been developed and used in cable systems, and fails to describe Comcast's system in Framingham.[329] According to Comcast, because its definition is written accurately to describe the system in Framingham, its proposed definition of cable system is reasonable.[330]

Comcast argues that the federal courts have consistently stated that a cable system operating under a cable television license may provide services other than cable services and still be considered cable systems under the law.[331] Comcast contends that the Cable Act

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327 Comcast Mot. Summ. Decision at 53, citing JX.27 at 59; JX.29, at 3–5.

328 Id. at 54.

329 Id., citing JX.27 at 59; 47 U.S.C. § 522(7).

330 Id. at 54–55.

331 Id. at 54, citing National Cable & Telecommunications Ass'n, v. Gulf Power Co., 534 U.S. 327 (2002); see also Texas Utils. Elec. Co. v. FCC, 997 F.2d 925 (D.C. Cir. 1993).

contains provisions that prevent local governments from using a cable franchise to prohibit or regulate any telecommunications services delivered over a cable system.[332]

Further, Comcast maintains that the RFP did not require Comcast to file a draft renewal license (in which Comcast proposed the definition), and that the contents of the final license were to have been "made during negotiations."[333] Comcast states that it was willing to use the federal definition if Framingham preferred it.[334] Comcast argues that the proposal should not have been rejected on the basis of the proposed definition, because the RFP invited it to negotiate license provisions.[335]

Framingham argues that it had the right to require the use of the federal definition of "cable system," because federal law prescribes the definition.[336] Framingham argues that Comcast's proposed definition attempts to include "telecommunications services," which do not fall within the definition of cable services as defined by the Cable Act.[337] Framingham suggests that Comcast may not insist upon a definition that gives it the right to provide telecommunications services when the statutory definition of a cable system does not explicitly

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332 Comcast Opp. Framingham Mot. Summ. Decision at 42, citing 47 U.S.C. § 541(b)(3)(A)–(D).

333 Id. at 41, citing JX.8, at Bates No. 2949.

334 Id. at 42, citing JX.27, at 58–59.

335 Id.

336 Framingham Mem. Summ. Decision at 38, citing 47 U.S.C. § 522(7).

337 Id. at 39.

include telecommunications.[338] Framingham contends that the cases cited by Comcast do not support its argument, but pertain only to the rates that may be assessed under the federal Pole Attachment Act, 47 U.S.C. § 224, when video and internet transmissions are commingled on the same facilities.[339]

c. Analysis

The RFP did not require a definition of the term "cable system." Therefore, the definition of the term was a matter for negotiation, and it was improper for Framingham to reject the proposal on the basis of Comcast's proposed definition. In any event, because Comcast concedes that it is willing to use the statutory definition of "cable system" that Framingham desires, there is no longer a live dispute between the parties. Accordingly, the Cable Division denies both motions on this issue as moot.

10. Level Playing Field (Reason 15)

a. Introduction

Comcast proposed a term providing for "level playing field" language: "To the extent allowed by applicable law(s), the grant of any additional cable television license(s) shall be on substantially equivalent terms and conditions as those contained in this Renewal License."[340] Framingham rejected Comcast's proposal in part on the grounds that the language has no basis

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338 Id.

339 Id. at 43.

340 JX.9, at Bates No. 3274.

in applicable state or federal law and would have had a "chilling effect on any new operators seeking to provide Cable Service in Framingham."[341]

b. Positions of the Parties

Comcast argues that the Cable Division as a matter of law should reject Framingham's reasons for denial on the basis of the proposed level playing field language.[342] Comcast argues that Framingham's finding of a chilling effect on market entrants is speculative, and that Framingham never presented any evidence to support the finding.[343] Comcast asserts that, to the contrary, new market entrants would be encouraged to enter a market with the assurance of competitive neutrality by an issuing authority.[344]

Comcast maintains that level playing field language ensures that no other operators providing service in the municipality receive terms and conditions more favorable than those provided in the existing license.[345] Comcast urges the Cable Division to take notice of the fact that Comcast currently faces competition from RCN and DBS providers, and that Verizon has announced plans to construct a new network in parts of Framingham and surrounding communities.[346] Comcast argues that if other providers do not incur the same obligations as

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341 Framingham Decision at 5.

