BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

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

COMMENTS OF COMCAST CORPORATION

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Comcast Corporation ("Comcast") hereby responds to the above-captioned Notice of Proposed Rulemaking ("*Notice*") in which the Commission seeks to examine the current state of local franchising and its impact on competition in the video marketplace.[1] Comcast welcomes the opportunity for a constructive exploration of how the franchising process is operating, and how it can be improved for all parties, including providers, local governments, and, most importantly, consumers.

I. INTRODUCTION AND SUMMARY

Unlike the market for local telephone services, the multichannel video marketplace is already fiercely competitive. Nonetheless, major telephone companies with enormous resources are demanding that the Commission ignore marketplace facts -- and urging it to flout laws passed by Congress -- to facilitate their entry into the cable television business. This proceeding will

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[1] *In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, Notice of Proposed Rulemaking, 20 FCC Rcd. 18581 (Nov. 18, 2005) ("*Notice*").

allow the Commission to, as Commissioner Adelstein put it, "get beyond the rhetoric to the facts of what is actually happening in local communities."[2]

Local franchise authorities ("LFAs") -- and the franchising process itself -- have come under attack by incumbent local exchange carriers ("ILECs") and certain third parties, many of which have benefited from ILEC support. Many of these criticisms are vague and unsubstantiated, and are being advanced to mislead the Commission, in hopes that it will be persuaded to circumvent sound policy choices deliberately made by Congress on multiple occasions. A thorough review of how the franchising process is working should silence these criticisms.

The record in this proceeding will show that: (1) today's multichannel video programming distributor ("MVPD") marketplace is already characterized by intense competition, so there is no reason for the Commission to pursue an aggressive and unsustainable role in eviscerating the franchising process; (2) LFAs routinely welcome additional competition and investment in broadband and video facilities and have no incentive to unreasonably refuse to grant additional competitive franchises; and (3) ILECs, with their long-established relationships with local and state governments and the extensive resources available to them, have been successful in obtaining local franchises in a timely fashion when they seek a franchise (rather than demand the right to operate outside the established legal framework) and when they cooperate, as other franchise holders do, in meeting the legitimate requests of LFAs.

Comcast's experience in obtaining, renewing, and transferring franchises has been that LFAs normally act in a reasonable and timely manner. This has also been the experience of

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[2] Statement of Commissioner Jonathan S. Adelstein, *Notice*, at 25 ("Adelstein Statement").

other cable operators, including both established companies and overbuilders. If, in fact, the ILECs are encountering difficulties in the franchising process, they can readily pursue remedies in the courts. That is what the statute provides. That is how Comcast and other cable operators have dealt with the comparatively small number of unreasonable demands presented by LFAs in franchise proceedings over the course of several decades.

The *Notice* invites comment on whether the Commission has the authority to regulate the franchising process pursuant to Section 621(a)(1) of the Communications Act. A careful analysis of the statute and the legislative history casts substantial doubt on the Commission's authority to adopt rules governing LFAs' implementation of their franchising authority. Nor does Section 706 of the Telecommunications Act of 1996 provide an independent source of authority. The Commission also lacks authority to preempt "level-playing-field" statutes and other franchising-related laws at the state or local level.

The Commission should instead reaffirm the bedrock principle -- which is firmly established in Section 621 -- that local communities must retain the primary role in managing the franchising process. To that end, the Commission should affirm its tentative conclusions that LFAs may, among other things, enforce reasonable build-out timelines and anti-redlining requirements and require "adequate public, educational, and governmental access" support from franchisees.[3] Indeed, the statute requires LFAs to do so. There is no evidence that Congress intended for the Commission to play any role in that process.

The Commission can, of course, play a useful role in monitoring marketplace developments and in presenting legislative recommendations to Congress. The value of any such

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[3] *Notice* ¶ 20.

legislative recommendations will depend in large measure on a careful understanding by the Commission of the legislative judgments that Congress has already made, an objective evaluation of marketplace facts, and a commitment to treating all stakeholders fairly.

