Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Protection and Competition Act of 1992	))))))))	MB Docket No. 05-311

COMMENTS OF AT&T INC.

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AT&T Inc. ("AT&T") respectfully submits these comments in response to the Commission's November 18, 2005 Notice of Proposed Rulemaking ("NPRM") in MB Docket No. 05-311.

INTRODUCTION AND SUMMARY

The NPRM begins with an indisputable fact that must guide this proceeding: "for all competitors in the marketplace, the abilities to offer video to consumers and to deploy broadband networks rapidly are linked intrinsically."[1] In today's converged marketplace, the local cable franchising process, undisciplined by federal rules, is a major obstacle to broadband infrastructure development. Exercising clear Commission authority to give content to the Act's ban on unreasonable franchising conditions is thus more than just good policy that will promote much-needed video competition. It is an unambiguous statutory mandate – Congress directed the Commission to "take immediate action" to "remov[e]" such "barriers to infrastructure investment."[2]

Nothing stands in the way of immediate Commission action that both honors legitimate local interests and ensures that unreasonable franchising conditions and processes do not negate core

[1] NPRM ¶ 1.

[2] 47 U.S.C. § 152, note (a) (also referred to as "§ 706").

federal policies. As Chairman Martin explained when the NPRM was issued, "[i]t is the Commission's responsibility to remove roadblocks to competition."[3] The Commission can fulfill that responsibility here by promulgating a handful of simple, easily administered rules to guide the franchising process. Inaction, in contrast, would cede the Commission's responsibility to carry out national broadband and video competition policies to tens of thousands of independent local franchising authorities – abdication that would necessarily frustrate those policies, discouraging both broadband deployment and true, robust video competition.

The urgent need for national rules to give content to the § 621(a)(1)[4] reasonableness requirement does not rest on evidence that many local franchising authorities ("LFAs") have in the past imposed anticompetitive barriers to entry and failed to allow competitive entry as quickly and effectively as possible or on predictions that LFAs will intentionally abuse the franchising process in the future. Rather, it is the revolutionary *changes* in technology, the scale and scope of planned entry and video marketplace dynamics that guarantee that continuing to leave the conditions on (and timing of) competitive video entry entirely in the hands of local authorities would produce intolerable entry barriers – even if each of the nation's thousands of LFAs could be expected to act as quickly and reasonably as state and local laws allow. The focus here must therefore be on the enormous threat that unconstrained local franchising poses to large-scale entry in the *current* environment and on the steps the Commission must take to avert that harm.

More than a decade after the enactment of federal legislation that supposedly opened local video markets to competition, only four percent of U.S. households have two choices for wireline video service. Technology now allows AT&T and others to enter video markets on an

[3] NPRM, Separate Statement of Chairman Martin at 1. *See also First 706 Report*, 14 FCC Rcd. 2398, ¶ 106 (1999) ("*First 706 Report*") ("We will act whenever necessary to ensure that deployment of broadband to all Americans proceeds at a reasonable and timely pace").

[4] Codified as 47 U.S.C. § 541.

unprecedented scale. AT&T and its peers already have the rights of way, the technical and financial resources, and the expertise to add video services to the voice and data services that they offer today. They are fully committed to providing these competitive video services broadly, in a safe, responsible and nondiscriminatory manner, and with appropriate payment to cities, emergency alert capabilities and public, educational and government access. And they have strong incentives to provide video services as rapidly and as widely as possible to compete with cable operators that, unrestrained by burdensome entry regulation, have moved quickly to add telephone services to their traditional video offerings. But making this potential a reality will require *billions* of dollars of investment that can be justified only if the upgraded facilities can be used immediately to compete for video revenues.

AT&T believes that its own IP-video service does not trigger local franchising requirements, because AT&T will not be providing "cable service" over "cable systems" as those terms are defined by the Communications Act.[5] But the cable industry has spurred a massive campaign to require AT&T and other new entrants to obtain local franchises before offering *any* competing video services – indeed, even before physically upgrading their networks. Absent Commission action, AT&T and other potential wireline competitors thus face the prospect of negotiating franchising demands town by town and abandoning plans to provide competitive video (and other broadband) services in hundreds, if not thousands, of towns and cities that refuse to take timely, reasonable positions – or claim that they are prevented by state law or incumbent franchise agreements from doing so.

The stakes could not be higher or more urgent. The prospect that large-scale entry plans will require independent review by thousands of individual decisionmakers, each with near absolute

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[5] *See Ex Parte* Letter From James C. Smith (SBC) to Marlene H. Dortch, WC Docket No. 04-36 (filed Sep. 14, 2005); *Ex Parte* Letter From James C. Smith (AT&T Inc.) to Marlene H. Dortch, WC Docket No. 04-36 (filed Jan. 12, 2006).

discretion to delay entry indefinitely or to impose unreasonable and unattainable conditions, is antithetical to sound communications policy. AT&T's initial entry plan alone, which would make IP-enabled video service available to nearly 20 million customers within about three years, encompasses areas that include nearly *two thousand* separate LFAs. It should be obvious that the unconstrained apparatus of municipal franchise regulation, which has evolved with little change from its monopoly-era origins, would inevitably and immediately interfere with national video and broadband policies.

Today, obtaining a franchise requires an elaborate showing of the applicant's "fitness to serve." The application triggers months or years of free-ranging "public interest" proceedings. The incumbent carrier is often entitled to – and usually does – intervene in the case, challenge the application, and embroil the applicant (and the LFA, if it supports the applicant) in costly and protracted litigation. The incumbent cable operators typically assert that the LFA's discretion to respond reasonably to competitive entry is constrained or foreclosed by protectionist state or local laws sponsored by the cable industry, or by guarantees embedded in the incumbent cable operator's franchise agreement. Even where that is not the case, the LFA's local decisions cannot be expected to account for *national* goals and timelines. The video regulation of thousands of individual local actors plainly cannot be allowed to dismantle the nation's policy of removing barriers to broadband deployment and actively encouraging market-driven investment. But absent binding federal rules that prohibit particularly unreasonable franchising practices, broadband deployment will inexorably be delayed and even foreclosed altogether in vast areas where it would otherwise be economically feasible.

This would be intolerable even if AT&T and its peers were untested start-ups seeking to build new networks from scratch through city streets. It is nothing less than absurd as applied to owners of established wireline networks that already occupy the public ways, are subject to active local government oversight, and seek only to provide additional services. Indeed, leaving regulatory processes and outcomes entirely in local hands make no more sense for video services, than for railroad services, airline services or telecommunications services in the context of parties that already operate networks in the public ways and that have signaled their willingness to pay appropriate fees and to provide appropriate emergency alert capabilities and public, educational and government access.

Unnecessary local regulation undeniably does great harm. As two of the nation's largest cable operators recently explained in defending the Commission's decision to preempt unreasonable local conditions on their telephone entry: even "state certification and tariffing" obligations – obligations that are positively tame in comparison to the unreasonable conditions commonly demanded of competitive video providers – remain "daunting barriers to entry."[6] And the enormous anticompetitive impact of the unconstrained local franchising process is only becoming more acute in the dynamic video marketplace, in which AT&T and other telephone companies will compete not only with incumbent cable operators, but with DBS providers and a host of new Internet and wireless video players that are exempt from local franchising delays and costs.

For these reasons, the Commission should promptly promulgate the straightforward rules implementing § 621(a)(1) that are detailed below: (1) mandating a streamlined, 30 day franchising process for established wireline network operators, (2) prohibiting anticompetitive and technology-specific wireline "buildout" conditions that foreclose entry and allow individual LFAs to dictate the

[6] Brief of Time Warner Inc., Time Warner Cable Inc., America Online Inc., and Charter Communications, Inc., in *Minnesota Pub. Utils. Commn*. v. *FCC*, Nos. 05-1069 *et al*., at 13 (8th Cir.) (filed Dec. 1, 2005); *see also* NCTA Comments, *IP Enabled Services*, WC Docket No. 04-36, at 21 ("This local layer of regulation makes no sense when – as here – new services can be offered simply by changing the pattern of signaling sent over an existing physical transmission facility. . . . Local regulation of new services such as VoIP delivered over the cable plant would stifle those services, since cable operators today can be subject to dozens or even hundreds of local franchising authorities for their cable systems in a single state. Offering VoIP services would be immensely more difficult with hundreds of inconsistent locally applied regulations").

pace and manner of broadband technology and infrastructure deployment, (3) establishing a single, consistent, national formula for the calculation of franchise fees, (4) prohibiting public studio space and similar requirements that are inconsistent with a competitive video applicant's technology and network architecture (5) prohibiting unreasonable city-specific customer service data collection requirements and reaffirming that LFAs cannot condition franchises on local customer service quality demands that go beyond the requirements of generally applicable laws and ordinances, (6) prohibiting requirements that broadband providers obtain a cable franchise before even upgrading their networks and (7) expressly preempting "level playing field" or other state or local requirements deemed to otherwise require any of these unreasonable conditions. The Commission has clear authority to promulgate each of these rules, each is necessary to streamline the franchising process to reflect today's marketplace realities and to remove unreasonable barriers to large-scale entry, and each respects legitimate state and local interests.

The remainder of these comments is organized as follows. Section I explains why local franchising requirements, undisciplined by uniform national rules, harm consumers. The applications and services that will be enabled by competing "super-broadband" networks will revolutionize and vastly improve both home and work life.[7] AT&T and other facilities-based telecommunications carriers are poised to make the necessary investments, but they cannot do so without reasonable assurances that they will obtain authorization – without undue delay or expense and on reasonable terms commensurate with their status as longstanding operators of wireline

[7] *See* George S. Ford and Thomas M. Koutsky, *In Delay There Is No Plenty: The Consumer Welfare Cost of Franchise Reform Delay* (Phoenix Center 2006) ("Ford & Koutsky"); General Accounting Office, *Issues Related to Competition and Subscriber Rates in the Cable Television Industry* (Oct. 2003) ("in those markets where [wire-based] competition is present, cable rates are significantly lower – by about 15 percent – than cable rates in similar markets without wire-based competition"); GAO testimony to the Subcom. on Antitrust, Competition Policy and Consumer Rights, U.S. Senate, *Wire-Based Competition Benefited Consumers in Selected Markets*, at 1 (Feb. 2004) ("expanded basic cable rates were 15 to 41 percent lower in 5 of the 6 markets with a [competing broadband service provider] when compared to their matched [demographically comparable] market [without a BSP]").

networks in the public ways – to offer consumers the *video* portion of the broadband bundle of services that will pay for the upgrades.

The existing regulatory regime does not begin to provide such assurances and, absent new Commission rules, is structurally incapable of doing so. Existing franchising authority is balkanized among 30,000 local jurisdictions. In most of these jurisdictions, the approval process is standardless and procedurally open-ended. The cable industry has exploited this Wild West legal environment by stalling franchise approval proceedings with litigation and lobbying, by pressuring LFAs to impose unreasonable conditions that have the intent and effect of foreclosing entry, and by obtaining state and local requirements designed to *mandate* such conditions even where LFAs otherwise would seek to encourage facilities-based competitive entry.

Neither case-by-case litigation nor state-wide legislation can eliminate these needless barriers to entry. Judicial review is limited to the particular LFA decision before the court, can require years of litigation, and, in the absence of federal rules giving content to the Act's reasonableness requirement, is necessarily ineffective. With few exceptions (*e.g.*, in Texas), statewide legislation has been part of the problem, not part of the solution. And it is no answer to suggest that new entrants can avoid the burdens and delays of the franchising process simply by signing the same agreement as the incumbent cable operator – larded with conditions and restrictions that make no sense at all for new entrants. The national policies of promoting rapid broadband deployment and local video competition require that franchises be granted expeditiously *and* on terms that do not erect unreasonable barriers to entry. A "solution" that "cures" the problem of delay by offering terms that impede and foreclose entry is no solution at all. In short, dismantling the barriers to entry that pervade the current municipal franchising process will require effective, uniform federal standards.

Section II demonstrates that the Act not only authorizes but *requires* the Commission to remedy this problem by expeditiously promulgating binding national rules. The § 621(a) prohibition against unreasonable refusals to award competitive franchises is a substantive federal requirement that 47 U.S.C. §§ 154(i), 201(b) and 303(r) each independently and indisputably empowers the Commission to implement through rulemaking. Moreover, in today's broadband, IP-enabled world, 47 U.S.C. §§ 621(b)(3)(B) and 253 provide the Commission with additional broad authority to prevent unreasonable "cable" regulation from limiting the provision of telecommunications services. Section 706 mandates the "immediate" exercise of this authority to eliminate all local franchising barriers to broadband infrastructure investment. And the Commission should expressly rule that its determinations of the meaning of § 621(a) bind both LFAs and reviewing courts: *any* contrary state or local requirements (including any contrary applications of state or local "level playing field" laws) may and should be preempted and can be given no force by the LFAs or by reviewing courts.

Section III identifies commonly-imposed conditions on competitive entry that are so obviously anticompetitive that the Commission should flatly prohibit them.

Build-out conditions. National rules enforcing the reasonableness requirement of § 621(a)(1) are nowhere more important than to combat the so-called "build-out" condition on entry, a regulatory anachronism left over from the early days of cable monopolies that has become the cable industry's principal anticompetitive weapon. In today's converged broadband environment, build-out conditions allow local franchising authorities to dictate both the pace of broadband deployment and carriers' broadband technology choices (wireline vs. satellite vs. fixed wireless) in direct contravention of § 706. By imposing nonsensical carrier of last resort and universal service obligations on video *new entrants*, but not on telephone entrants, they create a playing field that is anything but level. And by discouraging competitive entry, they actually disserve each of the interests the cable industry has advanced in support of them: retarding the development and scope of facilities-based competition and reducing the availability of competitive alternatives to low-income neighborhoods.[8]

That is why the main defense of build-out conditions on entry has not been that they serve the public interest – they obviously do not – but that the Act affirmatively ousts the Commission of jurisdiction to find them unreasonable. That is wrong. Section 621(a)(4)(A), which directs LFAs to "allow the applicant's cable system a reasonable period of time to become capable of providing cable service to all households in the franchise area," operates only to *limit* the power of LFAs to impose unreasonably short deadlines in circumstances where the build-out requirement itself can be justified as reasonable. Section 621(a)(4)(A) does not override the broader § 621(a)(1) prohibition against "unreasonable" conditions in *whatever* form they may take and certainly does not limit the *Commission's* authority to give content to that general prohibition on unreasonableness. The Commission is free to determine that in some circumstances – *e.g.*, as applied to a *competitive* provider in today's marketplace – an LFA's imposition of *any* build-out condition on entry constitutes an "unreasonabl[e] refus[al] to award an additional competitive franchise." 47 U.S.C. § 541(a)(1). Indeed, because build-out conditions on competitive video entry serve no substantial government interest and have the effect of restricting First Amendment-protected speech, the Commission *must*, under the canon of constitutional avoidance, reasonably construe the Act to provide the Commission with the authority to prohibit such conditions.[9]

In short, both the need and authority for immediate action are clear. Make no mistake about it: unless the Commission acts now to remove build-out barriers to entry, entire communities will be denied the robust facilities-based video and broadband competition that would otherwise occur.

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[8] *Texas Preemption Order*, 13 FCC Rcd. 3460, ¶ 13 (1997) ("*Texas Preemption Order*").

[9] *See Time Warner Enter. Co.* v. *FCC*, 240 F.3d 1126, 1130 (D.C. Cir. 2001); *Turner Broadcasting System, Inc.* v. *FCC*, 520 U.S. 180, 189 (1997).

Excessive demands for money and in-kind services and facilities. AT&T has no objection to reasonable, lawful payments to cities. But the franchising process frequently spawns extravagant demands for money, goods and services. The Commission therefore should establish a single, consistent, national formula for the calculation of franchise fees. The Commission also should rule that *any* obligation to make payments, or provide *anything* of value, constitutes the payment of franchise fees and must be credited – at full market value – toward the provider's franchise fee obligation.

Requirements that are inconsistent with the applicant's technology and architecture. The Commission should prohibit LFA demands that are inconsistent with a competitive video applicant's architecture or technology. For example, AT&T's IP-enabled video service uses remote servers and small local nodes, not traditional local headend buildings, and requiring AT&T and similarly situated entrants to provide "headend" space for public studios or other purposes thus would be an "unreasonable" condition on entry within the meaning of § 621.

Unreasonable Data Collection Requirements. The Commission should prohibit LFAs from imposing "data collection" and related requirements that are inconsistent with the IP-enabled video offerings provided over upgraded local exchange facilities. In particular, many LFAs impose requirements that franchisees collect, track, and report voluminous data relating to customer service requests on a "city specific" basis. But the call centers and systems that AT&T uses to respond to customer service requests are not city specific and cannot collect, track, and report data that is isolated to any individual city, and these requirements are thus unreasonable. The Commission should likewise reaffirm that LFAs cannot condition a franchise on local customer service quality standards that go beyond the requirements of generally applicable laws and ordinances.

Holding broadband network upgrades hostage to franchise requirements. A number of municipalities have asserted that existing telephone carriers need a local video franchise not only to provide IP-enabled video programming, but even to upgrade existing telephone networks with the fiber, electronics and other physical components needed to provide higher-bandwidth IP-enabled services. The Commission should rule that any such attempts to expand the reach of local franchising authority are clearly *ultra vires*. The Act requires a local video franchise only before a "cable operator" "provide[s] cable service." 47 U.S.C. § 541(b)(1).

Section IV addresses the problems associated with other LFA processes and entry conditions that, even if appropriately applied to a novice applicant, cannot reasonably or lawfully be applied to a franchise applicant that *already* holds a franchise to use public rights-of-ways to distribute *other* services – *e.g.*, wireline telephony – within the same municipality. There is no legitimate justification for burdening telephone companies with protracted proceedings and onerous conditions to obtain a separate license merely to provide video programming over distribution networks that are already authorized to carry other traffic. As the Commission has repeatedly held, local rights-of-way management means control over the right-of-way itself, not the content of the information that flows over it.

The Commission has both the power and the duty to require a streamlined franchise process for entities with existing franchises. The Commission should prescribe a short-form certification and a 30-day review period for applications by existing rights-of-way holders. The Commission should further rule that any such applicant that certifies its willingness to meet the franchise fee, PEG, emergency alert and other obligations detailed below shall, on the 30th day following certification, be authorized to begin providing video service in that franchise area. By drawing this clear demarcation between reasonable and unreasonable cable franchise regulation of existing rights-of-way holders, the Commission will both preserve legitimate local interests and assure that broadband infrastructure development and competitive service delivery occur as quickly and broadly as possible.

I. LOCAL FRANCHISING REQUIREMENTS, UNDISCIPLINED BY UNIFORM NATIONAL RULES, HARM CONSUMERS BY OBSTRUCTING VIDEO AND ADVANCED SERVICES ENTRY AND COMPETITION.