342 Comcast Mot. Summ. Decision at 53.

343 Id.

344 Id.

345 Id. at 52, citing JX.27 at 55–56.

346 Id., citing Tr.X at 62:4–6; CX.19.

Comcast, the cost imposed on Comcast would make it difficult to compete economically, and Comcast could not offer the same level of PEG Access support and other obligations if it must assume the risks of competition.[347] Comcast states that the proposal is consistent with the level playing field language contained in the existing license and that the same language is in 42 of the 43 franchises entered into by Comcast in Massachusetts in 2002 and 2003.[348] Comcast argues that the level playing field language is an issue for negotiation and that the RFP was silent on this issue.[349] Comcast contends that a material dispute exists that precludes summary decision for the Town on this issue, because Framingham refused to allow evidence of competition in the proceeding before it.[350]

Framingham asserts that level playing field language would have a negative chilling effect on new competition.[351] Framingham claims that the proposed language would require it to consider the effects of unlicensed providers over which it has no authority.[352] Framingham asserts that the language was not responsive to Framingham's "fundamental interest in encouraging new competition in the Town in order to benefit cable television

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347 Id., citing JX.27 at 56.

348 Id.

349 Comcast Opp. Framingham Mot. Summ. Decision at 43.

350 Id.

351 Framingham Mem. Summ. Decision at 40. Again, in support of this argument, Framingham cites to a website (the admissibility of which as evidence is tenuous at best), rather than attaching appropriate supporting documents to its motion or citing to record evidence. We decline to consider this information in ruling on the motions.

352 Id.

subscribers . . . ."[353] Framingham also argues that the language would be contrary to the intent of the Cable Act, which is to promote cable service competition.[354] Framingham contends that Comcast has a mature and established cable system, in contrast to new providers, which will have the burden of start-up and installation costs.[355] Framingham insists that it is important for it to have the flexibility to engage freely in negotiations with smaller, less established providers in order to ensure the growth of cable system competition in Framingham.[356]

c. Analysis

As Comcast points out, Framingham failed to mandate terms in its RFP regarding the level playing field language, even though the term was included in the 1999 Renewal License. That is, Framingham failed to identify in its RFP a community need to be free from the constraints of the level playing field provision. It was therefore improper as a matter of law for Framingham to have denied the renewal proposal pursuant to 47 U.S.C. § 546(c)(1)(D) based on the proposed inclusion of the level playing field language. Therefore, we deny Framingham's motion and grant Comcast's motion on this point.[357]

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353 Id.

354 Framingham Opp. Comcast Mot. Summ. Decision at 44.

355 Id. at 44.

356 Id.

357 Note, however, that Comcast moved only for a determination that Framingham's basis for denial was improper on this point, not for a finding that the level playing field language was reasonable as a matter of law.

That is not to say that the level playing field language must be incorporated in the license as a matter of law, because, as Comcast argues, there is a question of fact whether the provision is reasonable, which depends among other things on the state of existing competition and the threat of market entry by other cable operators over the term of a new license. We cannot credit Framingham's assertions of a "chilling effect" on competition, because the assertions are speculative and unsupported by any evidence. Having excluded relevant evidence of competition in the proceedings before it, Framingham could not have made a finding of fact based on evidence that level playing field language would have had a chilling effect on competition. We note that the FCC is currently seeking comments on whether such terms create an unreasonable barrier to entry or whether they create comparability among providers.[358] The FCC has yet to issue findings on this matter. In the proceeding before the Cable Division, Comcast must demonstrate that the level playing field provision is consistent with the Cable Act and that, given the state of competition in the market, the provision is reasonable in order for Comcast to be able to meet Framingham's cable related needs.

11. Ten Year Term (Reason 16)

a. Introduction

With respect to the renewal license term, the RFP stated:

> The Board of Selectmen, as statutory Issuing authority, will grant a renewal license for a term within the range of three (3) to ten (10) years. To this end,

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358 In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection Act of 1992, MB Docket No. 05-311, FCC 05-189, Notice of Proposed Rulemaking at ¶ 14 (rel. Nov. 18, 2005).

> Comcast must specify the length of the renewal license term that it is seeking and must provide the Town with a *detailed* rationale for such a desired term.
>
> Any renewal proposal, regardless of the length requested, *must include*, among other things, Comcast's detailed (i) cost projections, (ii) capital expenditures and investment in any upgraded Framingham cable system, (iii) financial assumptions, and (iv) projected returns during the entire length of the requested term. The Issuing Authority will determine the length of the renewal license term, based upon (i) such financial information, (ii) Comcast's direct investment into technologies that enhance and expand the Framingham cable system's output and channel capacity, and (iii) negotiations with Comcast.[359]

Comcast proposed a ten year license on the grounds that "[a] ten (10) year period is necessary in order to amortize the franchise obligations associated with a Renewal License and our Proposal. A shorter-term license reduces the amortization period causing upward pressure on rates and unnecessary increases to franchise-related cost pass-through on customer's monthly bills."[360] Framingham rejected the proposal on the grounds (1) that neither state nor federal law specifies that the renewal term should be ten years, (2) that Comcast did not provide detailed financial information to support its proposal, and (3) that Framingham "made virtually no requests for new services in the RFP" that would cause Comcast to need a ten-year term.[361]

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359 JX.8, at Bates No. 2950 (emphasis in original).

360 JX.9, at Bates Nos. 3227–28.

361 Framingham Decision at 5.

b. Positions of the Parties

(1) Comcast

As an initial matter, Comcast argues that Framingham cannot reasonably reject the proposal, because the RFP stated that the term of years would be determined after negotiations.[362] Comcast contends that Framingham failed to meet its commitment to negotiate the term.[363]

Comcast argues that it has submitted undisputed evidence to support a ten-year license term.[364] Comcast denies that it failed to provide requested financial information, stating that the Form 100 pro forma schedules provide all of the cost projections, capital expenditures, and projected returns demanded by Framingham.[365] Comcast claims that it has made a substantial investment in the Framingham system over a short period of time and that it is entitled to recover those costs as well as the costs imposed by Framingham in the RFP.[366] One of the purposes of the renewal provision in Section 626 of the Cable Act, Comcast notes, is to "encourage investments by the cable operator" and "ensure that the investment will not be

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362 Comcast Mot. Summ. Decision at 55, citing JX.8, at Bates No. 2950; JX.9, at Bates No. 3227; JX.14, at 14; JX.40, at 121:19–122:24.

363 Id., citing Tr.II, at 107:5–7, 109:7–8.

364 Id. at 56, citing JX.14, at 14; JX.28, at 7:19–22; JX.39, at 161:22–162:15.

365 Id., citing JX.39, at 161:22–162:15.

366 Id., citing H.R. Rep. No. 98-934, at 74 ("in assessing the costs under this title, the cable operator's ability to earn a fair rate of return on its investment and the impact of such costs on subscriber rates are important considerations.").

jeopardized at franchise expiration without action on the part of the operator justifying such a loss of business."[367]

Comcast maintains that the RFP would impose new costs.[368] Comcast states that cable bills would increase between $3.94 to $5.24 per month to cover pass-through costs of all of the requirements of the RFP when amortized over ten years.[369] Comcast claims that the pass-through costs of its own proposal would be $1.50 per month over ten years.[370] Comcast maintains that if those franchise-related costs are amortized over a license term shorter than ten years, the cost to subscribers will increase even further.[371] Comcast claims that undisputed survey evidence demonstrates that the majority of subscribers within the Framingham franchise area would not be willing to pay more to support franchise-related costs.[372]

Comcast contends that Framingham has no evidence to create a dispute of fact, and that neither George King nor Mark Purple reviewed Comcast's submitted financial data, financial

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367 Comcast Opp. Framingham Mot. Summ. Decision at 19, citing H.R. Rep. No. 98-934, at 72.

368 Comcast Mot. Summ. Decision at 57, citing JX.40, at 85:8–23.

369 Id., citing JX.28, at 3:7–11.

370 Id. at 57 n.14, citing JX.27, at 57:12–58:12.

371 Id. at 57.

372 Id. at 58, citing JX.31, at 6:1–7:19, Charts 13–16; JX.27, at 12:5–20, 58:2–6.

assumptions, cost projections, and projected returns.[373] Further, Comcast argues that no one with an accounting background reviewed Comcast's proposal.[374]

(2) Framingham

Framingham argues that under Massachusetts law, a 10-year renewal term is the maximum term that can be granted, but there is no presumption of a 10-year term.[375] Framingham asserts that "Comcast did not respond to virtually any" of the specific requests for information contained in the RFP.[376] Therefore, Framingham argues, "the Issuing Authority could make no judgment as to the appropriateness of the term requested by Comcast."[377] Framingham claims that Comcast has no need to expend substantial new capital, because the RFP contained no request to rebuild the subscriber network, rebuild the I-Net, or build a new studio.[378] Therefore, Framingham argues, Comcast's proposed maximum term is not justified as a matter of law.[379]

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373 Id. at 57, citing Tr.II, at 64:19–66:1; JX.40, at 117:17–118:14, 119:20–120:25.