The Commission's practice of permitting the local franchising process to operate completely free of uniform federal standards is no longer sustainable in light of fundamental changes in the marketplace. Congress, the President, and the Commission have all recognized that encouraging the widest possible deployment of broadband facilities is now the highest priority in communications policy. Widespread broadband deployment promises enormous consumer benefits in the form of lower prices and greatly increased capabilities and choices for voice, data and video services. Studies indicate that increased video competition alone could increase consumer welfare by more than $8.2 billion annually.[10]

AT&T and other facilities-based broadband providers stand ready to make the necessary investments. These network upgrades cannot be justified, however, without clear regulatory authority to provide the *video* portion of the next-generation bundle of IP-enabled services. As the Commission has recognized, broadband deployment and video entry are inextricably linked: broadband providers cannot justify the massive investments necessary to make advanced telecommunications services available without the ability to compete with the cable incumbents' full package of voice, data, and video services. Accordingly, effective implementation of federal broadband and video competition policies requires an efficient, predictable system of video entry that can accommodate the national and regional providers that are poised to enter the video market simultaneously in thousands of communities.

The current standardless system of local franchising is wholly at odds with these federal

[10] *See* George S. Ford, Thomas M. Koutsky and Lawrence J. Spiwak, *The Consumer Welfare Cost of Cable "Build-out" Rules* (Phoenix Center Policy Paper No. 22) (July 2005) ("Ford, Koutsky & Spiwak"); *see also* Bank America Equity Research, *Battle for the Bundle: Consumer Wireline Services Pricing*, at 10 (Jan. 23 2006) (finding that in certain areas where Verizon offers IP video services incumbent cable companies offer price cuts to subscribers of 28-42 percent).

policies. Even if the current system had been adequate in previous years, and even if local franchising authorities had always acted as quickly and as reasonably as state and local laws allow, the process would still be *inherently* inadequate today. Unlike in previous eras, broadband providers are entering video markets today with integrated offerings on a broad scale; indeed, the economics *require* entry on a broad scale. Thousands of local franchising authorities, all acting independently, simply do not have the institutional ability to promote the *federal* interest in facilitating this unprecedented broadband deployment and competition. If national broadband and video competition policies are to be achieved, the Commission must impose some federal standardization and order on the franchising process.

A. Fundamental Changes In The Nature of Entry Into The Video Market Have Outstripped The Ability Of The Existing Standardless System Of Local Franchising To Protect Consumers And Accommodate That Entry Consistent With Federal Broadband And Competition Policies.

There is consensus that the most important priority in communications policy today is the need for rapid deployment of broadband facilities. In 2004, the President established an aggressive policy of encouraging widespread deployment of broadband networks by 2007, to ensure that "consumers have got plenty of choices" for broadband services.[11] Since then, both Chairman Martin[12] and the full Commission[13] have consistently noted the critical importance of removing regulatory impediments to broadband infrastructure deployment.

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[11] *See* Speech of President Bush, March 26, 2004, available at http://www.whitehouse.gov/infocus/technology/economic_policy200404/chap4.html ("We ought to have . . . universal, affordable access for broadband technology by the year 2007, and then we ought to make sure as soon as possible thereafter, consumers have got plenty of choices when it comes to [their] broadband carrier").

[12] *Availability of Advanced Telecommunications Capability in the United States*, 19 FCC Rcd. 20540, Statement of Chairman Martin (Sept. 9, 2004) ("Encouraging the deployment of broadband services to all Americans has been my top priority during my tenure at the Commission. Broadband services are essential to the economy of the 21st century"); *see also Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, 17 FCC Rcd. 3019 (2005) (statement of Commissioner Martin) ("[b]roadband deployment is vitally important to our nation, as new, advanced services hold the promise of unprecedented business, educational, and healthcare opportunities for all Americans. . . . Placing additional financial burdens on broadband providers only creates barriers to deployment[, which] raise costs and decrease

These goals have only increased in importance as old distinctions between "telephony," "video," and "data" services are rapidly eroding. All of these services now can be distributed in an IP format simultaneously on the same facilities-based network.[14] The IP transformation promises both new services and many new capabilities and options for consumers of traditional offerings. Convergence over broadband networks also promises increased facilities-based competition in video markets that historically have seen only limited competition. But enabling this new environment will require the deployment of enormous bandwidth to each home, which, in turn, will require massive broadband infrastructure upgrades.

AT&T alone, through its planned initial buildout of Project Lightspeed, intends to make an initial investment of almost $5 billion over the next few years to upgrade its network. This project will involve extending fiber closer to customers (and in new developments, all the way to the customer premises) and installing advanced packet switching facilities in neighborhood nodes. The resulting upgraded facilities will create very high-speed, switched broadband capabilities that will allow consumers to originate and receive very high-quality voice, data, and video signals. Although

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demand for broadband, constraining the flow of capital investment and chilling innovation. Thus, I have repeatedly advocated that all levels of government should exercise self-restraint in placing financial burdens on broadband").

[13] *See, e.g., IP-Enabled Services*, 19 FCC Rcd. 4863, ¶ 3 (2004) ("*IP-Enabled Services NPRM*") ("we have recognized the paramount importance of encouraging deployment of broadband infrastructure to the American people"); *Amendment of Part 15 Regarding New Requirements and Measurement Guidelines for Access Broadband Over Power Line Systems*, 19 FCC Rcd. 21265, ¶ 12 (2004) ("The deployment of broadband delivery capabilities to provide all Americans with access to affordable high speed Internet and data services is one of the most important challenges currently facing the Commission and the communications industry"); *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, 20 FCC Rcd. 14853, ¶ 89 (2005) ("[o]ur primary goal in this proceeding is to facilitate broadband deployment in the manner that best promotes wireline broadband investment and innovation, and maximizes the incentives of all providers to deploy broadband").

[14] *See, e.g., IP-Enabled Services NPRM*, ¶ 3 ("[a]s broadband facilities have proliferated, communications services and networks have increasingly taken advantage of the efficiencies associated with translating data into IP packets running over the same network infrastructures. . . . Many observers predict that, before long, providers will be able to integrate voice and real-time video to provide new capabilities and service offerings. The development of such services is likely to prompt increased deployment of wireline, cable, wireless, and other broadband facilities capable of bringing IP-enabled services to the public, which in turn, we expect, will prompt further development and deployment of such services").

these upgrades are necessary for the United States to maintain its competitive broadband position and to permit consumers to take full advantage of the next-generation IP-enabled services that are being developed and deployed, carriers cannot rationally make multi-billion-dollar investments without clear and unencumbered regulatory authority to offer *video* services over their upgraded networks. *See* NPRM ¶ 18 (recognizing "the relationship between the ability to offer video programming and the willingness to invest in broadband facilities").

Entering video markets on a broad scale is a competitive necessity. Cable companies remain far and away the market leaders in video and other broadband services. Those companies – thanks largely to the Commission's deregulatory policies toward entry into telephony and Internet markets – increasingly offer bundles of video, voice, and Internet services. New entrants, to compete with incumbent cable companies, must be able to match these offerings. And, to recover the massive costs of the necessary infrastructure investments, broadband providers must be able to enter video markets on a broad scale in many communities simultaneously, offering the broadest possible array of services to create the maximum number of revenue streams.[15]

AT&T and its peers stand ready, and have active plans, to make these investments and to bring these improved IP-enabled services and increased competition to broadband consumers. But a debilitating obstacle stands in the way: the complete lack of any effective federal standards to govern the cumbersome local cable franchising process. The Commission's hands-off approach to the local franchising process dates from an entirely different, pre-IP era. Although that approach may have been appropriate for the needs of that era, the emergence of national and regional broadband entrants that must offer integrated broadband services on a large scale – coupled with the

[15] *See, e.g.*, Testimony of Walter B. McCormick, Jr. President and Chief Executive Officer United States Telecom Association Before the Senate Committee on Commerce, Science and Transportation (Feb. 7, 2006) ("McCormick Senate Testimony") ("Video will play a significant role in the rapid and widespread deployment of advanced broadband technology. The video services that local telecom companies (LECs) deploy over their new broadband networks will drive subscriber growth and, thus, network deployment, because they offer significant new capabilities").

lack of any federal rules to govern the local franchising process – is actively harming consumers, discouraging broadband deployment, and thwarting competition in video programming distribution services. These outcomes are wholly at odds with the national policy of promoting broadband investment by removing regulatory barriers to entry and encouraging market-driven investment.

The existing standardless local franchising system arose in the 1960s with the advent of cable itself, and is tailored to a monopoly environment in which the provision of video services required the construction of a service- and city-specific "cable" network. In the early days of video, when the first cable networks were built, nascent cable companies began service city by city. Even in the 1980s and 1990s, companies seeking to enter video markets as competitors to the incumbents still did so one city at a time. Because many of those new entrants were overbuilders (*e.g.*, RCN), local franchising proceedings still centered largely on local rights-of-way issues.

Things have changed dramatically. Technology advances now allow any existing facilities-based communications provider to offer any communications service (*e.g.*, voice telephony, Internet and data services, or video programming) over any technology platform (*e.g.*, traditional telephone networks, "video" networks, electric utility networks, or wireless networks). Accordingly, entry into the video market will no longer occur one municipality at a time, or even a few metropolitan areas at a time. Rather, economics and technology dictate that national and regional facilities-based network carriers must be able to enter in many communities at once, swiftly bringing robust, innovative alternatives on an unprecedented scale. Nor will entry be limited to single-service "video" networks or center on constructing brand new "video" networks from scratch, as traditionally occurred. Rather, a new generation of potential entrants, primarily national and regional carriers with existing rights-of-way currently used to provide other services, seek to upgrade their existing networks to provide a robust array of broadband services, including video services, in competition with both incumbent cable operators and a host of satellite, Internet and wireless video players that have no local franchise obligations or burdens.

In this radically changed environment, Commission inaction would only facilitate the ability of the local franchising system actively to thwart federal broadband and competition policies in numerous ways. First, local franchising authorities simply lack the institutional interest and perspective to safeguard and promote the *federal* interests in large-scale broadband deployment and increased video competition. If it is subjected to local franchising requirements, AT&T estimates that to implement its planned Project Lightspeed it would be required to obtain video franchises from as many as *two thousand* local franchising authorities. Thousands of local franchising authorities, each acting independently of the others, have no incentive or institutional competence to look at entry from a national perspective. Without federal standards, LFAs have the authority to impose a broad array of conflicting substantive requirements on new entrants, but lack any effective ability to consider the impacts outside of their jurisdictions. As the Commission has noted,

> Each local government may believe it is simply protecting the interests of its constituents. The telecommunications interests of constituents, however, are not only local. They are statewide, national and international as well. . . . This concern is exacerbated by the potential for multiple, inconsistent obligations imposed on a community-by-community basis. Such a patchwork quilt of differing local regulations may well discourage regional or national strategies by telecommunications providers, and thus adversely affect the economics of their competitive strategies.

TCI Cablevision of Oakland County Inc., 12 FCC Rcd. 21396, ¶ 106 (1997) ("*TCI Cablevision 1997 Order*").

History demonstrates that even a single recalcitrant or out-of-step franchising authority can thwart entry not only for that community but over broader contiguous areas.[16] A recalcitrant

[16] *See, e.g.*, Letter from Scott Burnside (RCN) to NTIA, December 19, 2001, available at http://www.ntia.doc.gov/ntiahome/broadband/comments4/rcn/RCN.htm, at 5 ("*RCN NTIA Letter*")

franchising authority can also diminish competition by exacerbating the relative programming cost disadvantage already faced by new entrants. For national and regional carriers that must enter video markets in many areas at once, with *integrated* broadband offerings designed to be deployed and provided on a broad scale, failure to adopt Commission rules on entry regulation would not only deter both entry and broadband infrastructure investment, but place thousands of independent LFAs, rather than the market, in the role of determining the pace at which broadband deployment will occur and the technologies that will be used to deliver broadband services.

Commission inaction would also mean untenable delay. Franchises can take many months and sometimes much longer to negotiate – a daunting barrier when multiplied by the thousands of video franchises that new entrants might be forced to obtain for broad-scale entry.[17] But the problems go well beyond delay. LFAs have considered themselves free to inquire into almost any subject, no matter how unrelated to the provision of video service. And most local franchising decisions are governed only by an open-ended litany of factors that permit essentially unfettered discretion over the scope of a franchising proceeding.[18]

("contiguous communities, by requiring RCN to follow wholly dissimilar procedures, have delayed the inauguration of service not only in their own communities but in neighboring ones as well").

[17] *See* BellSouth Video Comments, MB Docket No. 05-255, at 3-4, 11-12 (filed Sep. 19, 2005) (twenty video franchises obtained by September 2005 required nearly one year on average to negotiate, and some took three years); Qwest Video Comments, MB Docket No. 05-255, at 12-14 (filed Sep. 19, 2005) (three years to renegotiate seven franchises in Phoenix and obtain eight new agreements in Phoenix, Denver and Salt Lake City); Verizon Video Comments, MB Docket No. 05-255, at 8-9 (filed Sep. 19, 2005) ("The process – including application, review, negotiation and approvals – routinely takes many months, and often more than a year").

[18] The California statute is a good example. It forbids LFAs from granting a competing franchise without considering all of the following criteria: "(1) whether there will be significant positive or negative impacts on the community being served"; "(2) whether there will be an unreasonable adverse economic or aesthetic impact upon public or private property within the area"; "(3) whether there will be an unreasonable disruption or inconvenience to existing users, or any adverse effect on future use, of utility poles, public easements, and the public rights-of-way . . ."; "(4) whether the franchise applicant has the technical and financial ability to perform"; "(5) whether there is any impact on the franchising authority's interest in having universal cable service"; "(6) whether other societal interests generally considered by franchising authorities will be met"; "(7) whether the operation of an additional cable television system in the community is economically feasible"; and "(8) such other additional matters, both procedural and

Equally important, Commission inaction would create almost endless opportunities for incumbent cable operators to seek anticompetitive conditions through franchise agreements, state legislation, or litigation. The cable industry devotes enormous resources to exploiting the current franchising process in order to delay competitive franchising proceedings, to impose burdensome conditions on competitors, and to keep the conditions of a granted franchise in doubt through continuing litigation and legislative lobbying. Because the Commission has never issued rules under § 621 that deal with these anticompetitive responses to video entry, cable incumbents remain free to seek – and often win – a broad range of anticompetitive rulings and conditions.[19]

For all of these reasons, even if LFAs always acted as quickly and as reasonably as current processes allow, the existing franchising system – in the absence of national reasonableness rules – would plainly thwart federal broadband and video competition policies.

B. Traditional Franchise Regulation, Undisciplined By Federal Rules, Is Particularly Inappropriate For Entry By Existing Holders Of Franchises To Provide Other Services.

Equally important, the concerns that led to the existing protracted and fragmented local franchising regime simply do not apply to video entry by existing holders of telephone franchises. *See* NPRM ¶ 22. When an applicant to provide video service already holds a franchise to provide service over existing rights-of-way in the same municipality, there is no legitimate governmental interest in requiring a time-consuming and burdensome application for a *separate* license merely to upgrade existing equipment and to add new video programming services.

The rationale traditionally invoked by LFAs for imposing franchise restrictions on the use of public rights-of-way arises from the governmental interest in protecting public rights-of-way from

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substantive, as the franchising authority may determine to be relevant." Cal. Gov't Code § 3066.3(a). *Accord*, Fla. Stat. § 166.046(2); Ill. Comp. Stat., 65 ILCS 5/11-42-11(e)(2).

[19] *See*, *e.g.*, Comments of Telesat Cablevision, MM Docket No. 89-600, at 15 (filed Mar. 1, 1990) (framework invites open-ended regulatory delays and unreasonable demands and plays into the hands of incumbent cable operators that "invariably resist overbuilds with profuse and expensive litigation").

physical damage, safety hazards, congestion, noise, visual blight and other harms caused by the excavation, construction, maintenance and operation of local distribution networks.[20] This "public ways" rationale is the theoretical basis for the entire edifice of franchise regulation: the elaborate applications and RFPs; the adversarial hearing process; the applicant's burden of proving its "fitness to serve"; and the restrictions on entry by potential competitors of the first entrant.[21]

The "public ways" rationale, however, has little application to entities with existing public rights-of-way, because a municipality's existing regulatory oversight fully satisfies any public safety concerns over a carrier's use of public rights-of-way for video programming and complementary services. At least for existing local telephone carriers such as AT&T, municipalities and states already impose detailed time, place and manner restrictions on the use of public rights of way. Such rules require franchise holders to obtain permits for cutting pavement, laying fiber or undertaking any other construction; pay excavation and right of way management fees; and comply with public safety and traffic rules and other restrictions designed to promote the

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[20] 47 U.S.C. § 522(7)(B); S. Rep. No. 97-518, at 5 (1982); *NCTA* v. *FCC*, 33 F.3d 66, 73 (D.C. Cir. 1994) ("use of public rights of way . . . provide[s] a key justification for the cable franchise requirement"); *Entertainment Connections, Inc.*, 13 FCC Rcd. 14277, ¶ 62 (1998) ("public safety and convenience and management of public rights-of-way, provide a key premise for the cable franchise requirement").

[21] An earlier rationale for franchise regulation was the notion that video operators are natural monopolies and that the public interest is better served by giving operators exclusive franchises, and by directly regulating the rates and services offered by the franchised monopolist, than by allowing prices and services to be set by competition. *See* Kent D. Wakeford, *Municipal Cable Franchising: An Unwarranted Intrusion Into Competitive Markets*, 69 S. Cal. L. Rev. 233, 259 nn. 135 & 136 (1995) (citing earlier precedent). Congress properly repudiated this rationale with respect to cable television in the 1992 Cable Act. "The conferees believe that exclusive franchises are directly contrary to federal policy and to the purposes of S. 12, which is intended to promote the development of competition." Conference Report, H.R. Rep. No. 862, 102d Cong., 2d Sess. 77-78 (1992); *accord* Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, MB Docket No. 04-227, ¶ 4 (Feb. 4, 2005) ("*Eleventh Annual Cable Competition Report*") (summarizing evidence that competition among cable operators "provides consumers with increased choice, better services, higher quality, and greater technological innovation"); *see also* The Cato Journal, Boudreaux and Ekelund, Cable Reregulation, Vol. 14, No. 1, at 91 (1994) ("Virtually all well-executed empirical studies of competition in the cable industry find significant welfare benefits to consumers from overlapping municipal cable supply").

public safety and minimize traffic congestion, visual and aural blight, and other externalities.[22] AT&T and other local telephone carriers have been operating in these municipalities and responsibly using rights of way to place wires under such rules for a century, and AT&T is not here asking for relief from this local government oversight. To the contrary, AT&T recognizes the strong local interests in managing actual physical impacts on the public ways. But there is a world of difference between traditional rights of way management and subjecting an existing rights of way holder to onerous procedures and conditions merely because it seeks to provide an additional service.

Under these circumstances, there can be no legitimate governmental interest in burdening telephone companies with protracted proceedings and onerous conditions to obtain separate licenses merely to provide video programming over distribution networks already authorized to carry voice traffic and broadband data. That the stream of digital bits transmitted by AT&T and its peers over their networks will now be received by subscribers as video programming rather than telephone voice calls or Internet data simply has no bearing on the LFAs' rationales for franchise regulation. Here, no less than in the context of cable operators upgrading their networks to provide telephone and data services, local right-of-way management means control over the right-of-way itself, not the content of the information that flows over it.[23]

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[22] *See, e.g.,* 220 Ill. Comp. Stat. Ann. 65/4 (West 2005) (requiring every telecommunications carrier to obtain the consent of municipal corporate authorities before "construct[ing], maintain[ing], alter[ing], [or] extend[ing] its poles, wires, cables, and other appliances" by providing a minimum of ten days of notice (or 25 days in the case of excavation relating to new construction) "in writing in the form of plans, specifications, and documentation of the purpose" of the construction; providing "any and all plans, specifications and documentation available" and constructing the lines in accordance with any specifications that the municipal corporate authority requires; and complying with particular provisions of the Illinois Highway Code).