374 Id. at 58, citing JX.40, at 131:7-9, 118:22-25.

375 Framingham Mem. Summ. Decision at 41, citing G.L. c. 166A, § 13.

376 Id.

377 Id. at 42.

378 Id., citing Union CATV, Inc. v. City of Sturgis, No. 4:95-CV-72-M, slip op. (U.S.D.C., W.D. Ky. Dec. 29, 1995).

379 Id.

c. Analysis

There is no genuine dispute that the RFP indicated that the term of the renewal license would be determined after negotiation of that term between the parties based on financial statements to be submitted with the proposal.[380] Thus, Framingham was obligated by the RFP's own terms to review the submitted financial documents and negotiate a term between three to ten years. It was improper to reject the proposal on the basis of a proposed term that was in the range requested in the RFP and explicitly was left for negotiation.

The case in which a proposal failed to meet the requirements of this RFP could have arisen if Comcast had failed to submit specific supporting documentation that the proposal "must include." Framingham's representation to the Cable Division that Comcast failed to provide documentation to support its proposal as required by the RFP is without merit. A reasonably diligent review of the Form 100 pro forma schedules submitted should have revealed to Framingham that the schedules contain cost projections, capital expenditures and investments in the Framingham system, and projected returns. The undisputed record evidence indicates that the persons responsible for evaluating Comcast's proposal do not recall having reviewed these forms in any detail. Framingham, having failed to review the documents containing the information that it sought, cannot have issued its denial regarding the renewal term issue based on the evidence. Therefore, Framingham's motion with regard to the issue of the term of the renewal is denied.

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380 JX.8, at Bates No. 2950.

On the other hand, while Comcast has produced testimony that whether its proposal is ultimately adopted or whether a proposal implementing all of the town's requests is adopted, the result will be a rate increase to cover the franchise-related costs that may be passed through to customers,[381] the testimony regarding the pass-through is conclusory. These statements alone are insufficient to demonstrate that the pass-through would amount to approximately $1.50 per month at a minimum according to Comcast's proposal, or $3.94 to $5.24 per month according to the RFP. The Cable Division would require more developed testimony from the witnesses in arriving at this result, based on the Form 100 data and other available submissions, in order to verify the billing impact of the increased franchise costs net of embedded costs. Thus, we deny Comcast's motion on the issue of the term of the franchise renewal.

12. Town Hall Fiber Link (Reason 18)

a. Introduction

The RFP required Comcast to "install a direct fiber-link between the Memorial Building and Comcast's headend facility" in order "[t]o improve signal quality on the Governmental Access Channel."[382] Framingham rejected Comcast's proposal in part because "Comcast would not agree to construct and install a direct fiber-link between Memorial Hall (Town Hall) and Comcast's headend facility. The Issuing Authority believes that such a direct

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381 JX.28, at 57 and n.14.

382 JX.8, at Bates No. 2957.

fiber-link would have improved the signal quality on the Government Access channel, to the benefit of Comcast's subscribers."[383]

b. Positions of the Parties

Comcast contends that the only evidence of signal quality is Comcast's evidence that the signal quality on Comcast's system meets or exceeds FCC signal quality standards.[384] Comcast argues that while Framingham states that potential improvement of its government access signal quality is a "benefit," Framingham does not identify it as a cable-related community need or interest, and therefore, Framingham ignored the applicable standard in rejecting Comcast's proposal on this point.[385] In contrast, Comcast argues that it has offered undisputed evidence that 84 percent of Framingham subscribers are satisfied with the picture quality on the Comcast system, and that 79 percent of Framingham subscribers would not favor an increase in their monthly cable bills to support the I-Net.[386] Comcast urges the Cable Division to conclude that a similar percentage of subscribers would not be willing to pay for a bill increase to support an improvement in signal quality for the government access channel.[387] Comcast

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383 Framingham Decision at 5.