[23] *See, e.g., XO Missouri* v. *City of Maryland Heights*, 256 F. Supp. 2d 987, 995 (E.D. Mo. 2003); *Level 3* v. *City of St. Louis*, No. 4:-4-CV-871 CAS, slip op. at 13 (E.D. Mo. Dec. 19, 2005); *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, et al.* 17 FCC Rcd. 4798, ¶ 104 (2002) ("*Cable Modem Order*") (noting "previously expressed concern about unnecessary regulation at the local level that

As the Commission is aware, AT&T has, over the past decade, extended fiber deeper and deeper into its network and has installed digital equipment so that AT&T can continue offering broadband Internet services with capabilities and speeds comparable to or better than those offered by incumbent cable operators (and other competitors). These are the same types of upgrades that are necessary to permit AT&T to provide IP video services. It is simply unreasonable to lard on additional restrictions merely because those upgrades – which will be placed on rights-of-way governed by existing requirements – will allow AT&T to provide additional services to its customers over the upgraded network, particularly when those additional services will provide such significant benefits to consumers.

Further, extensive proceedings and safeguards are plainly unnecessary to ensure the fitness of established telephone companies to serve the public. AT&T and its telephone company peers are not untested startups. They are major corporations with long track records of building and maintaining networks in the public rights of way and providing both regulated and unregulated services to millions of consumers – with higher service standards, reliability and customer satisfaction than the incumbent cable operators typically provide. This track record obviates any need for bonds, financial guarantees, showings of fitness to serve, adversarial hearings, or multi-step evaluations of the public benefits of allowing the entrant to upgrade its existing telephone network, over its existing rights-of-way, to compete with the incumbent operator.

Nor do LFA desires to collect franchise fees, preserve channel capacity for PEG programming, and ensure appropriate emergency alert capabilities provide any basis for them to erect elaborate hurdles for the entry of telephone carriers into video programming distribution. AT&T has not contested the important public policy interest in establishing uniform, consistent

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extends far beyond local government interests in managing the public rights-of-way"); *Entertainment Connections, Inc.*, 13 FCC Rcd. 14277, ¶¶ 52, 62-63 (1998).

policies allowing local franchise authorities to collect reasonable, lawful fees, to reserve reasonable channel capacity from operators for PEG access, and to require applicants to accommodate emergency alerts. Enforcing those demands, however, does not require the elaborate and burdensome franchise review processes historically imposed by most local franchise authorities. It merely requires that existing network owners agree to uniform commitments pay lawful fees, preserve access to channel capacity for PEG programming and ensure appropriate emergency alert capabilities.[24]

C. Uniform Federal Standards Are All The More Urgent In Light of Cable Incumbents' Success In Winning Anticompetitive Conditions In Today's Standardless Environment.

As noted, the current franchise regime gives rise to inherent *structural* problems that can be solved only through federal rules. Accordingly, there is no need to build any "record" showing that LFAs abuse their authority or intentionally seek to thwart federal policies. Regardless of LFAs' intentions or effectiveness, the radical fragmentation of authority inherent in the current system, coupled with the lack of any rationale for burdensome franchising regulation of existing rights-of-way holders, necessarily mean that continuing to leave the franchising process entirely in local hands will harm consumers and defeat the federal policy of encouraging large-scale entry from facilities-based broadband providers. Similarly, the fact that some new entrants did obtain some franchises in the past (albeit often on unreasonable terms) is entirely irrelevant, *see* NPRM ¶ 8 (citing "anecdotal evidence" that new entrants have been "able to obtain cable franchises"), because today's circumstances are entirely different.

But even if it were necessary to build a historical record of franchising abuses, the local franchising process plainly has produced anticompetitive conditions in the past and can be expected

[24] AT&T has already committed to participating in the Emergency Alert System ("EAS") in communities where the company deploys Project Lightspeed. For an explanation of the IP-specific EAS solutions that AT&T plans to use for both broadcast and non-broadcast channels, *see* Comments of AT&T, EB Docket No. 04-296 (filed Jan. 24, 2006).

to do so again. The providers that tried to enter the video market during the last fifteen years quickly encountered numerous roadblocks that greatly slowed the pace of entry, increased costs, and in some cases forced an abandonment of entry plans altogether.

The Ameritech experience confirms that anticompetitive LFA decisions can bar entry even for well-financed telephone companies, which, because of their existing networks and experience, are the best-positioned entrants. In the late 1990s, Ameritech New Media ("ANM"), an affiliate of AT&T's predecessor, Ameritech, sought to provide video services in competition with the incumbent cable operators. As Ameritech began to navigate the maze of local franchising authorities, however, it encountered numerous anticompetitive conditions. For example, many local franchise authorities, even in relatively small communities, refused to deal with ANM unless it responded to voluminous Requests for Proposals, including detailed submissions of proprietary financial information. A number of communities demanded free service to public buildings, or charges for institutional networks that were patently unreasonable. One city required a multi-stage application process with public hearings, an additional 2% of gross sales tax on top of the five percent franchise fee, a $500,000 payment for local producers, a set-aside of *ten percent* of the channel capacity for a local public access corporation and a substantial payment to support the corporation. Another city insisted that ANM use, and pay rent for, conduit space owned by the city even though the required routes were inconsistent with ANM's preferred architecture. One city had the audacity to demand that Ameritech pay for a new recreation center and pool. In several cities, obtaining franchises required two or more years of negotiations. And two LFAs simply demanded that ANM give them whatever other communities could extract. Eventually, those two LFAs simply stopped negotiating when the incumbent cable operator threatened to deny local residents access to its regional access studio if the local franchise authorities granted competing franchises for ANM.

In all, ANM faced difficult and inordinately time consuming negotiations in the vast majority of towns where it applied for franchises. In many jurisdictions, ANM simply abandoned the application process in the face of patently unreasonable demands. And after years of costly efforts, ANM was eventually forced to abandon entirely its initiative to provide competing video services. *See Eleventh Annual Cable Competition Report*, ¶¶ 12, 125; GAO Report to the Chairman, Committee on Commerce, Science, and Transportation, U.S. Senate, *Issues Related to Competition and Subscriber Rates in the Cable Television Industry*, at 10 (October 2003) (after initial entry attempts were foiled, "the four largest local telephone companies . . . largely exited the cable market" by 2002).

Now that it no longer has any significant expansion plans, RCN lately has little interest in Commission rules to streamline the franchising process. RCN's actual experience as a new entrant, however, dramatically underscores the need for such rules. *Cf.* NPRM ¶ 8 (noting that RCN had obtained "over 100" franchises). As RCN explained to the NTIA in 2001, the company experienced a wide variety of difficulties ranging from "excessive delays" to "attempt[s] to extract excessive concessions" to "local efforts to regulate interstate telecommunications," and, "not least, to a wide variation in local policy and practice." *RCN NTIA Letter* at 3. RCN experienced on a small scale the anticompetitive effects of wildly varying local standards that today's national and regional new entrants would experience on a much larger scale.[25] These variations in local practice – even within the relatively confined areas that were the targets of RCN's entry plans – were "so substantial that it [became] a significant barrier to the rapid and effective deployment of facilities and development of competition." *Id.* at 5. RCN also encountered other unreasonable demands that remain common, such as delay due to the lack of an established process, excessive demands for cash or services, and

[25] *See id.* at 3 ("[t]hese factors have materially slowed RCN in the build-out of its state-of-the-art fiber optic plant . . . and impaired the design and construction of integrated or unified systems in multi-jurisdictional settings such as that in the Washington, D.C. metropolitan area").

burdensome application procedures. *Id.* at 3. The end result: RCN reorganized in bankruptcy in 2004.

There are numerous other examples of local entry regulation thwarting competitive entry. When Verizon sought to obtain a franchise in Tampa Florida, "City officials presented them with a $13 million wish list, including money for an emergency communications network, digital editing equipment and video cameras to film a math tutoring program for kids."[26] In New York, "Verizon face[d] [a] request for seed money for wildflowers and a video hookup for Christmas celebrations." *Id.* In Virginia, one locality wanted "fiber strung to all its traffic lights so it can remotely monitor traffic flow." *Id.* In Massachusetts, officials are "seeking free television for every house of worship and a 10% video discount for all senior citizens." *Id.* Other cities want "high-speed Internet for sewage facilities and junk yards, flower baskets for light poles, cameras mounted on stop lights and Internet connections for poor elementary students." *Id.*[27]

AT&T's Project Lightspeed is already encountering significant regulatory roadblocks from local franchising authorities. One aspect of the necessary network upgrades is conditioning work to remove "bridge taps" that are no longer necessary and degrade performance. On June 7, 2005, AT&T's predecessor sought a routine encroachment permit from Walnut Creek, California, to carry

[26] As Verizon Enters Cable Business, it Faces Local Static – Telecom Giant Gents Demands As it Negotiates TV Deals, Wall St. J., Oct. 28, 2005, at 1.

[27] Indeed, there is a long history of localities blocking competitive video entry with unreasonable demands. In the early 1990s, in Dade County, Florida, Telesat Cablevision was stopped "dead in its tracks" by delay. A "six-month, $100,000 study into the feasibility of competition led to one delay after another in the processing of Telesat's application for a franchise . . . [as] incumbents prodded the county to ask for more data before taking any action. Finally, after 2½ years of waiting, Telesat withdrew its application . . .." Mark Robicheaux, *Captive Audience: Cable Firms Say They Welcome Competition But Behave Otherwise – Some Established Systems Go To Great Lengths To Keep Rivals Out of the Game – A Nasty Battle In Niceville*, Wall Street Journal, at A1 (Sept. 24, 1992). Similarly, in mid-1993, FiberVision applied for a franchise to serve New Haven, Hartford, Bridgeport, and New Britain in Connecticut. The franchises were not granted until 1994 and 1995, and the incumbent operators challenged all four grants in court, including one suit that reached the Connecticut Supreme Court. In September 1997, FiberVision, its capital exhausted, abandoned all four franchises. Thomas W. Hazlett & George S. Ford, *The Fallacy of Regulatory Symmetry: An Economic Analysis of the 'Level Playing Field' in Cable TV Franchising Statutes*, 3 Business and Politics, issue 1, at 32-40 (2001) ("Hazlett & Ford").

out this work. The standard permit form required only an agreement to comply with the City's standard specifications, ordinances and traffic requirements, but the City issued the permit with a non-standard one-page rider that conditioned the permit on AT&T's agreement that it would not provide any video service over the upgraded facilities without first obtaining a cable franchise from the City – without regard to whether the particular service provided would trigger a local franchise requirement under any applicable law. After five months of unsuccessful administrative appeals and negotiations with the City, AT&T ultimately sued the City in federal court. AT&T now faces the costs and delay of litigation before it can even upgrade its network to deliver a range of new IP-enabled services. And the roadblocks are proliferating in other cities. AT&T recently sued the City of Lodi, California, which imposed similar restraints to those in Walnut Creek,[28] and other cities in California have imposed, or have announced their intention to impose similar restraints.

Other anticompetitive obstacles loom ahead. Perhaps the single most daunting barrier to entry facing potential competitors are build-out conditions – the requirement that a new entrant build out its wireline "cable" network to be capable of serving all of the households served by the incumbent, or all of the households within a municipality that exceed a minimum (and generally low) household density. As explained in more detail in Section III, *infra*, because they replace market-driven investment decisions with public mandates, build-out conditions vastly increase the investment necessary for entry and simultaneously increase the risk and expected returns of entry. The predictable effect of imposing a minimum build-out requirement on potential competitors is to ensure that competitive entry does not occur in the first place, which is why the most vociferous

[28] *See Pacific Bell Tel. Co.* v. *City of Lodi*, No. CV028523 (Superior Court of Cal., San Joaquin County), Verified Petition for Writ of Mandamus (filed Feb. 6, 2006).

proponents of build-out conditions are the incumbent cable operators.[29] Only uniform Commission rules can remove such obstacles and open the way for substantial consumer benefits.

D. Neither Case-by-Case Litigation In The Federal Courts Nor State-Level Initiatives Can Effectively Substitute For Strong Uniform Federal Standards Embodied In Commission Rules.

The only checks on the local franchising process today are (1) after-the fact litigation, in which courts attempt to implement the federal "unreasonable refusal" standard on an *ad hoc* basis; and (2) state laws regulating the local franchising process. Neither of these checks can possibly be effective at establishing the uniform standards needed to ensure that the Commission's pro-consumer goals for broadband deployment and video competition are achieved. Effective uniform standards require Commission rules.

Section 621(a)(1) allows rejected cable franchise applicants to seek review of local franchising decisions in either federal or state court. 47 U.S.C. § 541(a)(1). Case-by-case litigation, however, cannot provide uniform federal standards on the local franchising process. Courts can only address isolated issues on a sporadic basis, and those rulings apply only locally or within a single state or a federal circuit. Moreover, courts can disagree, and resolving these disagreements through the appeals process can take years. In short, it is simply unrealistic to expect the judiciary to enunciate a clear, uniform, and comprehensive view of federal cable entry standards within any meaningful time frame. Nor is it realistic to expect the judiciary to have the institutional competence or disposition to act as a substitute for an expert federal regulatory agency and to administer Congressional goals such as the Commission's § 706 mandate to encourage broadband deployment. To the contrary, the federal courts recognize that "reasonableness" determinations are

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[29] *See* Hazlett & Ford, at 25-26; BellSouth Comments at 5-7 (overbuild requirements in Germantown, TN, and Coral Springs, FL, forced BellSouth to withdraw franchise applications there); BellSouth Reply Comments, MB Docket No. 05-255, at 3 (filed October 11, 2005); Qwest Comments, MB Docket No. 05-255 at 11 n. 21 (filed Sep. 19, 2005) (build-out conditions forced WideOpenWest to abandon its franchise agreements before acquiring a single subscriber).

generally the province of expert agencies. Without Commission rules giving content to the statute's prohibition against "unreasonable" denials, the courts are much more likely to defer to an LFA.

And courts could never address some of the most important shortcomings of the current system. For example, § 621(a)(1) provides for review only "from a final decision of denial." The ability to challenge a decision after an application is denied does nothing to counteract the unreasonable delays that applicants typically experience during the application process itself.[30] In addition, the prospect of case-by-case litigation is prohibitively expensive and time-consuming, especially for providers like AT&T with broad-scale entry plans that encompass areas governed by thousands of separate LFAs.

Nor is there is any basis for believing that statewide oversight of local franchise authorities could substitute for uniform federal standards adopted in Commission rules. With isolated exceptions, state-level activity has been a major part of the *problem*, as the cable incumbents have used their political influence to push enactment of legislation imposing onerous, anticompetitive requirements on new entrants. Ad hoc coalitions or working groups of municipalities have likewise tended to worsen, not cure, the entry barriers created by local franchise authorities, fostering a race to the bottom in which individual LFA wish lists are combined to create even more onerous conditions on entry.

There has been one prominent exception: Senate Bill No. 5, legislation enacted in Texas in September 2005. This legislation, codified as Chapter 66 of the Texas Utilities Code, allows video programming providers to obtain a state franchise; defines the necessary contents of a franchise application; requires that the state commission grant a franchise within 17 business days of the filing of a completed application; limits the in-kind contributions that municipalities may extract

[30] To be sure, as noted below, agency delay, if sufficiently protracted, can constitute constructive denial of an application. The decisions granting relief under this theory, however, typically involve agency inaction lasting for several years.

from franchisees; forbids municipalities from discriminating in favor of incumbent video operators; and imposes other competitive safeguards. AT&T and other competitors – including incumbent cable operators – are taking advantage of the new opportunities created by these pro-consumer efforts of the Texas legislature.

Unfortunately, many states have gone in the other direction. Acting at the behest of incumbent cable operators, these states have enacted so-called "level playing field" and other patently protectionist measures that affirmatively discourage competitive entry by making it even more difficult to negotiate reasonable terms with LFAs. Where such statewide measures are in place, even LFAs that attempt to use their franchising authority reasonably and without favoritism are often frustrated by video incumbents' pressure and litigation.

At least 11 states currently have "level playing field" statutes.[31] The California and Illinois statutes are typical. The Illinois statute provides, in relevant part, that

> Except as provided in paragraph (5) of this subsection (e) [which authorizes renegotiation of existing franchises to protect the interests of the incumbent operator], no such *additional cable television franchise shall be granted under terms or conditions more favorable or less burdensome to the applicant than those required under the existing cable television franchise, including but not limited to terms and conditions pertaining to the territorial extent of the franchise, system design, technical performance standards, construction schedules, performance bonds, standards for construction and installation of cable television facilities, service to subscribers,* public educational and governmental access channels and programming, production assistance, liability and indemnification, and franchise fees.

Ill. Comp. Stat., 65 ILCS § 5/11-42-11(e)(4) (emphasis added). Likewise, the California statute provides, *inter alia*, that:

> Any additional franchise granted to provide cable television service in an area in which a franchise has already been granted and where an

[31] Similar roadblocks to competitive entry are also embodied in local ordinances or incorporated in incumbents' franchise agreements. *See* NPRM ¶ 14 n.59.

> existing cable operator is providing service or certifies to the franchising authority that it is ready, willing, and able to provide service, shall require the franchisee to wire and serve the same geographical area within a reasonable time and in a sequence which does not discriminate against lower income or minority residents, and shall contain the same public, educational, and governmental access requirements that are set forth in the existing franchise.

Cal. Gov't Code § 53066.3(d) (emphasis added).[32]

As explained in Section III, the cable industry attempts to use these statutes to make the "playing field" as *unlevel* as possible, by insisting that compliance with these statutes is only possible by saddling new entrants, which cannot hope to enjoy the protected revenue streams that the incumbent operators received for many years, with costly regulatory burdens that the incumbents were able to spread across a much broader customer base.[33]

In short, the only way to establish effective, uniform federal standards that are consistent with the policies announced by the President and the mandates embodied in § 706 and § 621 is for the Commission to adopt federal rules.

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[32] At the same time, however, the statute gives the LFA discretion to condition the grant of a competing franchise on requirements more onerous than those imposed on the incumbent:

> Nothing in this section prevents any city, county, or city and county from considering the approval or denial of an additional cable service franchise in any area of the city, county, or city and county, subject to compliance with subdivision (d), or the imposing of additional terms and conditions upon the granting of the franchise, as the city, county, or city and county determines is necessary or appropriate.

Id., § 53066.3(b) (emphasis added).

[33] *See generally* Hazlett & Ford. *See also Petition of Verizon New York Inc. for a Certificate of Confirmation for its Franchise with the Village of Massapequa Park, Nassau County*, Case No. 05-V-1263 (Order and Certificate of Confirmation Issued Dec. 15, 2005) at 13-14, 16, 21 (modifying municipal franchise decision, at the request of the incumbent cable operator, to provide that Verizon, the competing entrant, must offer service to "any and all persons who are owners or tenants of residential property within the Municipality").

II. THE COMMISSION HAS BOTH THE AUTHORITY AND THE DUTY TO ADOPT BINDING FEDERAL RULES TO SAFEGUARD NATIONAL BROADBAND DEPLOYMENT AND VIDEO COMPETITION POLICY FROM UNREASONABLE LOCAL FRANCHISING CONDITIONS.

The Communications Act, in numerous provisions, gives the Commission express statutory authority to adopt rules that eliminate unreasonable local restrictions on the competitive provision of video programming services in order to foster the "interrelated federal goals of enhanced cable competition and rapid broadband deployment." NPRM ¶ 11. Moreover, § 706 of the Act affirmatively *requires* the Commission to exercise that authority and take "immediate action" to eliminate local franchising barriers to the implementation of national broadband policy. Under the routine operation of established preemption principles, the Commission's rules should preempt any and all inconsistent local and state requirements.

A. The FCC Has Express Statutory Authority To Promulgate Rules To Implement § 621 And Other Cable-Related Provisions Of The Act.

The Commission's tentative conclusion that it has the power to adopt rules defining what constitutes an "unreasonabl[e] refus[al] to award an 'additional competitive franchise'" under § 621(a) is plainly correct. NPRM ¶ 16. Section 621(a) is part of the Communications Act, and, as the Supreme Court has made absolutely clear, the Commission has rulemaking authority over *all* provisions of the Communications Act.

Indeed, even before the Cable Act of 1984 gave the Commission express authority over the local franchising process, the Commission manifestly had statutory authority to regulate cable franchising and to prevent disruptions of the deployment of video programming services. Section 2 of the Act provides the Commission with jurisdiction over communications, 47 U.S.C. § 152(a), and other sections of the Act grant the Commission authority to adopt rules implementing its provisions, 47 U.S.C. §§ 201(b),[34] 303(r),[35] 154(i).[36] Together, these provisions authorize the Commission to make such rules and regulations, and "issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions." *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 181 (1968); *see also FCC* v. *Midwest Video Corp.*, 440 U.S. 689, 706 (1979). Thus, even before the Communications Act was amended by the 1984 Cable Act, the Supreme Court specifically upheld the Commission's authority to preempt local franchising requirements that could frustrate the introduction and expansion of cable systems. *See Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 700 (1984).

Indeed, the Commission engaged in active oversight of franchising as early as the 1970s, creating a system of "deliberately structured dualism" for cable regulation. *Cable Television Report and Order*, 36 F.C.C. 2d 141, ¶ 177 (1972). The Commission set franchising rules and terms, allowing local authorities to implement cable franchising. In formal rulemakings, the Commission adopted minimum standards that LFAs were required to include in cable franchises. It enforced these standards through a certification process that notified parties that any terms inconsistent with the governing national rules "will be considered null and void, having been preempted by federal regulations." *Amendment of Part 76 of the Commission's Rules and Regulations*, 54 F.C.C.2d 855, ¶ 15 (1975). As the Commission explained, "[a]lthough we have determined that local authorities

[34] *See* 47 U.S.C. § 201(b) ("The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter").

[35] *See* 47 U.S.C. § 303(r) (The Commission may "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party").

[36] *See* 47 U.S.C. § 154(i) (authorizing the Commission to "make such rules and regulations, and issue such orders, not inconsistent with this [Act], as may be necessary in the execution of its functions").

ought to have the widest scope in franchising cable operators, the final responsibility is ours." *Teleprompter Cable Sys., Inc.*, 52 F.C.C. 2d 1263, ¶ 9 (1975).[37]

The Commission's pre-existing authority to preempt disruptive local franchising requirements was more expressly defined and expanded in the Cable Act of 1984 and its amendments, all of which are themselves amendments to the Communications Act. In the Cable Act, Congress amended § 2 of the Communications Act to grant the Commission explicit jurisdiction over "cable services,"[38] and enacted the substantive federal requirements and limitations set forth in Title VI of the Communications Act. Sections 4(i), 303(r), and 201(b) all authorize the Commission to adopt rules to carry out the provisions of the Communications Act. Thus, as the Supreme Court has held, the Commission plainly has the power to enact rules implementing the Cable Act. *See City of New York* v. *FCC*, 486 U.S. 57, 70 n.6 (1988) ("§ 303 of the Communications Act continues to give the Commission broad rulemaking power 'as may be necessary to carry out the provisions of this chapter,' 47 U.S.C. § 303(r), which includes the body of the Cable Act as one of its subchapters").[39]

Indeed, the Commission's authority has become doubly clear since the Supreme Court held that the Commission's § 201(b) authority to issue regulations extends to *all* amendments to the Communications Act. *See AT&T Corp.* v. *Iowa Util's Bd.*, 525 U.S. 366, 378 (1999) ("the grant in § 201(b) means what it says: The FCC has rulemaking authority to carry out the 'provisions of this

[37] Although the Commission ultimately decided to refrain from intervening, it made clear that it would stay its hand only "as long as the actions taken at the local level will not undermine important and overriding federal interests." *Amendment of Subparts B and C of Part 76 of the Commission's Rules Pertaining to Applications for Certificates of Compliance and Federal-State/Local Regulatory Relationships*, 71 F.C.C. 2d 569, ¶ 7 (1979).

[38] *See* 47 U.S.C. § 152(a) ("The provisions of this Act shall apply with respect to cable service, to all persons engaged within the United States in providing such service").

[39] *Accord United Video* v. *FCC*, 890 F.2d 1173, 1183 & n.5 (D.C. Cir. 1989); *see also Mobile Communications Corp.* v. *FCC*, 77 F.3d 1399, 1404-05 (D.C. Cir. 1996) (finding authority under §§ 151 & 154(i)); *New England Tel. & Tel. Co.* v. *FCC*, 826 F.2d 1101, 1107 (D.C. Cir. 1987).

Act,' which include [sections] added by the Telecommunications Act of 1996"). Since Congress directed § 621 of the 1992 Cable Act, like the local competition provisions of the 1996 Act, to "be inserted into the Communications Act of 1934," the grant of rulemaking authority in § 201(b) "extend[s] to implementation of [those] provisions" by its plain terms. *Id.* at 377-78.[40]

The courts have thus specifically held that the Commission has authority to implement the Cable Act amendments to the Communications Act, including § 621. *See City of Chicago* v. *FCC*, 199 F.3d 424, 428 (7th Cir. 1999) ("[w]e are not convinced that for some reason the FCC has well-accepted authority under the Act but lacks authority to interpret [47 U.S.C.] § 541 [*i.e.*, § 621 of the Act] and to determine what systems are exempt from franchising requirements"); *Time Warner* v. *Doyle*, 66 F.3d 867, 877 (7th Cir. 1995) (Congress has charged FCC with administration of the Cable Act). The Commission itself has previously issued orders implementing and enforcing other aspects of § 621 and overruling franchising authority decisions that violate § 621. *See, e.g.*, *TCI Cablevision of Oakland County, Inc.*, 12 FCC Rcd. 21396 (1997), *recon. den.*, 13 FCC Rcd. 16400, ¶¶ 78, 106 (1998); *Entertainment Connections, Inc.*, 13 FCC Rcd. 14277, ¶¶ 61, 66 (1998) ("The Commission is charged with administering and enforcing the Communications Act. Incumbent in such jurisdiction is interpreting the applicability of the provisions of the Communications Act such as the definition of cable operator and cable system . . . as those terms relate to the franchising requirements of Section 621(b)(1) of the Communications Act."). And, it is wholly irrelevant that § 621 does not speak specifically of Commission rulemaking authority, for the Commission's general rulemaking authority authorizes the agency to construe and implement provisions of the Act that do not expressly grant such authority. *See, e.g.*, *United Video*, 890 F.2d at 1183 & n.5

[40] *See also id.* at 380 ("§ 201(b) *explicitly* gives the FCC jurisdiction to make rules governing matters to which the [Act] applies") (emphasis in original); *NCTA* v. *Brand X Internet Services*, 125 S.Ct. 2688, 2699 (2005) ("Congress has delegated to the Commission the authority to 'execute and enforce' the Communications Act . . . and to 'prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions' of the Act").

(Commission may enact a syndicated exclusivity rule even though Title VI lacks specific authorization to do so); *ACLU* v. *FCC*, 823 F.2d 1554, 1574 (D.C. Cir. 1987) (same, with respect to § 622's franchise fee provisions).[41] Likewise, it is well settled that the Commission has authority to determine how it should conduct its affairs to carry out its mission.

It is equally clear that the Commission's authority to promulgate rules implementing the prohibition against unreasonable "refusal[s] to award" competitive franchises includes the authority to promulgate rules prohibiting LFAs from placing unreasonable conditions on entry that have the effect of denying a competitive franchise. NPRM ¶ 19. The courts have expressly recognized that imposing an unreasonable condition on the grant of a license application may be deemed an effective denial of that license for purposes of § 402(b) of the Act. *See Tribune Co.* v. *FCC*, 133 F.3d 61, 66 (D.C. Cir. 1998) (*citing Mobile Communications Corp. of America* v. *FCC*, 77 F.3d 1399 (D.C. Cir. 1996)). And where a local franchising authority refuses to grant a competitive franchise application that reasonably addresses legitimate local interests – and instead conditions approval of the application on the addition of other unreasonable conditions – the LFA has quite literally "unreasonably refused to award" a competitive franchise. Section 621 thus clearly authorizes the Commission to prohibit "conditions" that merely disguise "denials," and any determination that LFA insistence upon particular conditions constitutes an unreasonable refusal to award a competitive franchise would command substantial deference.[42]

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[41] The Commission's authority to implement § 621 is so clear that even incumbent cable operators have recognized it in other contexts. *See, e.g., Inside Wiring Order*, 13 FCC Rcd. 3659, ¶ 179 (1997) (invoking § 621 in requesting that the Commission prohibit property owners from denying cable companies' access to an easement over the property under certain circumstances).

[42] In other contexts, the Commission has promulgated detailed regulatory schemes to implement the Act's requirement of "reasonable" practices. *See, e.g.,* 47 C.F.R. § 1.1409(e) (implementing 47 U.S.C. § 224); 47 C.F.R. §§ 51.503-51.513 (implementing 47 U.S.C. §§ 251-254). There, as here, the Commission's interpretation of what is "reasonable" and "unreasonable" is due substantial deference. *See Capital Network Sys., Inc.* v. *FCC*, 28 F.3d 201, 204 (D.C. Cir. 1994) ("Because 'just,' 'unjust,' 'reasonable,' and 'unreasonable' are ambiguous statutory terms, this court owes substantial deference to the interpretation the Commission accords them").

Indeed, the § 621(a)(1) ban on unreasonable refusals to grant competitive franchise applications is a prototypical situation calling out for the adoption of national rules. Section 621(a)(1) is a part of the Communications Act amendments that Congress enacted to foster "*national* policy concerning cable communications," 47 U.S.C. § 521(1) (emphasis added), in order to "promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems," *id.* § 521(6). As the legislative history shows, Congress was particularly concerned that state and local franchise laws were inhibiting such competition by erecting unreasonable barriers to entry. *See* H.R. Rep. No. 98-934 at 23-34 (reprinted in 5 USCCAN 4655, 4660-61 (August 1, 1984)) (if the local franchise process "is to further the purposes of this legislation, the provision of those franchises must be based on certain important uniform Federal standards").[43]

As the Commission properly recognized, "the 1992 Cable Act's revisions to § 621(a)(1) indicate that Congress considered the goal of greater competition to be sufficiently important to justify the Commission's adoption of rules." NPRM ¶ 15. *See also Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992*, 9 FCC Rcd. 7442, ¶ 6 (1994) ("promotion of the emergence of effective competition through the entry of alternative distribution technologies is a critical element of the regulatory framework mandated by Congress" and the Commission may thus adopt rules "to foster the emergence of a competitive market for the delivery of video programming to consumers"); *Definition of Cable Television System,* 5 FCC Rcd.

[43] Indeed, the legislative history of § 621 illustrates that it was specifically designed to preempt anticompetitive franchise restrictions. Congress initially considered identifying and prohibiting specific local franchising conditions, but ultimately determined that the 1992 Cable Act's core purpose would only be fulfilled by condemning *all* "unreasonable" practices as it did in Section 621. *See* House Conf. Rep. No. 102-862 at 77 (Sept. 14, 1992); *see also Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992*, 9 FCC Rcd. 7442, ¶¶ 55-56 (1994) (Congress' intent in amending § 621 was to "prohibit franchising rules whose intent or effect is to create unreasonable barriers to the entry of potential competing multichannel video providers" and to "limit local franchising requirements to appropriate governmental interests (*e.g.*, public health and safety, repair and good condition of public rights-of-way, and the posting of an appropriate construction bond)").

7638, ¶¶ 8, 29 (1990) (legislative history of 1984 Cable Act confirms that Congress was concerned that "Federal law not provide the cable industry with an unfair advantage in the delivery of video programming," and that Congress did not intend to limit the Commission's authority to preempt).[44] In sum, the Commission has broad authority to promulgate the binding national rules necessary to ensure that the Act's core pro-competitive purposes are not defeated by unreasonable conditions on (and delays of) competitive entry.

In today's converged broadband, IP-enabled environment, §§ 621(b)(3)(B) and 253 of the Act provide additional broad authority for the issuance of Commission rules, because local "cable" regulation necessarily impacts the full suite of telecommunications and information services provided over upgraded broadband networks. Section 621(b)(3)(B) expressly prohibits any franchise requirement that "has the purpose or effect of prohibiting, limiting, restricting, or conditioning the provision of a telecommunications service by a cable operator or an affiliate thereof." 47 U.S.C. § 541(b)(3)(B). Similarly, § 253 provides that the Commission "shall preempt" any state or local statute that "may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C.§ 253(a), (c). Hence, the build-out and other unreasonable conditions that create unreasonable barriers to video

[44] The Commission's tentative conclusion (NPRM ¶ 17) that § 621's provision authorizing applicants to appeal final franchising decisions to federal district courts or state courts pursuant to the provisions of § 635 does not alter the Commission's authority to regulate the local franchising process is likewise plainly correct. The Commission is not required to give content to the prohibition of "unreasonable" restrictions only through case-by-case litigation; indeed, a Commission decision to do so would seriously undermine § 621's purposes and goals. Only by adopting national rules can the Commission establish clear standards for LFAs and courts to apply and provide the certainty necessary for broadband investments and competition, while increasing efficiency, reducing litigation costs, and simplifying judicial and administrative proceedings across the nation. *See AT&T* v. *Iowa Utils. Bd.*, 525 U.S. at 378 n.6 (affirming Commission rules implementing federal policy and governing decisions made by local tribunals, subject to review by the courts).

competition also undermine the Commission's authority and duty to enforce §§ 621(b)(3)(B) and 253.[45]

B. Section 706 Mandates The "Immediate" Elimination Of Local Franchising Barriers To Deployment Of Advanced Telecommunications Infrastructure.

Section 706(a) of the Telecommunications Act of 1996 requires the Commission to "encourage the deployment [of advanced telecommunications capabilities] on a reasonable and timely basis" by employing "measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment." Section 706(b) further directs that the Commission "shall take *immediate* action to accelerate deployment of such capability by removing barriers to infrastructure investment." *Id.* §§ 706(a), (b) (emphasis added).

As explained above, the balkanized local franchising process, undisciplined by any federal rules or time lines, unquestionably discourages and delays broadband infrastructure investment that will support not just innovative new IP-enabled video services, but a wide range of other broadband services. In the wake of revolutionary technology advances and the large-scale broadband entry that is now essential, a standardless local franchising environment "intrinsically" inhibits investment not only in competing video services, but also in "advanced telecommunications capabilit[ies]" that will be capable of providing video, voice and data. NPRM ¶ 1. Indeed,

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[45] *See, e.g., Cal. Payphone Ass'n*, 12 FCC Rcd. 14191, ¶ 31 (1997) (§ 253(a) violation is established where challenged regulation "materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment"); *Texas Preemption Order*, ¶ 22 (1997) ("section 253 expressly empowers – indeed, obligates – the Commission to remove any state or local legal mandate that 'prohibits or has the effect of prohibiting' a firm from providing any interstate or intrastate telecommunications service"); *Inside Wiring Order*, 15 FCC Rcd. 22983, ¶ 4 (2000) (Commission is "committed to removing obstacles to competitive entry into local telecommunications markets by any of the avenues contemplated by the 1996 Act"); *TCI Cablevision of Oakland County, Inc.*, 13 FCC Rcd. 16400, ¶ 38 (1998) (rejecting city's attempt to impose conditions pursuant to its franchise authority as a violation of Section 621(b)(3)(B)); *Knology, Inc.* v. *Insight Communications Co., L.P.*, 2001 WL 1750839, *3-4 (W.D. Ky. March 20, 2001) (unpublished opinion) (granting preliminary injunction based, *inter alia*, on a finding that a cable franchise provision preventing Knology from offering video, telephone and Internet access services violated Section 621(a)(3)(B)).

standardless local franchising processes, along with the wireline build-out and other unreasonable conditions they foster effectively allow thousands of narrowly-focused local franchising authorities to dictate both the pace of broadband deployment and to deny carriers the ability to make efficient wireline, wireless, satellite and other broadband technology choices. Thus, under § 706, the Commission is compelled to exercise its broad rulemaking authority to implement the § 621 "reasonableness" requirement to remove barriers to enhanced wireline video competition as part of its broader pro-consumer mandate of encouraging deployment of broadband services.

The Commission has long recognized that where, as here, there is evidence that regulation is deterring broadband investment, it is obligated to act. *First 706 Report* ¶ 106 ("We will act whenever necessary to ensure that deployment of broadband to all Americans proceeds at a reasonable and timely pace."); *see also Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd. 14853, ¶ 77 (2005) ("section 706 . . . does provide the Commission with a specific mandate to encourage broadband deployment"). The Commission has a laudable track record of doing just that – intervening wherever federal, state or local regulation imposes a substantial barrier to broadband infrastructure development.[46]

Section 706 demands similarly decisive action in this proceeding. In the absence of federal reasonableness limits, the local cable franchising process poses substantial barriers to the deployment of broadband infrastructure. The Commission therefore not only can, but must, take immediate action by promulgating rules that will remove these barriers to entry and thereby encourage not only much-needed wireline video competition, but rapid and substantial

[46] *See, e.g.*, *Triennial Review Order*, 18 FCC Rcd. 16978, ¶ 290 (2003) ("*Triennial Review Order*"); *see id.* ¶¶ 278, 286, 290 (modifying UNE rules to "promote . . . deployment of the network infrastructure necessary to provide broadband services"); *Title I Broadband Order*, 20 FCC Rcd. 14853, ¶¶ 19, 44, 68, 72 (2005) (eliminating wireline broadband Internet regulation that was "deter[ring] broadband infrastructure investment"); *271 Broadband Forbearance Order*, 19 FCC Rcd. 21496, ¶¶ 21, 25, 27 (2004) (forbearing from unbundling regulations that "discourage the BOCs from building next generation networks"); *DSL Preemption Order*, 20 FCC Rcd. 6830, ¶¶ 29, 31 (2005) (preempting state-imposed unbundling restrictions that would create a barrier to infrastructure deployment).

infrastructure deployment that is urgently needed to further national broadband policy. No other course can be squared with Congress' § 706 directive.