384 Comcast Mot. Summ. Decision at 24, citing JX.27, at 29:19–21; JX.29, at 6:7–16.

385 Id. at 25.

386 Id., citing JX.9, at Bates No. 1522; JX.31, at 6:34–35.

387 Id.

maintains that it is undisputed that a fiber link would cost subscribers an additional $200,000.[388]

Framingham did not move for summary decision on this issue. Framingham's opposition to Comcast's motion on this point does not respond with countervailing evidence to Comcast's motion.[389]

c. Analysis

Framingham does not address the ground for Framingham's denial of the proposal, which was that Comcast would not agree to construct and install a fiber-link from the Town Hall to the headend. Comcast has presented testimony, undisputed by Framingham, that there is an existing coaxial drop to the Town Hall.[390] We do not rely upon Comcast's citation to testimony that its system meets or exceeds FCC signal quality standards, because Comcast did not identify the relevant standards. Comcast has demonstrated that subscribers are satisfied with the signal quality of the system, and that the cost of a new fiber link would be $200,000. However, Comcast's motion relies upon an inference that subscribers would be unwilling to pay for an improvement in signal quality. We are unable to draw this inference in favor of Comcast on summary decision. Therefore, we deny Comcast's motion in part on this issue.

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388 Id. at 26, citing JX. 27, at 30:2–5; Tr. II at 97:6–10.

389 Framingham Opp. Comcast Mot. Summ. Decision at 23.

390 JX.27, at 29:19–21.

13. Expanded Basic Cable and Additional Drops (Reasons 19 and 20)

a. Introduction

The RFP required Comcast to provide to all Framingham Public School buildings and all other public buildings in the town "a free, activated cable drop, outlet and free monthly Expanded Basic Service to all such public buildings, at the written request of the Town," and "to continue providing up to three hundred (300) additional drops and/or outlets in School buildings, without charge to the Issuing Authority or the School Department."[391] Comcast proposed to maintain the current level of active drops and outlets and to provide Basic Service to municipal and other public buildings.[392] Comcast also proposed that it would provide one drop, outlet, and Basic Service to all new municipal and other Town owned and occupied public buildings which lie along its cable routes in the Town, but that it would not be required to install an additional drop to any municipal or Town building that already has a free drop or outlet provided under the prior license.[393] Framingham denied the proposal in part on the grounds that Comcast would not agree to provide Expanded Basic Cable Service and additional drops and outlets, and that "[t]here was testimony at the ascertainment hearing in support of the continuation of such additional drops and outlets by Comcast."[394]

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391 JX.8, at Bates No. 2961. We note that the use of the word "continue" mischaracterizes the nature of this requirement, which is to require Comcast to construct up to 300 new drops or outlets.

392 JX.9, at Bates No. 3278.

393 Id.

394 Framingham Decision at 6.

b. Positions of the Parties

(1) Comcast

Comcast argues that its proposal to provide free basic service to municipal buildings more than satisfies its obligation, under G.L. c. 166A, § 5(e), which only requires cable operators to provide one cable drop and one outlet at no charge to municipal buildings.[395] Therefore, Comcast argues that its proposal was reasonable as a matter of law under the governing standard.[396] Further, Comcast argues that the requirement to provide expanded basic cable service would force Comcast to retain a specific type of cable programming, and that franchising authorities cannot dictate program offerings.[397] Comcast argues that it needs to make decisions on programming based on the needs of its customers in a competitive environment, and that those decisions may involve eliminating or altering existing tiers of service.[398]

Comcast highlights the school department's statement that it "wished" to have additional outlets as an example of Framingham's failure to demonstrate that the requirement was necessary to meet the Town's needs considering costs.[399] Comcast contends that it is not

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395 Comcast Mot. Summ. Decision at 34.

396 Id.

397 Id., citing Jones Intercable v. City of Stevens Point, 729 F. Supp. 642, 649 (W.D. Wis. 1990).

398 Comcast Opp. Framingham Mot. Summ. Decision at 46, citing JX.27, at 36.

399 Comcast Mot. Summ. Decision at 34.

required "to respond to every person or group that expresses an interest in any particular capability or service" when it proposes a renewal of the license.[400]

Comcast argues that the Cable Division should reject Framingham's argument that it may rely on prior licenses to establish need and reasonableness of costs.[401] Comcast argues that the process of Section 626 under the Cable Act was not intended to be a "comparative process" where a franchisor may deny a renewal due to another party indicating an intent to provide more, and that "community needs and interests may not be established on the basis of such alternative proposals."[402] Comcast maintains that the same reasoning applies to a proposal submitted at an earlier time by a predecessor operator.[403]

(2) Framingham

Framingham asserts that expanded basic service to all public buildings, and expanded basic service and additional drops to all public schools are "identified" needs.[404] Framingham argues that because these needs had been required under the 1999 Renewal License, it may rely on those terms for the proposition that such terms further the needs and interests of the community and are not unreasonable as to cost.[405] Further, Framingham asserts that "[a]s the

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400 Id. at 35, quoting H.R. Rep. 98-934, at 74.