C. The Commission's § 621 Rules Will Preempt Inconsistent State And Local Requirements, Including Inconsistent Requirements Grounded In State or Local "Level Playing Field" Laws.

The Commission should make clear that the rules it establishes to implement § 621(a) and other provisions of the Act squarely preempt *any* inconsistent state and local statutes, regulations, rules, and practices. For this reason, that incumbent cable operators have succeeded in having anticompetitive conditions mandated by state or local "level playing field" laws (or through clauses in their own franchise agreements) is entirely irrelevant to the Commission's determinations in these proceedings. The Commission should make clear that its determinations of the meaning of § 621(a) bind LFAs and reviewing courts, and any contrary requirements contained in "level playing field" laws or existing franchises will be preempted and can be given no force by the LFAs or by reviewing courts.[47]

It is well settled that, where the Commission has authority to promulgate rules, those rules may preempt contrary state and local regulation. *Fidelity Federal Savings & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 153 (1982) ("[f]ederal regulations have no less pre-emptive effect than federal statutes"). As the Supreme Court has explained, the only "inquiry [is] whether the federal agency has properly exercised its own delegated authority." *City of New York* v. *FCC*, 486 U.S. 57, 64 (1988). "[I]n a situation where state law is claimed to be preempted by federal regulation, a

[47] *See, e.g.*, Cal. Gov't Code § 53066.3(D); Conn. Gen. Stat. § 16-331(g); Fla. Stat. § 166.046(3); Illinois. Comp. Stat., 65 ILCS § 5/11-42-11(e); Minn. Stat. § 238.08(1)(b); N.H. Rev. Stat. Ann. § 53-C:3-b; 11 Okl. Stat. § 22-107.1; Tenn. Code §§ 7-59-201-7-59-207. Some cable incumbents have managed to obtain franchises with provisions purporting to prohibit the LFA from granting a competitive franchise on terms different from the incumbent's agreement. The Commission's determination that certain conditions are unreasonable under § 621(a) and cannot be applied to new entrants will bind LFAs and reviewing courts, and any conditions in existing incumbent franchises that purport to require these conditions will be invalid. To the extent the incumbent cable operators thereafter complain that LFAs "violated" their franchise agreements by failing to impose the entry barriers on new entrants, the Commission's rules should provide the LFAs with a complete defense because enforcement of such terms would be contrary to federal law.

'narrow focus on Congress' intent to supersede state law is misdirected,' for '[a] preemptive regulation's force does not depend on congressional authorization to displace state law.'" *Id.* (*quoting de la Cuesta*, 458 U.S. at 154). Rather, the "statutorily authorized regulations of an agency will pre-empt any state or local law that conflicts with such regulations or frustrates the purposes thereof." *Id.*

Those general preemption principles are strongly reinforced here by an explicit provision of the Act: Section 636(c). *See* 47 U.S.C. § 556(c); *see also* NPRM ¶¶ 15-17. Section 636 provides that "any provision of law of any State, political subdivision, or agency thereof . . . which is inconsistent with [the Cable Act] shall be deemed to be preempted and superseded." 47 U.S.C. § 556(c). As the First Circuit has held, this provision makes clear that Congress "unmistakably" intended to preempt state and local franchising decisions that are inconsistent with the Act, including § 621. *Liberty Cablevision of Puerto Rico* v. *Municipality of Caguas*, 417 F.3d 216, 221 (1st Cir. 2005). Indeed, even prior to the 1984 Cable Act amendments to the Communications Act, the Supreme Court had held that the Commission's cable regulations adopted pursuant to its ancillary Communications Act jurisdiction had full preemptive effect. *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 698-700 (1984).

Thus, although the existence of state and local laws that have been construed to require that LFAs impose unreasonable conditions on entry is highly relevant to the *need* for immediate Commission action, it is entirely irrelevant to the Commission's *authority* to promulgate binding national rules that require different outcomes. The Commission's rules will operate to preempt and prohibit the enforcement of *any* such state or local requirements that are construed to require conditions that the Commission has deemed unreasonable.

III. THE COMMISSION SHOULD SPECIFICALLY PROHIBIT "BUILD-OUT" AND OTHER FACIALLY UNREASONABLE CONDITIONS TO ENTRY.

Several conditions commonly imposed in the local franchising process pose such obvious barriers to competitive entry that the Commission should find that they are *per se* unreasonable and thereby preempt the application of any contrary local or state law requirement. These facially unreasonable conditions include:

1. Requirements that condition competitive entry on the applicant's pre-commitment to provide wireline service to all, or any subset, of the households within the municipality ("build-out conditions").

2. Requirements that condition entry on paying fees or making in-kind contributions of services or equipment that are not credited at full market value against the entrant's franchise fee obligation.

3. Requirements that duplicate existing regulation of existing rights-of-way holders or that condition entry on the provision to an LFA of unnecessary and duplicative facilities.

4. Requirements that condition entry on the provision of local facilities (*e.g.*, space to house PEG channel equipment or studios) that are inconsistent with the applicant's network architecture, and are therefore not only unreasonable but independently barred by § 624(e) ("No State or franchising authority may prohibit, condition, or restrict a cable system's use of . . . any transmission technology").

5. City-specific data collection and record-keeping requirements and attempts to condition a franchise on local customer service quality standards that go beyond the requirements of generally applicable laws and ordinances.

6. Attempts to impose franchise pre-conditions to mere upgrading of existing telephone networks, prior to any provision of cable service.

For no good reason, each of these requirements serves to raise the cost of entry, deter broadband investment, and deny consumers the benefits of competition and choice. The Commission should prohibit each of these practices through the straightforward rules discussed below.

A. The Commission Should Prohibit "Build-Out" Conditions To Competitive Entry.

National rules enforcing the reasonableness requirement of § 621 are nowhere more important than to combat so-called "build-out" conditions on entry. Build-out conditions, a regulatory anachronism left over from the early days of cable monopolies, have become the cable industry's principal anticompetitive weapon. The purpose and demonstrated effect of these requirements is to deter entry altogether by substantially inflating the up-front and ongoing costs of entry. As the Commission has found, "build out requirements are of central importance to competitive entry because these requirements impact the threshold question of whether a potential competitor will enter the . . . market *at all*." *Texas Preemption Order* ¶ 13. And for new video entrants, the difference between market-driven deployment decisions and publicly-mandated deployment decisions is the difference between entry and no entry in many areas. Yet, throughout the nation, incumbent cable operators are successfully pressuring LFAs to condition franchise awards on an obligation to provide wireline service throughout the *entire* franchise area served by the incumbent, or a specific subset of that service area (*e.g.*, all households in the service area in neighborhoods with a density greater than 30 households per mile).[48] And many municipalities insist that state and local laws *require* them to impose anticompetitive build-out conditions to new entry.

In these circumstances, the Commission's failure now to promulgate national standards preempting local build-out conditions would abdicate to LFAs the Commission's authority under § 706 to promote broadband infrastructure development. These 30,000 independent local actors lack the resources and authority to promote the federal policy of rapid broadband deployment, unencumbered by barriers to entry. Sections 621 and 706 of the Act give the Commission ample

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[48] *See* Ford, Koutsky and Spiwak, at 3 n. 2; Hazlett & Ford at 27.

authority to carry out this federal policy, which the Congress, the President, and the Commission itself have all endorsed. And the rapid and wide deployment of broadband Internet services – AT&T has deployed DSL service to 80 percent of its legacy local telephone footprint without *any* build-out mandates – starkly confirms that market-driven investment spurred by *de*regulatory government action is the way to ensure the widest possible broadband investment and deployment.

Equally important, local build-out conditions also frustrate the broadband policies of the Congress, the President, and the Commission by allowing LFAs to dictate the *manner* of broadband deployment in the guise of video regulation. This is an issue of enormous public interest importance and of direct concern to AT&T, which currently plans to offer broadband and video broadly to the vast majority of its telephone customer base through a varying mix of wireline and wireless technologies. Wireline build-out conditions mandate technology choices and limit the technologies available to consumers. LFAs simply cannot be allowed to dictate the time, place and manner of broadband deployment – and, in particular, the mix of wireline, satellite and wireless technology used to distribute video programming – in the guise of local franchise regulation.

The competitive case against build-out conditions to competitive entry is overwhelming. The NPRM recognizes that build-out conditions may create "unreasonable barriers to entry for facilities-based providers of telephone and/or broadband services" because the "areas served by such entities frequently do not coincide perfectly with the areas under the jurisdiction of the relevant LFAs." NPRM ¶ 23. That is plainly correct. A condition that ties service over an *existing* network on the construction of *new* distribution networks in other neighborhoods is obviously unreasonable on its face. It deprives consumers in the neighborhoods where the potential entrant already has a telephone network of the potential economies from upgrading that network to provide video by holding those consumers hostage to the much higher costs of building networks elsewhere from scratch.

But the harms to consumers and competition from municipal build-out conditions go far beyond the problem of non-overlapping networks. As the Commission has repeatedly recognized, build-out conditions – even if appropriately applied to applicants for an *initial* franchise to provide service – impose on subsequent entrants an unreasonable "financial burden that has the effect of prohibiting" beneficial entry. *Texas Preemption Order* ¶ 13. *See also Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service*, 5 FCC Rcd. 4962, ¶ 139 (1990) ("incremental service . . . is often essential to the entry of a second competing cable system").[49]

For that reason, the Commission has consistently refused to impose build-out conditions on later entrants and has not hesitated to preempt state and local rules that would impose such potent and harmful barriers to entry. The Commission should do the same here and promptly prohibit build-out entry requirements that harm consumers by blocking not just much-needed video competition but the many other advanced services that wireline networks upgraded to enable IP-enabled video services would offer.

The policy arguments advanced by the cable industry in defense of build-out conditions on entry are baseless. Build-out conditions do not protect consumers, promote universal service, or advance regulatory "fairness." Rather, by deterring competitive entry, build-out conditions have precisely the opposite effects.

That is why the main defense of build-out conditions on entry has not been that they serve the public interest, but that § 621 expressly sanctions such requirements and ousts the Commission of jurisdiction to find them unreasonable. That is plainly wrong. As both the courts and the

[49] *See also id.* ("New competitors can often enter the market only by providing a limited number of products or services, or by serving a limited number of customers. Such fringe competition, although not initially full-fledged, usually results in lower prices or the provision of new service, which benefits consumers. This has been the pattern in the cable industry").

Commission have held, § 621(a)(3) merely forbids "redlining" – *i.e.*, denial of service based on neighborhood income – and imposes *no* other requirements concerning the extent of service offered within a franchise area. And § 621(a)(4)(A) operates only to *limit* the power of LFAs to impose unreasonably short deadlines in circumstances where the build-out requirement itself can be justified as reasonable. Section 621(a)(4)(A) does not override the separate broader § 621(a)(1) prohibition on LFAs' authority to impose "unreasonable" conditions in whatever form they may take and certainly does not limit the *Commission's* authority to give content to that general prohibition on unreasonableness.[50] The Commission is thus free to determine that in some circumstances – *e.g.*, as applied to a competitive provider rather than the initial monopoly franchisee – an LFA's imposition of *any* build-out condition on entry constitutes an "unreasonabl[e] refus[al] to award an additional competitive franchise." 47 U.S.C. § 541(a)(1).

The Commission should, accordingly, prohibit LFAs from conditioning the grant of a competitive franchise on compliance with any build-out conditions. This pro-competitive rule will allow new entrants to self-define their own service areas in response to competitive forces – subject of course to anti-redlining requirements – and will thereby encourage entry wherever and whenever it is economically feasible. A decision not to preempt build-out conditions, in contrast, would be a stark reversal of the Commission's core broadband policy of removing regulatory barriers to entry and encouraging market-driven investment.

[50] Indeed, Congress expressly considered and rejected a proposal to exempt build-out requirements from the "unreasonableness" standard of § 621 by rejecting language in the House version of the bill providing that an LFA's "refusal to award a franchise shall not be unreasonable if, for example, such refusal is on the ground . . . of inadequate assurance that the cable operator will, within a reasonable period of time, provide universal service throughout the entire franchise area under the jurisdiction of the franchising authority." H.R. Rep. No. 102-628, at 9 (1992).

1. Build-Out Conditions On Entry Harm Consumers By Erecting A Major Barrier To Competitive Entry.

It is now beyond serious debate that, whatever the merit of build-out conditions as applied to *initial* cable franchisees, build-out conditions on competitive video entry by *subsequent* entrants harm consumers and competition by increasing the cost and risk of entry, and thereby deterring beneficial entry that would occur without such requirements.[51] As detailed above, AT&T and its peers are undertaking massive capital investment programs to upgrade their existing networks to offer a wide range of IP-enabled and interactive video programming, broadband data and voice services. Wireline providers have every incentive to make these investments and deploy these innovative services as broadly as economically possible, and as soon as possible, to compete with the full suite of communications and entertainment services offered by incumbent cable operators (and others). Requiring AT&T and other telephone carriers to offer service to the entire customer base of the incumbent operators, however, creates an enormous barrier to entry.

The disparate and asymmetric impact of build-out conditions on AT&T and other potential entrants as compared to the incumbent cable operators stems from three structural characteristics of wireline distribution of broadband services: (1) the enormous variations in the costs per household of the investments necessary to provide wireline video programming; (2) the smaller potential revenue stream available to subsequent video entrants than to the incumbent cable operators; and (3) the greater vulnerability of subsequent video entrants to loss of up-front investment as a result of retaliatory price cuts by the incumbent. We discuss each factor in turn.

Variability of build-out costs per household. New entrants rationally (and properly) seek to focus on serving areas where the anticipated incremental revenues of providing service exceed the

[51] *See* Hazlett & Ford at 25-26; *see also generally,* Ford, Koutsky, and Spiwak. *See also* BellSouth Comments, MB Docket No. 05-255, at 5-7 (filed Sept. 19, 2005) (overbuild requirements in Germantown, TN, and Coral Springs, FL, forced BellSouth to withdraw franchise applications there); Qwest Comments, MB Docket No. 05-255, at 11 n.21 (filed Sept. 19, 2005) (build-out conditions forced WideOpenWest to abandon its franchise agreements before acquiring a single subscriber).

anticipated costs. As an economic witness for the cable industry has acknowledged, efficient competitive prices must be sufficient to cover the costs of an entrant over the long term.[52] The average cost per household of a broadband network capable of distributing video programming varies considerably throughout a local franchise area. For potential entrants like AT&T, the most obvious reason is the incomplete overlap between (1) existing telephone distribution networks and (2) municipal boundaries (or the boundaries of the incumbent operators' networks). Although the cost of upgrading a telephone network to provide video service is quite substantial, it is much less than the cost per household of building a distribution network from scratch.

The problem is far broader than the non-overlapping nature of network boundaries, however. Low density neighborhoods cost much more to serve than higher density neighborhoods, because low density neighborhoods require longer runs of cable and support structure per household. "Greenfield" (new) housing developments typically cost less to serve than established neighborhoods, because developers of new developments often allow telephone carriers, cable operators and other utilities to install conduit in common trenches dug by the developers. In addition, fundamental differences in network architecture and technology make build-out requirements far more costly for AT&T and similar IP-based wireline video service providers than for traditional cable operators. Incumbent cable networks have been sized and designed so that head-ends are located within maximum feasible cable distances to the households within the service area. Existing telephone networks, however, were typically designed and sized to meet only the lower bandwidth requirements of narrowband service, which typically allowed much longer feeder and distribution runs. Accordingly, some households that currently receive narrowband phone service over existing distribution networks are simply too far away from the fiber portion of the

[52] Steven S. Wildman, *Assessing the Policy Implications of Overbuild Competition* (Feb. 9, 2004), available at http://www.ncta.com/pdf_files/Wildman_Overbuild_Study.pdf.

network to receive broadband service without enormously costly upgrades. AT&T's innovative IP-enabled video service, for example, requires extending the fiber portion of the network within 3000 feet or so of the homes served. Until advances in technology generate substantial further reductions in cost per household, it is simply a fact of life that entry is not currently economic in all areas *even where AT&T already has existing facilities* (*e.g.*, where a large amount of fiber would have to be deployed to serve relatively few consumers). This fact illustrates the folly of mechanically applying to AT&T and other telecommunications carriers the franchise conditions developed for the incumbent cable operators and their very different network architecture and technology.

Smaller potential revenue from later entry. The financial burdens from nominally even-handed cable franchise requirements are affected not only by the mandated costs, but also by the "magnitude and volatility of the cash flows anticipated from the regulated business."[53] Subsequent entrants are less able to subsidize the build-out of high cost neighborhoods than were (and are) the incumbent operators, because the potential revenue from entry by subsequent entrants in a market is generally much less than the revenue that the incumbent cable operator could (and did) earn as the first entrant. The original cable operator could agree to more costly franchise obligations than would a competitive firm because it enjoyed exclusivity, and the relatively high subscribership that went with this first-mover advantage. Competitive video entrants, by contrast, lack any first-mover advantage, must compete for customers with one or more existing suppliers, and cannot realistically expect to capture all of the potential subscribers in the franchise area, let alone do so for a long enough period to amortize the initial capital costs of entry. Accordingly, the present value of the expected revenue stream available to later video entrants is much smaller than for the incumbent cable operator. For this reason, requiring a later entrant to build a network capable of serving the entire base of households served by the incumbent cable operator almost inevitably makes entry

[53] Hazlett & Ford at 22.

unprofitable – which explains why incumbent cable operators are such vocal supporters of build-out conditions on entry.[54]

Greater up-front investment requirements. Ostensibly neutral build-out conditions have an asymmetric entry-deterring effect for a further independent reason: build-out conditions increase the financial risk of entry, and thus reduce its attractiveness, by increasing the amount of investment that a new entrant must irretrievably commit up front.[55] Simply put, build-out conditions can mean the difference between entry and no entry. To manage the financial risk of entry, second and subsequent firms in competitive markets typically compete, at least initially, for only a subset of the market served by the incumbent.[56] The efforts of incumbent cable operators to persuade franchising authorities to impose build-out requirements on new entrants are intended to have precisely the opposite effect: to *increase* the financial risk of subsequent entry by increasing the minimum scale of entry required. That strategy – which is only rational, of course, because the incumbent cable operator expects that increasing the minimum scale of entry will foreclose entry altogether – is a classic entry-deterring strategy.[57] For these reasons, the predictable effect of build-out conditions or other so-called "level playing field" requirements is not to increase the percentage of households in

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[54] Hazlett & Ford, at 22 *et seq*.; McCormick Senate Testimony at 3.

[55] Hazlett & Ford, at 24 *et seq*.; *Triennial Review Order*, n. 244 ("Significant sunk costs by the incumbent can increase an entrant's concern that an incumbent will lower prices in the face of vigorous competition. In addition, large sunk costs can give a significant first-mover advantage to the incumbent. Other firms that are contemplating entry will realize that large-scale facilities-based entry on their part will create excess capacity and force prices down to marginal cost, leading to large losses. These firms are therefore unlikely to enter"); *Section 257 Report*, 12 FCC Rcd. 16802, ¶ 18, n.48; *Merger of MCI Communications Corp. and British Telecomms. PLC*, 12 FCC Rcd. 15351, ¶ 162 (1997); Jean Tirole, *The Theory of Industrial Organization* 314-21 (1988).

[56] *See 1990 Cable Report*, 5 FCC Rcd 4962, ¶ 139 (1990) ("incremental service . . . is often essential to the entry of a second competing cable system").

[57] *See First Annual Video Competition Report*, 9 FCC Rcd. 7442, at App. H ¶¶ 37-38 (1994); Thomas Krattenmaker and Steven Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price*, 96 YALE L. J. 209 (Dec. 1986); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. OF ECON. AND MANAGEMENT SCIENCE 3 (Spring 1971).

a municipality that enjoy competitive service alternatives, but to deter firms from competing in the franchise territory at all.[58]

The history of the cable industry provides repeated proof of the destructive effect of build-out conditions. Telesat Cablevision, an overbuilder that invested over $100 million building competitive cable systems in Florida in the 1980s, abandoned its efforts in the face of pervasive build-out conditions, including "rural first" provisions that required new competitors to build plant first in the *least* densely populated franchise areas – areas that incumbent operators had avoided for decades.[59]

Build-out conditions also played a central role in the collapse of the overbuilding sector in the late 1990s. Otsego, Minnesota, is a prime example. In 1999, Lakedale Communications, a small (11,000-line) LEC formed a joint venture with the Wright-Hennepin Cooperative Electric Association to offer video programming, broadband Internet and voice services to portions of Otsego in competition with the cable incumbent, Charter Communications. The City of Otsego, however, refused to grant a franchise to the competing joint venture unless the entrant agreed to provide services to *every* neighborhood in the incumbent's existing service area with a density of nine or more homes per quarter mile. Because this build-out requirement would have destroyed the economics of entry, the applicants abandoned their project. Today, consumers in Otsego still lack any wireline alternative to the incumbent operator.[60] Other overbuilders (*e.g.*, Wide Open West, Knology and StarPower) scaled back entry plans, or cancelled deployment altogether, after

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[58] Mark Robichaux, *Captive Audience: Cable Firms Say They Welcome Competition But Behave Otherwise—Some Established Systems Go To Great Lengths to Keep Rivals Out of the Game—A Nasty Battle in Niceville*, WALL ST. J., Sept. 24, 1992, at A1.

[59] Reply Comments of Telesat Cablevision, Inc., MM Docket No. 89-600, at 3-4 (filed Apr. 2, 1990).

[60] McCormick Senate Testimony at 4.

incurring huge losses while attempting to satisfy municipal build-out conditions during the same period.[61]

This history and the economic realities portend much greater harm to consumers and competition in the present environment of potential large-scale entry. The revenue from video is now a key driver for new fiber deployment in the residential market. In municipalities where local build-out conditions undermine the business model for offering multichannel video to consumers, there is usually no alternative business model for making the investment needed to deploy "super-broadband" capacity.[62] Build-out conditions thus threaten to deny entire communities competitive choice in a range of video and other broadband services.

For all of the foregoing reasons, the notion that new entrants can somehow short-circuit the burdens and delays of the franchising process by entering into franchise agreements with build-out conditions and other terms identical to the incumbents' franchise agreements is a complete non-starter. The national policies of promoting rapid broadband deployment and local video competition require that franchises be granted expeditiously *and* on terms that do not erect unreasonable barriers to entry. A "solution" that cures the first problem by requiring new entrants to surrender to the second problem – thereby foreclosing entry altogether in many areas – is obviously no solution at all.

2. The Policy Justifications Offered In Support Of Conditioning Competitive Entry On Build-Out Commitments Are Makeweights.

The cable industry has sought to cloak its parochial interest in entry-deterring build-out conditions in the garb of the public interest by claiming that such requirements are necessary to (i) prevent "redlining" denial of service on the basis of income; (ii) promote broader entry; and (iii)

[61] *See*, *e.g.*, Joe Estrella, "Overbuilders Pull Back in Four States," *Multichannel News* (July 30, 2001) at 1, available at http://www.multichannel.com/article/CA149452.html?display=Top+Stories.

[62] Ford, Koutsky & Spiwak at 2 n. 1.

preserve regulatory "fairness" and "symmetry." *Cf.* NPRM ¶¶ 13-14. None of these justifications withstand scrutiny. Indeed, by discouraging entry, build-out conditions on competitive entry disserve each of these interests: harming consumers, reducing competition, retarding the deployment of wire-based broadband infrastructure, and reducing the availability of competitive alternatives to low-income neighborhoods.

Prevention of "Redlining." The cable industry's most common justification for saddling competitors with build-out conditions is to claim that these requirements are necessary to prevent AT&T and other established telephone companies from denying service on the basis of their income.[63] This is an utterly baseless claim.[64]

First, federal law (and the law of many states) directly *prohibits* such "red-lining" and provides enforcement mechanisms to address any violations of the prohibition, *see* 47 U.S.C. § 541(a)(3). For that reason, the courts have, as detailed below, flatly rejected attempts to justify build-out conditions on entry as anti-red-lining measures.[65]

Second, there is absolutely nothing to the cable industry's irresponsible speculation that its potential competitors will violate the law and base their business decisions on impermissible factors. AT&T, for one, has never engaged in redlining, and has no plan to begin doing so. AT&T serves tens of millions of customers throughout the nation (and the world) without regard to neighborhood income. And claims that AT&T and its peers are likely to break the law and base

[63] *See, e.g.*, Press Release, *Texas Cable Industry Announces Position on HB 3179*, Texas Cable TV Association (Apr. 12, 2005).

[64] That the cable operators would assert such a claim is particularly ironic. The cable television industry chronically has the worst customer service record of any industry measured by the American Customer Satisfaction Index. *See* MB Docket No. 04-227, Reply Comments of the National Association of Telecommunications Officers and Advisors *et al*. (filed Aug. 25, 2004) at 7.

[65] *See ACLU* v. *FCC*, 823 F.2d 1554, 1579-1580 (D.C. Cir. 1987); *Telesat Cablevision, Inc.* v. *City of Riviera Beach*, 773 F. Supp. 383, 400 (S.D. Fla. 1991); Report and Order in *Implementation of the Provisions of the Cable Communications Policy Act of 1984*, 50 Fed. Reg. 18, 637 (1985).

their advanced services deployment plans on impermissible factors are soundly refuted by their track records in deploying advanced services broadly in both high and low income areas.[66]

There is absolutely no basis to presume that telephone companies will have any different incentives with respect to their new broadband video services. To the contrary, basing entry plans on illegal redlining considerations is even less economically rational with respect to video programming, where subscription rates correlate little with income.[67] This is particularly true if, as the incumbent cable operators claim, they plan to offer competitive local telephone services broadly. The prospect that the incumbent cable operators will offer the full suite of communications and entertainment services throughout the incumbents' service areas provides AT&T and its peers with an enormous competitive incentive to offer video programming services as widely as economically feasible.

AT&T has already begun the provision of Project Lightspeed advanced services in San Antonio, Texas, and intends to provide the service in a wide variety of neighborhoods. AT&T plans entry into additional areas across AT&T's 13-state local operating region and the rollout of additional features and functionality by mid-2006. By the first half of 2008, AT&T hopes to reach nearly 20 million households. And, ultimately, AT&T expects to make the Project Lightspeed investments and deploy the advanced services those investments enable as broadly and as quickly as sound business practices will allow.

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[66] For example, AT&T has already upgraded its local networks to offer broadband DSL services to more than 80 percent of the households served by those networks.

[67] *See, e.g.*, Ford, Koutsky & Spiwak at 3 n. 3 (citing economic literature); R. Kieschnick and B.D. McCullough, *Why Do People not Subscribe to Cable Television? A Review of the Evidence*, Unpublished Manuscript (1998) at 7-8 and App. A (available at www.tprc.org/abstracts98/kieschnick.pdf (reviewing economic literature); *1990 Cable Report*, ¶ 139 n.198 ("the nature of the broad-based demand for cable services should minimize the prospect that in the long term new entrants would find it profitable to only serve limited groups of homes within a metropolitan area").

In 2006, AT&T also plans to launch "Homezone," a set-top box and service that integrates Dish Network satellite programming with AT&T's high-speed Internet service offering video-on-demand content. HomeZone is expected to offer these services to the vast majority of the households served by AT&T's local telephone networks, including in neighborhoods where Project Lightspeed has not yet been deployed. In short, so long as local franchising barriers to entry do not prevent it from doing so, AT&T plans broad deployment of video services with no illegal redlining.

The sole basis of incumbent operators' contrary speculation appears to be a statement attributed to an AT&T executive that Lightspeed services would be more available to "high-value" customers – *i.e.*, customers more likely to buy the services that Lightspeed enables – than "low-value" customers – *i.e.*, customers less likely to buy the Lightspeed services. *See* NPRM ¶ 6 & n.37. But an intention to target investment where one expects customers hardly constitutes denying service on the basis of income, and AT&T intends to seek high value customers wherever they are and without illegal redlining, race, ethnicity or any other improper considerations.

Finally – and ironically – build-out conditions, by deterring entry, are actually likely to cause more selective deployment at the municipal level and thus could not be held out as a reasonable "remedy" even if there were any basis here for redlining concerns. The economically rationale response to onerous build-out conditions is to bypass the community entirely.[68] Thus, as the empirical data confirms, build-out conditions on competitive entry are likely to *reduce* the deployment of advanced broadband networks to low-income areas.[69]

"Universal Service." Assertions that build-out conditions on entry will advance "universal service" policies – by increasing the provision of service in rural and other low density areas – are

[68] Ford, Koutsky & Spiwak, *The Consumer Welfare Cost of Cable "Build-Out" Rules*, Phoenix Center Policy Paper No. 22 (July 2005, Second Release).

[69] Ford, Koutsky & Spiwak, *The Impact of Video Regulation on the Construction of Broadband Networks to Low-Income Households*, Phoenix Center Policy Paper No. 23 (Sept. 2005).

equally meritless. The concept of universal service is meaningless as applied to video newcomers like AT&T, which will be the third or fourth entrants in local markets where every household already can receive basic video service from one (and typically two or more) existing cable or satellite providers. Incumbent build-out or "universal service" requirements arose in an environment in which the provision of video service was thought to be a natural monopoly and multiple applicants were often vying for the right to be the *exclusive* provider of service in a particular franchise area. In this context, build-out conditions were justified as necessary to ensure that service was available at all, and in return for the commitment to serve the entire community, the initial franchisee had decades free from significant competition to recoup its build-out costs. In the present environment, however, incumbent providers already provide near-universal service, and there are two nationwide DBS providers. DBS allows all households, no matter how rural or isolated, to obtain universal service. Indeed, it was precisely because of the poor economics of providing "wired" service to rural areas that DBS initially focused its marketing efforts on those areas.

Under the circumstances, the only sensible (and pro-competitive) course is to let the marketplace decide the optimal method of providing video programming to rural residents. Thus, when wireline video operators or telephone companies can offer service in lower density areas at a cost comparable to DBS, the wireline operators will have every incentive to compete for these consumers. When the opposite is true, the market will allow DBS – as well as a growing array of other video distribution technologies, such as video over wireless phones, Internet streaming video, and Internet-downloaded video – to capture the business, which is precisely the outcome that best serves society.

In short, all or virtually all potential residential video subscribers already have at least one video option. In these circumstances mandatory build-out conditions on entry deter, rather than further, interests in universal service and more wireline competitive choice.

Competitive "fairness," regulatory "parity" or preservation of a "level playing field." Assertions that protecting consumers and maximizing broadband deployment and video entry by prohibiting build-out conditions on entry would violate principles of "regulatory parity" are equally baseless.[70] These appeals to playground justice have it backwards: principles of regulatory parity weigh *against* imposing build-out conditions on AT&T and other competitive entrants.

The Commission has never required that cable companies and other telecommunications service competitors, when entering voice telephony markets, match the universal service and carrier of last resort obligations that were imposed on incumbent LECs, including requirements to provide service throughout their service areas.[71] Indeed, in the *Texas Preemption Order*, the FCC expressly preempted build-out conditions for competitive telecommunications carriers – including incumbent cable operators – as a barrier to entry *even in a context – unlike here – where the statute expressly sanctioned state rules designed to promote universal service*. *Texas Preemption Order* ¶ 13 ("universal service" requirements impose an unreasonable "financial burden that has the effect of prohibiting" new entrant competitors from providing service).[72]

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[70] *See, e.g.*, Bara Vaida, *Clashing High-Tech Titans*, NAT'L. J. (Sept. 24, 2005).

[71] *See, e.g.*, Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, § 253(a) (preempting state laws that barred competitive entry into local exchange telephony); *Title I Broadband Order*; *Texas Preemption Order*.

[72] The *Texas Preemption Order* distinguished PCS build-out conditions from competitive entry build out requirements: "The Commission's grant of a PCS license confers on the licensee an exclusive right to use a designated portion of the electromagnetic spectrum for the term of the license" and in that narrow context, build-out conditions "are a reasonable way of fulfilling the explicit statutory mandate that the Commission prevent a licensee from stockpiling or warehousing spectrum and ensuring that the licensee promptly constructs the facilities necessary to use the designated spectrum." *Id.* ¶ 89.

In response, the incumbent cable operators, striving to optimize their profits, generally have offered telephone service only in selected areas.[73] Because the cable incumbents are free to enter voice and data markets without any obligation to offer service to the entire customer base of the incumbent voice and data providers, regulatory symmetry requires that telephone carriers be allowed to provide video service without building out to match the entire customer base of the incumbent cable operators. The incumbent cable operators, as the dominant participants in the video marketplace and the beneficiaries of light-handed regulation of their entry into voice and Internet markets – unconditioned on any build-out conditions at all – cannot seriously contend that new video entrants must be saddled with build-out conditions for the incumbents to remain competitive.

Moreover, build-out conditions would be unwarranted as a matter of economics even if the Commission were writing on a clean slate. Imposing the same regulatory requirements on both incumbent cable operators and new video entrants could make sense only if the two groups of firms are similarly situated in relevant respects. As noted above, incumbent cable operators have enjoyed enormous first mover advantages from their years of monopoly, and are far better capable of recouping the costs of build-out obligations and other costly franchise conditions than are later video entrants.[74] By contrast, new entrants face from the outset the likelihood of sharing a market with two, three or more existing competitors. The revenue potential of such entry – and the ability of the entrant to subsidize costly construction in low-density areas – is much more limited. In these

[73] *Eleventh Annual Video Competition Report,* at 25, 36, 69.

[74] It is worth noting that the build-out conditions imposed on the incumbents are exaggerated. Existing cable franchises often took decades to build. Many networks were built before the advent of cable franchising, and thus had no build-out conditions at all. *See* Hazlett & Ford, at 38 & n. 76; *Comcast Cablevision of New Haven, Inc.* v. *Connecticut DPUC*, 1996 WL 661805 at *3 (holding that Comcast, the incumbent, had no basis for challenging the new entrant's proposal to build a 737-mile system within 12 years after entry, when Comcast and its predecessors actually took 15 years to build only 525 miles). And, as noted, many incumbents are still exempted to this day from building out in low density areas.

circumstances, the "prior existence" of the incumbent "makes the entry process *intrinsically asymmetric*, and this asymmetry exists even if the entry costs borne by the entrant and incumbent are identical."[75] "Labeling nominally symmetric obligations borne by entrants and incumbents as 'equal' burdens ignores the greater likelihood that the residual profits anticipated by the entrant will be insufficient to cover fixed costs, relative to the incumbent that entered without rivals."[76]

The law recognizes that, in circumstances like these, it undermines any rational notion of regulatory fairness or parity to impose the same regulatory mandates on such *dis*similarly situated parties. Neither the Commission nor any other rational regulator has ever endorsed "regulatory parity" as the cable industry defines it – precisely mirrored obligations on all providers without regard to relevant differences. To the contrary, the Commission has always properly recognized that "legal, market, or technological distinctions may *require* different regulatory requirements." *Wireline Broadband NPRM*, 17 FCC Rcd. 3019, ¶ 7 (2002). And no provision of the Cable Act evinces any congressional intent to impose identical conditions on all operators in a franchise area, under the rubric of a "level playing field" or any other theory. To the contrary, the Act is replete with differing conditions that reflect the different positions of incumbents and new entrants. *See, e.g.*, § 623(a)(1) (rate regulation); § 653(c)(1)(C), 47 U.S.C. § 573(c)(1)(C) (exempting Open Video Systems from local franchising requirements). Precisely because new entrants often are *not* similarly situated with incumbent providers, the Commission, Congress and the courts have repeatedly rejected pleas for universal service or build-out conditions on entry in particular contexts where, as here, those conditions will deter entry and harm competition and consumers.[77]

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[75] Hazlett & Ford, at 24 (emphasis in original).

[76] *Id*.

[77] *See, e.g.*, *Texas Preemption Order*; Ford, Koutsky, & Spiwak at 3, n.4; *LyncStar Integrated Communications, LLC*, 13 FCC Rcd. 24280, n.20 (1998) (citing *Implementation of Section 302 of the Telecommunications Act of 1996: Open Video Systems*, 11 FCC Rcd. 18223, 18330, 18332 (1996)) ("in enacting the open video system provisions of the Communications Act, Congress expressly excluded

3. The Commission Has Clear Statutory Authority To Rule That Conditioning Entry On Build-Out Commitments Constitutes An "Unreasonable" Refusal To Award A Competitive Franchise.

As shown above, the Commission has broad authority to determine that particular LFA conditions on entry are "unreasonable." The cable industry contends that other provisions of § 621 nonetheless foreclose the Commission from exercising that rulemaking authority to limit build-out conditions even if it determines that they are unreasonable. These arguments are baseless. Neither § 621(a)(3), which prohibits redlining, nor § 621(a)(4)(A), which forbids LFAs from mandating unreasonably short build-out periods, precludes the Commission from prohibiting as unreasonable build-out conditions on competitive entry. And given that entry-deterring – and thus speech-restricting – build-out conditions on competitive video entry serve no substantial government interest, the Commission *must* adopt this reasonable construction of the Act under the canon of constitutional avoidance.[78]

Section 621(a)(3). Some have contended that express authority for LFAs to impose build out requirements can be found in § 621(a)(3) of the Act, which directs that "[i]n awarding a franchise or franchises, a franchising authority shall assure that access to cable service is not denied to any group of potential residential cable subscribers because of the income of the residents of the local area in which such group resides." Both the courts and the Commission have rejected this argument.

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requirements, such as build-out obligations, which would impede the rapid development and operation of open video systems").

[78] *See, e.g.*, *Turner Broad. Sys.*, *Inc.* v. *FCC*, 520 U.S. 180, 189 (1997) (a content-neutral restriction on video programming distribution will be upheld only if it "advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests"); *see also Time Warner Enter. Co.* v. *FCC*, 240 F.3d 1126, 1130 (D.C. Cir. 2001) (same); *Watchtower Bible & Tract Soc'y of New York*, *Inc.* v. *Village of Stratton*, 536 U.S. 150, 163 (2002) (First Amendment requires permitting requirements to be justified by legitimate governmental interests even if officials have no discretion as to whether to grant such license).