401 Comcast Opp. Framingham Mot. Summ. Decision at 45–46.

402 Id. at 46, citing H.R. Rep. 98-934, at 74.

403 Id.

404 Framingham Mem. Summ. Decision at 44.

405 Id.; see also Framingham Opp. Comcast Mot. Summ. Decision at 31.

town of Framingham is the largest 'town' in Massachusetts, population wise, it was reasonable for the Town to ascertain that provision of expanded basic service, additional drops and cable modem service were ongoing 'local needs' necessary to serve the Town's residents."[406]

Framingham argues that there is nothing in the law supporting Comcast's position that these terms are only negotiable and that it need not offer them.[407] Framingham argues that G.L. c. 166A, § 5(e) mandates that a cable operator provide a cable drop and outlet to public buildings, but that it is not a statutory prohibition against providing expanded basic service or additional drops and outlets.[408] Framingham contends that Comcast did not provide any financial analysis to support its failure to address these needs, and therefore, Framingham was correct to deny renewal on this basis.[409]

c. Analysis

While Comcast is correct that its proposal meets the requirements of G.L. c. 166A, § 5(e) to provide a drop and an outlet to each public building, that is not sufficient alone to demonstrate that its proposal is "reasonable" as a matter of law under the relevant standard, 47 U.S.C. § 546(c)(1)(D). The obligation under state law does not preclude the possibility of requiring additional drops and outlets, or the provision of expanded basic service. We also are not convinced that including a term for the provision of expanded basic service in a franchise

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406 Framingham Opp. Comcast Mot. Summ. Decision at 31.

407 Framingham Mem. Summ. Decision at 45.

408 Framingham Opp. Comcast Mot. Summ. Decision at 30–31.

409 Framingham Mem. Summ. Decision at 45; see also Framingham Opp. Comcast Mot. Summ. Decision at 32.

would usurp Comcast's power to determine the particulars of programming and service tiers. The requirement does not dictate any specific programming, nor does it identify broad categories of programming. Even if the term were included, the offering under the expanded basic service tier would remain subject to Comcast's discretion. Comcast's subsequent decisions to alter or eliminate the expanded basic service tier could not be considered to be noncompliance with the term requiring provision of expanded basic service. Rather, Comcast's burden in this proceeding is to show that the proposal to provide basic service to municipal and public buildings is reasonable, given the cost of providing expanded basic service.

Finally, Comcast has not met its burden on summary decision with respect to either refuting or showing a lack of proof of community need. The fact that the school department used the term "wish" rather than "need" is not determinative of a lack of a need. And, while the Cable Division agrees with Comcast that terms required by prior franchise licenses entered into by the cable operator or its predecessors are not themselves proof of a current community need or interest, Comcast has not met its burden to show that proof of Framingham's cable-related community need for expanded basic service and additional drops will not be forthcoming in this proceeding. The Framingham Decision Reason 20 indicated that "[t]here was testimony at the ascertainment hearing in support of the continuation of such additional drops and outlets by Comcast."[410] Comcast has not yet demonstrated a lack of such proof; the

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[410] Framingham Decision at 6.

burden did not shift to Framingham to produce countervailing evidence of its need in opposing Comcast's motion. Therefore, we deny Comcast's motion in part on this issue.

For the same reason, however, we deny Framingham's motion for summary decision regarding expanded basic service and additional drops. We have rejected the argument that Framingham may rest on the fact that prior licenses may have required expanded basic service to demonstrate a current community related need that Comcast must meet. Beyond that, Framingham's motion is entirely devoid of evidence on this point. Framingham failed to demonstrate any material element of its claim on this point, and therefore, cannot prevail on its motion. Thus, we deny Framingham's motion in part on this issue.

14. Cable Modem Service (Reason 21)

a. Introduction

The RFP required Comcast to provide cable modem service to all public school buildings in Framingham.[411] Comcast refused on the grounds that "[m]odem service is not a 'cable service' and therefore is not part of the renewal process."[412] Framingham rejected the renewal proposal, in part because "Comcast would not agree to continue to provide Cable Modem Service to all Framingham public school buildings, as required by the 1999 Renewal License."[413]

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411 JX.8, at Bates No. 2962.