Section 621(a)(3) "does not mandate that the franchise authority require the complete wiring of the franchise area." *ACLU*, 823 F.2d at 1579-1580. "The statute on its face prohibits discrimination based on income; it manifestly does not require universal service." *Id*. at 1580; *see also id*. ("if no redlining is in evidence, it is likewise clear that wiring within the franchise area can be limited"); *Telesat Cablevision, Inc.*, 773 F. Supp. at 400 ("the intent of [§ 621(a)(3)] [is] to prevent the exclusion of cable service based on income and . . . this section does not mandate that the franchising authority require the complete wiring of the franchise area in those circumstances where such an exclusion is not based on the income status of the residents of the unwired area."); Report and Order in *Implementation of the Provisions of the Cable Communications Policy Act of 1984*, 50 Fed. Reg. 18637 (1985) (same).

Section 621(a)(4)(A). Nor is the Commission's authority to prohibit build-out conditions as a condition on competitive entry limited by § 621(a)(4)(A), which provides that "[i]n awarding a franchise or franchises, a franchising authority shall allow the applicant's cable system a reasonable period of time to become capable of providing cable service to all households in the franchise area." By its terms, § 621(a)(4)(A) operates to limit the authority, not of the Commission, but of the *LFAs*. The statute provides that even where imposing a build-out requirement would otherwise be reasonable, the LFA must allow a "reasonable" period of time for the franchisee to comply with that requirement. That limitation on the LFAs' discretion to impose unreasonable deadlines on build-out conditions that they otherwise have the authority to impose in no way constrains the Commission's broad authority to construe the reasonableness requirement of § 621(a)(1) and to determine that some build-out conditions – *i.e.*, those applied as a condition to competitive entry – are unreasonable regardless of how long the LFA allows for compliance. Rather, § 621(a)(4)(A) simply prohibits franchise authorities from imposing "immediate" build out requirements in those instances where build out requirements are appropriate. Not only is this construction of

§ 621(a)(4)(A) compelled by the provision's text, but given the clear entry-deterring effect of build-out conditions, no other construction of § 621 can be reconciled with the provision's core purpose of promoting competition and eliminating monopoly.[79] Accordingly, § 621(a)(4)(A)'s directive to LFAs does not, and could not, preclude the Commission from ruling in this proceeding that it is unreasonable for LFAs to condition competitive entry on build-out commitments.

Not surprisingly, the D.C. Circuit has already rejected the cable industry's anticompetitive reading of § 621(a)(4)(A). *Americable Intern., Inc.* v. *Dep't of Navy*, 129 F.3d 1271, 1274-75 (D.C. Cir. 1997). There, a cable operator argued that §§ 621(a)(1) and 621(a)(4)(A) "were intended to prevent cable providers from 'cherry-picking' only the most lucrative portions of a cable franchise area." The D.C. Circuit squarely rejected that argument, finding that § 621(a)(4)(A) "does not . . . require" that cable operators extend service "throughout the franchise area" – or, indeed, that cable operators do *anything* – but instead was a limit on franchising authorities that sought under state law to impose such obligations. *Id.*[80]

For all of these reasons, the Commission should act without further delay to promulgate national standards preempting local build-out conditions. Failure to act now would cede the Commission's Section 706 mandate to the uncoordinated decisions of 30,000 LFAs, which lack the

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[79] *See* House Conf. Rep. No. 102-862, 102d Cong., 2d Sess. 1991, reprinted in [1992] 4 U.S. Code Cong. & Admin. News 1133, 1259 ("The conferees believe that exclusive franchises are directly contrary to federal policy and to the purpose of S. 12, which is intended to promote the development of competition. Exclusive franchises artificially protect the cable operator from competition"); *NCTA* v. *FCC*, 33 F.3d 66, 75 (D.C. Cir. 1994) (The Commission "must take into account 'the provisions of the whole law, and . . . its object and policy'") (quoting *United States Nat'l Bank* v. *Independent Ins. Agents, Inc.*, 113 S.Ct. 2173, 2182 (1993)).

[80] *See also Americable Intern., Inc.* v. *U.S. Dept. of Navy*, 931 F. Supp. 1, 2-3 (D.D.C. 1996) ("Americable argues first that the Cable Act establishes a 'requirement' that a franchise 'provide universal service throughout the franchise area.' Its authority for that position is 47 U.S.C. § 541(a)(4)(A), which requires that a franchising authority (here the Navy) allow an applicant's system 'a reasonable period of time to become capable of providing cable service to all households in the franchise area. . . .' That language contains no requirement of universal service, of course. Americable's strained argument is at odds with the purpose of the Cable Act, which is to promote competition, and of the amendment in question, which protects the interests of new franchise applicants and not incumbents like Americable. *See* S. Rep. 92, 102d Cong., 2d Sess. 1991, reprinted in [1992] 4 U.S. Code Cong. & Admin. News 1133, 1225").

resources and authority to eliminate existing barriers to entry. Accordingly, the federal policy of rapid broadband deployment – and of timing and technology decisions determined by market forces, not regulatory fiat – dictates that the Commission exercise its statutory authority under §§ 621 and 706 by preempting build-out conditions now.

B. The Commission Should Set A Uniform, National Franchise Fee That Preserves Important Local Revenue Streams But Also Does Not Foreclose Competition.

Section 622(b) of the Cable Act provides that franchise fees imposed on an operator "shall not exceed five percent of such cable operator's gross revenues derived . . . from the operation of the cable system to provide cable services." 47 U.S.C. § 542(b). AT&T has no objection to paying appropriate fees in connection with its provision of IP-enabled video services. LFAs have come to rely upon franchise fee revenue and AT&T has signaled its willingness to pay its fair share – even though DBS, wireless and Internet video providers do not pay such fees. It is critically important, however, that franchise fees be limited to reasonable, lawful amounts that do not competitively disadvantage new wireline competitors. Such a fee should be substantially similar to what reasonable local governments typically collect in connection with existing cable franchise arrangements and designed to compensate municipalities for reasonable and lawful franchise fees that may be lost as a result of competitive wireline video entry. Therefore, the Commission should determine in this proceeding a single, consistent, national formula for the calculation of such fees. In this way, local government revenue streams will be preserved without stifling competition by forcing new entrants to negotiate thousands of separate fee arrangements.

In addition, the Commission should ensure that LFA demands for cash and free or discounted services and equipment over and above franchise fees do not effectively tax new entrants to death, and have the very effect that Congress acted to prevent: deterring entry and competition.[81]

Specifically, the Commission should promulgate a rule that expressly provides that *any* obligation to make payments, or provide *anything* of value, to an LFA or its designee must be credited – at full market value – toward the provider's revenue-based franchise fee obligation to the LFA, as set by the formulation established by the Commission. Such a rule is necessary to implement the statutory requirement that the "franchise fee" include "*any* tax, fee, or assessment *of any kind*" imposed by the LFA, including payments "for, or in support of the use of, public, educational, or governmental access facilities." 542(g)(1) & (2)(B). Congress' use (twice) of the inclusive term "any" in the "franchise fee" definition, including its express statement that "assessment[s] *of any kind*" constitute franchise fees, makes plain that franchise fees encompass in-kind goods, equipment, and services provided to LFAs. In addition, in-kind and discounted equipment and services do not fall within any of the express exceptions in the "franchise fee" definition. *See Robin Cable Systems, L.P.* v. *City of Sierra Vista*, 842 F. Supp. 380, 381 (D. Ariz. 1993) (Congress in § 622(g) defined the term "franchise fee" broadly, and the listed exceptions are "narrowly tailored").

To eliminate any ambiguity and to ensure uniformity, the Commission should issue rules that clarify that the following types of assessments, charges or requirements are to be credited against any franchise fee paid pursuant to the national formula:

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[81] An empirical study showed that approximately 26 percent of the capital costs incurred by cable operators, and 11 percent of operating expenses, were attributable to in-kind contributions to local franchise authorities, with little or no benefit to consumers. Mark A. Zupan, *The Efficacy of Franchise Bidding Schemes in the Case of Cable Television: Some Systematic Evidence*, 32 J. OF LAW & ECON. 401, 405 (Oct. 1989).

(i) any "application" and other fees and charges associated with obtaining a franchise that exceed the LFA's reasonable costs of processing the application (which should not exceed $5,000);[82]

(ii) any voice, data or other services provided to the LFA or its designee, including services provided for, or in support of, public, educational or governmental access;[83]

(iii) any requirement that the applicant provide free or discounted facilities or equipment to the LFA or its designee;[84]

(iv) any requirement that the applicant purchase or lease from the LFA or its designee services or equipment (including, but not limited to, fiber, conduit, and rights-of-way) that are unwanted or are made available at rates or charges that exceed the fair market value of those services or equipment;

(v) any costs an applicant incurs in connection with any obligation to indemnify the LFA against lawsuits or other claims by the incumbent operator or other industry litigation challenging the authority or lawfulness of the franchise sought by the applicant, or the adequacy of the conditions imposed by the local franchise authority;

[82] *See Robin Cable Systems*, 842 F. Supp. at 381 (city's attempt to impose license "processing costs" of up to $30,000 violated section 622(g); *id.* ("[a]ny substantial fee charged on top of the annual license fee is inconsistent with the Cable Act").

[83] Although the "capital costs" of PEG facilities themselves may be excluded from the statutory cap on franchise fees, "payments for, or in support of the use of, PEG access facilities" – including but not limited to "equipment costs, salaries, and training" – are subject to the statutory cap. *City of Bowie, Maryland*, 14 FCC Rcd. 7674 (1999).

[84] Section 622(g)(1) defines franchise fees as encompassing "any tax, fee or *assessment of any kind* imposed by a franchising authority . . . on a cable operator or cable subscriber, or both, solely because of their status as such." 47 U.S.C. § 542(g)(1) (emphasis added). Moreover, while the statute expressly excludes from the cap on franchise fees the "capital costs" incurred by the cable operator for "public, educational, or governmental access facilities," *id.*, § 542(g)(2)(C), there is no comparable exemption for the costs of institutional networks. This omission cannot be dismissed as an oversight, for Section 611 of the Act clearly defines – and distinguishes between – the two concepts. 47 U.S.C. § 531(b), (f).

(vi) any "acceptance" fees that are a condition for obtaining a franchise beyond those that are clearly "incidental" to filing; [85] and

(vi) any fees purportedly used by the LFA to hire attorneys or outside consultants.[86]

Because any LFA that fails to treat such payment and service obligations in this fashion both violates § 622 and imposes unreasonable barriers to entry, the Commission should expressly rule that any such demands violate the § 621 reasonableness requirement.[87]

Finally, with respect to "capital costs" incurred in connection with institutional networks and other PEG facilities, the Commission should rule that it is unreasonable for LFAs to require new entrants to construct duplicative new facilities as a condition of a franchise.[88] Section 621(a)(4)(B)

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[85] Although § 622(g)(2)(D) excludes "charges *incidental* to the awarding . . . of the franchise," many LFAs have attempted to assess fees well in excess of any legitimate, incidental costs that the LFA incurs in awarding a franchise. The courts have held that such charges cannot be recovered outside of the franchise fee cap. *See, e.g.*, *Robin Cable Systems* at 381 (D. Ariz. 1993).

[86] The courts have repeatedly held that amounts paid to indemnify an LFA for consultant fees, litigation costs or similar items constitute franchise fees under the Act, and that state or local rules requiring indemnification of such amounts in addition to the maximum franchise fee are preempted by federal law and therefore unenforceable. *See Charter Communications, Inc.* v. *County of Santa Cruz*, 131 F. Supp. 2d 1184, 1211-1213 (N.D. Cal. 2001), *rev'd on other grounds*, 304 F.3d 927 (9th Cir. 2002); *Time Warner Enter. Co.* v. *Briggs*, 1993 U.S. Dist. LEXIS 1196, 1993 WL 232710 (D. Mass. Jan. 14, 1993); *Robin Cable Systems, L.P.* v. *City of Sierra Vista*, 842 F. Supp. 380, 381 (D. Ariz. 1993); *Birmingham Cable Commns. Inc.* v. *City of Birmingham*, 1989 U.S. Dist. LEXIS 7475, 1989 WL 253850 (N.D. Ala. 1989).

[87] The Commission should also make clear that under § 622 an LFA may not impose franchise fees on the provision of telephony, Internet data or other non-video services. In its *Cable Modem Order*, 17 FCC Rcd. 4798, ¶ 105 (2002), the Commission expressly held that "Title VI does not provide an independent basis of authority for assessing franchise fees on cable modem services." Notwithstanding that decision, some LFAs have attempted to tax non-video services. *See, e.g.*, *Liberty Cablevision of Puerto Rico, Inc.* v. *Municipality of Caguas*, 417 F.3d 216 (1st Cir. 2005). The fact that some LFAs continue to impose such unlawful fees underscores the need for the Commission to issue rules that expressly preempt any attempt by an LFA to demand fees on non-cable services.

[88] Section 622(g)(2)(B) narrowly excludes only "capital costs" incurred in connection with PEG access facilities from the definition of "franchise fees." This exception is thus narrow: "capital costs" are "those costs incurred in or associated with the *construction* of PEG access facilities," and do not include "payments for, or in support of the use of, PEG access facilities" including "equipment costs, salaries, and training." Public Notice, *Letter Regarding City of Bowie, MD*, 1999 WL 307499 (CSB May 18, 1999); *see also Cable TV Fund 14-A* v. *City of Naperville*, 1997 WL 433628, *12 (N.D. Ill) ("Capital costs refer to those costs incurred in or associated with the construction of PEG access facilities . . . and are distinct from, or in support of the use of, PEG access facilities."). Thus, all other non-capital PEG-related expenses count towards the five percent franchise fee cap.

permits an LFA to require that cable service providers fund "adequate" PEG facilities – not duplicative or gold-plated PEG facilities. Further, as the Commission recognized in its OVS rulemaking proceeding, requiring a new entrant to construct duplicate facilities is "unnecessary [and] wasteful" given that whatever institutional networks and other facilities the LFA deemed necessary are already in place by virtue of the incumbent cable operator's franchise (and were generally deployed at a time when the incumbent did not face significant competition). *OVS Order*, ¶ 131. Thus, requiring a new entrant to construct such "duplic[ative] . . . facilities" would only create an entry barrier that undermines "Congress' goal of competitive entry." *Id.*, ¶ 132.

In addition to demanding that new entrants construct and fund PEG access facilities, some LFAs also demand that new entrants construct new data networks as a condition of entry. The Commission should expressly rule that LFAs cannot require a new entrant to construct such "institutional networks" as a condition of a franchise. The Commission should also adopt rules that clarify that, where an entity has already constructed an "institutional network," an LFA can only require that appropriate channel capacity for governmental and educational video services be provided on that network and, thus, that LFAs cannot require a new entrant to provide for free the types of broadband services that are typically offered to residential and business customers.

Section 611(a) states that an LFA "may establish requirements in a franchise with respect to the designation or use of channel capacity for public, educational, or governmental use *only to the extent provided in this section*." 47 U.S.C. § 531(a) (emphasis added). Section 611(b), in turn, provides that an LFA "may in its request for proposals require as part of a franchise . . . that . . . *channel capacity on institutional networks be designated for educational or governmental use*." *Id.* § 531(b) (emphasis added). The plain language of § 611(b) thus makes clear that only "channel capacity" on existing institutional networks may be dedicated to educational or governmental use and does not provide any authority to an LFA to require *new* construction.

In applying § 611 to open video system operators, the Commission permitted an LFA to designate channel capacity for educational and governmental use only to the extent that the open video system operator "maintain[ed]" an "institutional network." In upholding that decision, the court of appeals held that "§ 611 does not permit localities to require cable operators to build institutional networks, but instead, by its terms, merely states that" an LFA may require channel capacity on an existing network that qualifies as an "institutional network." *City of Dallas* v. *FCC*, 165 F.3d 341, 350 (5th Cir. 1999). "In other words, localities may require that cable operators devote space on their existing institutional networks, if there are any such networks, to educational or governmental use, but the statute does not authorize local governments to *require* the construction of institutional networks." *Id.*[89]

In all events, § 611 does not permit LFAs to require new entrants to provide broadband Internet access services or other comparable data services as a condition of a franchise. As noted, § 611(b) allows an LFA only to "designate" "*channel capacity* on institutional networks . . . for educational or governmental use." *Id.* § 531(b) (emphasis added). Section 611(b) thus contemplates that LFAs may require a cable operator who has constructed an "institutional network" to provide only "channel capacity" – *i.e.*, capacity used for video programming services, thereby excluding the types of broadband services or special access services that LECs sell to both business and residential customers. The Act's definition of "institutional network" reinforces this conclusion with respect to the type of broadband Internet access services provided to residential customers. Section 611 defines an "institutional network" as "a communications network which is

[89] Section 621(b)(3)(D) is not to the contrary. That section states that "[e]xcept as otherwise permitted by sections 611 and 612, a franchising authority may not require a cable operator to provide any telecommunications service or facilities, other than institutional networks, as a condition of the initial grant of a franchise." 47 U.S.C. § 541(b)(3)(D). As such, this provision merely refers back to § 611 as the source of the LFA's authority and thus cannot be viewed as an independent grant of authority. For this reason, the Fifth Circuit in *City of Dallas* found that it was "[o]bvious[]" that "the obligation to provide institutional networks could not stem from § 621(b)(3)(D)." *City of Dallas*, 165 F.3d at 351 n. 10.

constructed or operated by the cable operator and which is generally available only to subscribers who *are not residential subscribers*." 47 U.S.C. § 531(f) (emphasis added).

C. The Commission Should Prohibit LFA Demands That New Entrants Provide Space In Local Headend Buildings For The Use Of LFAs Or Their Designees.

Traditional cable operators have generally deployed an architecture that relies on many local headend buildings dispersed throughout the service area. Based upon that architecture, many incumbent operators have agreed to franchise conditions that they provide space in those headend buildings for the use of LFAs or their designees (*e.g.*, to house studios, equipment and personnel used for public, educational or governmental channels). Even if those franchise conditions are reasonable as applied to the incumbent operators, they would be *unreasonable* as applied to new entrants such as AT&T that are fully capable of providing adequate PEG channels but that use an architecture and technology that does not involve dispersed headend buildings.

AT&T's innovative new IP-enabled video service uses an architecture and technology that fundamentally differs from traditional cable system architecture and technology. Specifically, AT&T has deployed a very different architecture using its existing telephone plant that does *not* employ local headend offices. AT&T's IP-enabled service relies upon remote servers that house and distribute content to small local nodes (and ultimately to subscribers). As a result, AT&T simply does not have headend space that it can make available to LFAs. Accordingly, requiring AT&T and similarly situated entrants to provide space for PEG studios, equipment or personnel at headend facilities, or other facilities, would be patently "unreasonable" because it would effectively require AT&T to either build or rent facilities solely for the use of the LFAs and their designees. Imposing such a substantial burden on new entrants would place them at a significant competitive disadvantage with respect to incumbents and, therefore, would be an "unreasonable" condition on entry within the meaning of § 621.

Moreover, such a requirement is also unnecessary. AT&T can satisfy PEG obligations in other ways, has ample bandwidth to do so, and is prepared to give innovative access to local governments in ways consistent with AT&T's architecture.

D. The Commission Should Preempt Any Local Or State Rule That Subjects The Upgrading Of Existing Telephone Networks To Video Franchise Regulation.

A number of municipalities have asserted that existing telephone carriers need a local video franchise not only to provide IP-enabled video programming, but even to upgrade existing telephone networks with the fiber, electronics and other physical components needed to provide IP and broadband service. These attempts to expand the reach of local franchising authority are clearly *ultra vires*, as the New York Public Service Commission recently held.[90]

The Act requires a local video franchise only before a "cable operator" "provide[s] cable service." 47 U.S.C. § 541(b)(1). LFAs have no authority to bar existing telephone carriers from installing fiber, upgraded electronics or other assets in their existing telephone rights-of-way, or from taking any other action short of providing cable service. *New Ulm Telecom*, 10 FCC Rcd. 2705, ¶ 8 (1995) ("We have not been persuaded that carrier construction of a cable system . . . prior to the obtaining of a franchise violates the franchise requirements of Section 621(b) of the Act if there was no provision of service at that time . . . Section 621(b) prohibits on its face only provision of cable services prior to receiving a franchise."); *see also Entertainment Connections, Inc.*, 13 FCC Rcd. 14277, ¶ 61 (1998) ("only cable *operators* are required by Section 621(b) to obtain cable franchises and comply with the other Title VI requirements") (emphasis added); *TCI Cablevision of Oakland County Inc.*, 133 FCC Rcd. 16400, ¶ 2 (1998) ("The City's right-of-way management authority vis-à-vis the construction and operation of a cable system must be exercised pursuant to the limitations and restrictions contained within Title VI, regardless of whether the City chooses to

[90] *Joint Petition of the Town of Babylon, et al.*, 2005 N.Y. PUC LEXIS 253, *5 (June 15, 2005).

enact separate local ordinances to govern the franchising and construction permit aspects of this authority.").[91]

E. The Commission Should Adopt Rules To Prevent LFAs From Adopting Unreasonable Data Collection Requirements Or Demanding Local Customer Service Quality Standards That Go Beyond The Requirements Of Generally Applicable Laws Or Ordinances.

The Commission can and should adopt rules to prevent LFAs from imposing "data collection" and related requirements – in the guise of local "customer service quality" rules – that cannot be satisfied in the case of multichannel video programming services that are provided in IP protocol over upgraded local exchange facilities. In particular, many LFAs impose requirements that franchisees collect, track, and report data relating to customer service requests on a "city specific" basis. But the call centers and systems that AT&T uses to respond to customer service requests are not city specific; they operate on region wide bases and cannot collect, track, and report data that is isolated to any individual city.

Because IP-video customers will typically purchase a number of services from AT&T, customer service requests for IP-video services will be placed to the same regional call centers that handle customer service requests for other services. AT&T will take reasonable steps to constitute its customer service call centers with sufficient toll-free telephone line capacity and sufficient personnel to provide overall performance in each call center that satisfies local customer service requirements that have been established by an LFA in the area served by the call centers.

However, in addition to establishing customer service standards, many LFAs have imposed obligations that franchisees collect, track, and report customer service performance data that is

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[91] *See also TCI Cablevision of Oakland County Inc.*, 133 FCC Rcd. 16400, ¶ 78 (1998) ("Upgrades of existing copper and coaxial cable plant are necessary today for the delivery of high quality cable services, are required for the provision of tomorrow's competitive local telephone service, and are essential for the future provision of switched, integrated broadband voice, video and data services. All levels of government can best serve the public interest by joining together to speed the accomplishment of the sorts of cable upgrades TCI seeks to make in Troy by streamlining and hastening administrative processes").

specific to the service requests made by customers in each individual LFA. Compliance with such requirements is simply not economically feasible. AT&T's IP-video service is provided over the same regional facilities and systems that support all of its IP-based services. Service requests for IP-video are thus handled by call centers that both respond to requests by video customers in multiple LFAs and respond to requests for telecommunications, Internet access, and other non-video services. To attempt to install systems that would first isolate calls applicable to IP-video services and would then identify the particular city or other LFA from which the call was placed would be enormously difficult and expensive. The Commission can and should declare any city-specific requirements of data collection for customer service requests to be unreasonable and make explicit that AT&T and other similarly situated IP video providers can demonstrate their compliance with LFA customer service standards based on the aggregate performance data of the call center that serves that LFA.

The Commission should also reaffirm that LFAs may not – absent the franchise applicant's consent – impose *any* local service quality standards in the franchising process that go beyond the requirements of duly enacted laws and ordinances. Section 632(d)(2) of the Cable Act, entitled "Customer Service Requirement Agreements," expressly provides that the Act does not "preclude a franchising authority and cable operator from agreeing to customer service requirements that exceed" the Commission's rules, but that, absent agreement, the franchising authority may only impose local service quality standards embodied in a "municipal law or regulation, or any State law." 47 U.S.C. § 552(d)(2). *See also Implementation of Section 8 of the Cable Television Consumer Protection and Competition Act of 1992 Consumer Protection and Customer Service*, 8 FCC Rcd. 2892, ¶ 12 (1993) ("Should local governments wish to exceed the customer service standards we adopt today, they may do so through the franchising process or otherwise with the consent of the cable operator, or they may enact an appropriate law or regulation").

IV. THE COMMISSION SHOULD ADOPT A STREAMLINED SHORT-FORM APPLICATION FOR APPLICANTS SEEKING TO PROVIDE SERVICE OVER EXISTING RIGHTS OF WAY, AND RULES STATING THAT FAILURE OF AN LFA TO ACT ON SUCH AN APPLICATION WITHIN 30 DAYS TRIGGERS AN IMMEDIATE RIGHT TO BEGIN OFFERING SERVICE.

As demonstrated in the previous section, there are several kinds of conditions that cannot reasonably be applied to any new video entrant, and thus should be preempted by the Commission as *per se* unreasonable. But there are other common procedural hurdles, restrictions and conditions that, even if appropriately applied to firms that have no existing franchise or right to use the public rights-of-way, cannot reasonably or lawfully be applied to applicants that are *already* entitled to use municipal rights-of-way to distribute *other* services – *e.g.*, wireline telephony – within the same jurisdiction. Indeed, the Commission already has questioned whether municipalities can impose franchising obligations on an OVS provider that "already has a franchise as a telephone company." Order on Remand, *Implementation of Section 302 Of the Telecommunications Act of 1996*, 14 FCC Rcd. 19700, ¶ 9, n.29 (1992).

The NPRM properly recognizes that there is no "clear . . . justification" for imposing substantial additional restrictions on carriers "that already have franchises that authorize their use of [public] rights of way." NPRM ¶ 22. As explained in detail in Section I.B, *supra*, none of the traditional rationales for franchise regulation applies when an existing franchise holder seeks to upgrade its existing distribution network to offer video services. In those circumstances, distributing video programming over an existing wireline network imposes no meaningful additional burden on the public rights-of-way. The municipality is already regulating the network owner's use of those rights-of-way to provide existing services and to repair and upgrade its wireline facilities to enable new and better telephone and broadband services. Accordingly, requiring the holder of an existing franchise for telephone or electric service to submit a full-blown cable franchise application – accompanied by redundant rights-of-way management and performance conditions and protracted public "fitness to serve" investigations and hearings – imposes unnecessary barriers to competitive entry and does not advance any legitimate government purpose, and is hence unreasonable in violation of § 621(a)(1).[92]

For these reasons, the Commission should "impos[e] . . . greater restrictions on the authority of LFAs with respect to those entities . . . that already have permission to access public rights of way." NPRM ¶ 22. In particular, the Commission has ample authority to, and should, endorse a reasonable short-form franchise application – that contains provisions, *inter alia*, for the payment of franchise fees, for reasonable public, educational and government access, and for emergency alert capabilities that serve legitimate local interests – for telephone companies and others that already operate franchised physical networks within the municipal jurisdiction.[93] Pursuant to this short-form application process, the LFA's role would essentially be limited to ensuring that the terms for entry and service proposed in the application meet the substantive rules developed by the Commission (as discussed further, *infra*). And, an LFA's failure to verify and approve a conforming short-form application within 30 days would constitute an unreasonable refusal to award an additional competitive franchise within the meaning of § 621, 47 U.S.C. § 541(a)(1), and would mean that an applicant may begin to offer video services immediately upon the expiration of the thirty-day period.

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[92] In light of these facts, construing Section 621(a)(1) to authorize the imposition of such needless restrictions on the distribution of video programming would violate the First Amendment. *See Time Warner Enter. Co.* 240 F.3d at 1130; *Turner Broad. Sys., Inc.*, 520 U.S. at 189. The Commission should follow the well-established rule of construing statutes to avoid constitutional problems of this kind.

[93] *Cf. Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992 Horizontal and Vertical Ownership Limits, Cross-Ownership Limitations and Anti-Trafficking Provisions*, 8 FCC Rcd. 6828, Appendix B (1993).

A. The Commission Has Statutory Authority And An Affirmative Duty To Require A Streamlined Franchise Application Process For Entities With Existing Franchises.

Duplicative and unnecessary franchising requirements harm consumers by deterring and delaying the entry of new video providers that can offer advanced broadband and video services, and therefore the Commission should adopt a streamlined application process for such new entrants. The Commission clearly has authority to do so. As noted, § 621 gives the Commission authority to promulgate rules to define what constitutes the "unreasonable refusal" of a franchise by an LFA (*see* NPRM ¶ 19) and, correspondingly, to define what constitutes "reasonable" franchise requirements. Accordingly, the Commission has authority under § 621 to adopt measures ensuring that entities with existing franchises are able to obtain cable franchises without being subject to "unreasonable" requirements, *i.e.*, requirements that are unnecessary, unduly burdensome or duplicative.

The Commission has long recognized that different regulatory requirements for different classes of carriers are appropriate where "reasonable" obligations vary based on the unique circumstances of the carrier classes. Thus, the Commission has refused to impose carrier of last resort and other incumbent obligations on new entrants. Indeed, the Commission has routinely adopted rules that impose different obligations on different classes of carriers.[94] Congress, too, has endorsed different regulatory schemes for different kinds of carriers providing similar services. *Compare* 47 U.S.C. § 251(b) to *id.* § 251(c). For example, video providers that also provide

[94] *See, e.g., Non-Dominance Order*, 85 F.C.C. 2d. 1, ¶ 53 (1980) (the "application of different regulatory rules by class of carrier comes well within our broad discretion and authority under the Act"); *id.* ¶ 45 (rejecting the argument that "the Act require uniform application of Title II to all carriers"); *id.* ¶ 34 ("it would defy logic and contradict the evidence available to regulate in an identical manner carriers who differ greatly"); *id.* ¶ 39 ("classification scheme[s] . . . are by no means a radical departure . . . if anything, [they] merely codif[y] [the Commission's] practice of adjusting regulation to the realities of this industry and marketplace"); *DBS Public Interest Order*, 13 FCC Rcd. 23254, ¶ 41 (1990) ("The determination of whether access is reasonable . . . is a highly fact-specific determination that must take into account a number of factors."); *Curt Himmelman* v. *MCI*, 17 FCC Rcd. 5504, ¶ 14 (2002) ("violations of [the just and reasonable standard under] section 201(b) are determined based on the specific circumstances of a case").

telephone services are exempt from obtaining a telephone franchise license in addition to the video distribution license. 47 U.S.C. § 541(a)(4)(A)(i).

The same logic applies to the differently situated carriers who seek cable franchises. As demonstrated above, there is no legitimate interest in forcing video programming entrants that already operate a network subject to local franchise requirements to waste time and resources by jumping through hoops in order to obtain a traditional cable franchise, because such carriers already have demonstrated their fitness to hold such franchises and are already subject to restrictions sufficient to protect the locality's interests. For these carriers, a streamlined approach that eliminates such unnecessary costs and entry barriers is plainly appropriate and authorized.

Of course, any streamlined approach adopted by the Commission must include a specific time period in which a firm's streamlined application must be approved or denied to avoid unnecessary delays in a new entrant's ability to enter local video markets. Specifically, the Commission should further rule that if an LFA fails to verify and approve an application within 30 days, the application is deemed granted as a matter of federal law, and that the applicant may begin to provide service immediately thereafter upon committing to comply with the short-form franchise terms described in Section IV.C, *infra* – regardless of whether the LFA has executed an agreement embodying those terms with the applicant.

The Commission is clearly authorized to adopt such a rule. Where the LFA fails to act on a franchise application within thirty days, and the applicant is willing to commit to the short-form franchise requirements described below, the Commission has ample authority to issue rules establishing that a "franchise" has been granted as a matter of law. Any denial by an LFA of such an application would, as a matter of federal law, constitute an "unreasonable refusal" to grant a competitive license within the meaning of § 621.[95] Accordingly, the Commission may use its authority to implement § 621 to promulgate a rule that, if an LFA fails to act within that timeframe, the franchise is deemed as a matter of federal law to be granted.[96]

Thirty days is a reasonable time period because it provides localities more than sufficient time to conduct complete verification that the applicant has agreed to comply with the obligations set out by the Commission. A 30-day deadline is consistent with the localities' obligation under § 623 of the Act to approve proposed rates within 30 days, which often will be a far more complex inquiry than addressing the fitness of an existing franchise owner to obtain a video franchise. 47 U.S.C. § 543(a)(4). And, a 30-day deadline is quite generous compared to the mere 90 days that state commissions have to conduct far more complex and time consuming proceedings – which include evidentiary hearings – required by § 252 of the Act. 47 U.S.C. § 252. Further, a 30-day deadline is eminently reasonable when weighed against the substantial public interest harms of delaying competitive entry into local video markets.[97] Finally, the reasonableness of a 30-day

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[95] In this regard, it is well settled that "agency inaction may represent effectively final agency action," which is then subject to administrative or judicial review "when administrative inaction has precisely the same impact on the rights of the parties as denial of relief." *Sierra Club* v. *Thomas*, 828 F.2d 783, 793 (D.C. Cir. 1987). *See also Blackman* v. *District of Columbia*, 382 F. Supp. 2d 3, 9 (D.D.C. 2005) (failure of school board to conduct timely hearing under the Individual with Disabilities Education Act "unquestionably constitutes denial" of student's "right" under the statute to appropriate education).

[96] If necessary, the Commission could also make clear that, in such circumstances, the Commission itself would assume the role of a "franchising authority" under the Act and would grant the "franchise" to the applicant. A "franchising authority" is defined as "*any* governmental entity empowered by Federal, State or local law to grant a franchise," and a franchise is simply an "initial authorization or renewal . . . issued by a franchising authority . . . which authorizes the construction or operation of a cable system." 47 U.S.C. § 522(9) & (10) (emphasis added). Section 201(b) of the Act gives the Commission authority to prescribe such rules and regulations as may be necessary to carry out the provisions of the Act, which necessarily carries with it the authority to act as a franchising authority in appropriate circumstances. For applicants that own and operate a distribution network in rights-of-way already regulated by a municipality, the Commission itself could grant a video franchise where a local authority does not act and the applicant commits to the short-form application requirements.

[97] The Commission and Congress have routinely adopted 30 day (and shorter) deadlines to ensure that delay is not used as a device to avoid statutory obligations. As one example, in the *TR Remand Order*, 18 FCC Rcd. 16978 (2003) ("*TR Remand Order*"), the Commission established a default timetable for modification of interconnection contracts to reflect changes in the Commission's governing rules. *TR Remand Order*

deadline is underscored by the strict limit of 120 days imposed by Section 617 of the Act for review transfers of franchises to new entities, including entities that have never provided service in the area at all. If 120 days is a sufficient period for such review, a 30-day period is surely ample for processing the application of a well-known entity that has been providing a wide range of narrowband and broadband telecommunications and information services within the municipality for decades, and checking that application against the already enumerated and finite set of standards developed by the Commission.

B. The Commission Should Preempt Unreasonable Franchise Restrictions By Prescribing A Short-Form Franchise Application And A Truncated Period For Review Of The Application By Local Franchise Authorities.

For the reasons discussed above, the Commission should require that cable franchise applications by existing local telephone carriers be subject to streamlined local review. Specifically, the Commission should promulgate rules similar to those recently adopted by the Texas Legislature (*see* Part I, *supra*), by prescribing an affidavit by an officer of the applicant that contains the reasonable terms and assurances that address legitimate local interests in this context.

The Commission should rule that it constitutes an unreasonable denial of a competitive franchise for a LFA to fail to authorize a qualifying short-form applicant to provide video service in areas and on a time table determined by the applicant in its sole discretion within 30 days after receipt of a completed affidavit submitted by the applicant, and signed by an officer or general partner of the applicant, containing statements:

¶ 703. The Commission further held that even in instances where the interconnection agreements contained a change in law provision, failure to adhere to these time frames could constitute failure to adhere to the 1996 Act's "good faith" negotiating requirement. *Id.* ¶ 704. Similarly, in 1983, when the Commission sought to eliminate certain resale and shared use restrictions, it rejected arguments that states should be provided *any* time to adopt their own requirements with respect to those issues. *American Telephone and Telegraph Companies Restrictions on the Resale and Sharing of Switched Services used for Completion of Interstate Communications*, 94 F.C.C. 2d 1110, ¶¶ 8-12 (1983). In that proceeding, the Commission explained that there was a strong public interest in implementing such restrictions, and the corresponding public harm that would be caused by any further delay in such action. *Id.*

(1) Describing the service area footprint to be served within the municipality.

(2) Identifying the location of the applicant's principal place of business and the names of the applicant's principal executive officers.

(3) Affirming that the applicant has filed, or will timely file, all forms required by the Commission in advance of offering cable service or video service;

(4) Agreeing to comply with all applicable federal and state statutes and regulations;

(5) Agreeing to pay a reasonable fee pursuant to the methodology established by the Commission in this proceeding, and to provide reasonable PEG channel capacity that is substantially similar to what is typically made available to local communities in connection with their existing arrangements with incumbent cable operators.

(6) Agreeing to comply with all other applicable municipal permitting and related regulations regarding the use and occupation of public rights-of-way in the delivery of the cable service or video service.

(7) Agreeing reasonably to cooperate with the LFA to identify a process to provide appropriate messages in the event of a public safety emergency; and

(8) Agreeing to comply with all nondiscrimination laws, cooperate with appropriate audits, and indemnify the LFA for any negligence while installing, repairing or maintaining facilities in the public rights-of-way.

These obligations, together with the obligations under which AT&T and other similarly situated carriers must already comply pursuant to their existing use of the public ways, will fully protect the interests of each municipality. At the same time this streamlined application will allow competitors with existing franchises to swiftly and efficiently begin providing competing video services and other new or improved broadband services to end user customers. For new entrants and end users, this is a win-win proposal. Only incumbent operators seeking to maintain their local monopoly franchises – and seemingly endless rate increases – through the maintenance of regulatory barriers to entry will potentially lose out.

CONCLUSION

For the foregoing reasons, the Commission should exercise its authority and obligation to promulgate rules consistent with the proposals set forth in these Comments.

Respectfully Submitted,

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