412 JX.9, at Bates No. 3249.

413 Framingham Decision at 6.

b. Positions of the Parties

Comcast argues that Framingham has no authority to regulate cable modem service.[414] Comcast states that both the FCC and the federal courts have agreed that cable modem service is an interstate "information service," and not a "cable service."[415] Further, Comcast argues that the Cable Division has made clear that towns have no power through the cable license process over this service.[416] Therefore, because the town is without authority to regulate cable modem service, Comcast argues that Reason 21 of the Framingham Decision should be rejected as a matter of law.[417]

Just as it argued with respect to expanded basic cable service, Framingham rests on the fact that the 1999 Renewal License required the provision of free cable modem service to the schools as proof of the needs and interests of the community and proof that the requirement is reasonable.[418] Framingham responds to Comcast's motion, arguing that Comcast's argument based on the FCC Declaratory Ruling is opposite to the argument that it sets forth for an

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414 Comcast Mot. Summ. Decision at 32.

415 Id., citing Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Internet Over Cable Declaratory Ruling and Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, at ¶ 60 (2002) ("FCC Declaratory Ruling"); National Cable Telecommunications Association v. Brand X, 125 S.Ct. 2688 (June 27, 2005).

416 Id. at 33, citing MediaOne of Mass., Inc. v. Town of North Andover, CTV 99-2 (May 1, 2000).

417 Id.

418 Framingham Mem. Summ. Decision at 44.

expanded definition of the term "cable system."[419] Framingham also argues that the FCC only held that cable companies providing broadband internet access did not provide "telecommunication services" as defined by the Act, "thus exempting them from common carrier regulation under Title II, without any further comment on Title VI."[420]

c. Analysis

There is no merit to Framingham's representation that the FCC Declaratory Ruling did not comment on the regulatory classification of cable modem service with respect to Title VI. The question of the classification of cable modem service under Title VI was at the heart of that ruling.[421] The FCC ruled that "cable modem service is not a 'cable service' under the definition prescribed by the Act."[422] It is well-settled that cable modem service is not a cable service. Comcast has made a sufficient showing as a matter of law that cable modem service is not a cable-related community need or interest. Therefore, Comcast's refusal to offer free cable modem service may not be a factor in denying renewal of the franchise as a matter of law. Thus, we grant Comcast's motion in part on this issue. As we have discussed throughout this order, the fact that the requirement appears in the 1999 Renewal License, while enforceable under that license, does not demonstrate that Framingham may require the term to

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419 Framingham Opp. Comcast Mot. Summ. Decision at 30.

420 Id., citing Brand X, 125 S.Ct. at 2703.

421 FCC Declaratory Ruling at ¶¶ 60–69.

422 Id. at ¶ 60.

be included in a subsequent license. Thus, we deny Framingham's motion in part on this issue.

VI. ADDITIONAL PROCEDURAL MATTERS

Because we have found that issues of fact and law remain to be tried in this proceeding, the Cable Division will establish a procedural schedule for the remainder of this proceeding. We direct the parties to confer and submit a proposed procedural schedule providing for discovery, submission of pre-filed testimony if necessary, and hearings. The parties shall file a proposed schedule no later than 30 days after the issuance of this Order.

VII. ORDER

Accordingly, after due consideration, it is

ORDERED: That Comcast's motion to take administrative notice is DENIED; and it is

FURTHER ORDERED: That Framingham's motion to take administrative notice is DENIED; and it is

FURTHER ORDERED: That Framingham's motion to strike is DENIED; and it is

FURTHER ORDERED: That the official record of the administrative proceedings before the Board of Selectmen of the Town of Framingham in the matter that is the subject of this proceeding may be entered into the evidence in this proceeding consistent with this order and by stipulation of the parties; and it is

FURTHER ORDERED: That Comcast's motion for summary decision is GRANTED IN PART and DENIED IN PART; and it is

FURTHER ORDERED: That Framingham's motion for summary decision is GRANTED IN PART and DENIED IN PART; and it is

FURTHER ORDERED: That the parties shall file a proposed procedural schedule within 30 days of this Order; and it is

FURTHER ORDERED: That the parties shall comply with all other provisions of this Order.

By Order of the
Department of Telecommunications and Energy
Cable Television Division

/s/ Alicia C. Matthews
Alicia C. Matthews
Director