II. MARKETPLACE EVIDENCE DEMONSTRATES THAT THE LOCAL FRANCHISING PROCESS PROMOTES COMPETITION.

The Commission has asked parties to submit "empirical data" and provide "concrete examples" as to how the franchising process is working today.[4] The short answer is that LFAs have opened their doors to the robust competition that already exists in the MVPD marketplace, and they are now welcoming applications for additional competitive franchises. There is abundant evidence that ILECs are in fact obtaining franchises in a reasonable and timely manner. And the only reason that AT&T has been "unable" to obtain local cable franchises is that *AT&T unreasonably refuses to apply for them*.

A. The Video Distribution Marketplace Is Already Intensely Competitive.

At the outset, it is important to remember that the marketplace in question is already fiercely competitive.[5] The Commission should not be deceived by ILEC mischaracterizations of the marketplace or lured into skating on thin legal ice.

As every consumer already knows, and as the Commission's recent *Video Competition Reports* reflect, there is abundant competition among distributors of video programming and that competition is growing every day. Two years ago, the Commission concluded that: *"[T]he vast*

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[4] *Id.* ¶ 13.

[5] Chairman Martin underscored this point at the recent Commission hearing in Keller, Texas, stating that the MVPD marketplace is "actually a vibrant, robust, and competitive marketplace." Statement of Chairman Kevin J. Martin at FCC Open Meeting (Feb. 10, 2006) ("Martin Statement"), *at* http://www.fcc.gov/realaudio/agendameetings.html (at 35:45 of meeting).

majority of Americans enjoy more choice, more programming and more services than any time in history."[6] One year ago, the Commission recognized that "consumers today have viable choices in the delivery of video programming, and they are exercising their ability to switch among MVPDs."[7] Those statements can be made with even greater conviction today.

Comcast is experiencing the effects of this competitive landscape firsthand. DIRECTV and Dish Network offer MVPD service in every Comcast market, and Comcast also faces multichannel video competition from cable overbuilders in several markets.[8] As detailed below, the ILECs are starting to roll out their video services in communities across the country. Moreover, as the Commission has correctly observed, competition in the video marketplace comes not merely from traditional MVPDs, but also from Internet video and other emerging video distribution platforms.[9]

LFAs have played an important role in the development of this robust marketplace for MVPD services. LFAs have granted hundreds of competitive franchises since passage of the 1992 Cable Act. RCN alone has obtained approximately 130 local cable franchises.[10] The overbuild industry as a whole has over 16 million households under active franchise where

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[6] *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Tenth Annual Report, 19 FCC Rcd. 1606 ¶ 4 (2004) ("*2003 Competition Report*") (emphasis added).

[7] *See In the Matter of Annual Assessment of the Status of Video Competition in the Market for the Delivery of Video Programming*, Eleventh Annual Report, 20 FCC Rcd. 2755 ¶ 6 (2005) ("*2004 Competition Report*").

[8] *See* Comcast Comments, filed in MB Dkt. No. 05-255, at 5-22 (Sept. 19, 2005) ("*Comcast Competition Comments*") (detailing competition from traditional MVPDs).

[9] *See, e.g.*, *2004 Competition Report* ¶¶ 113-123 (describing competition from Internet video and other entrants); *see also Comcast Competition Comments* at 22-30 (explaining that Internet video has become a significant competitor in the video marketplace).

[10] *See* Comments of RCN Telecom Services, Inc., filed in MB Dkt. No. 05-255, at iii (Sept. 19, 2005).

overbuilders offer service and two million additional households under franchise in anticipation of future network build-outs.[11] Ameritech, Southern New England Telephone ("SNET"), and other ILECs also obtained franchises to serve hundreds of communities in the 1990s, after Congress removed the prohibition on their entry into the cable business in 1996.[12]

As the Commission has recognized in its *Video Competition Reports*, competition from franchised cable operators and other MVPDs has provided "consumers with increased choice, better services, higher quality, and greater technological innovation."[13] In such a dynamic marketplace, Comcast and other established MVPDs cannot afford to rest for a moment. Comcast continues its rapid development and deployment of advanced services, including new digital and high-definition television programming, video-on-demand, digital video recorder service, high-speed Internet service, and digital voice service. In every respect, Comcast's marketplace behavior shows the powerful effects of vibrant marketplace competition.[14]

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[11] *See* Comments of Broadband Service Provider Association, filed in MB Dkt. No. 05-255, at 7 (Sept. 19, 2005).

[12] *See In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, Sixth Annual Report, 15 FCC Rcd. 978 ¶¶ 123-127 (2000) ("*1999 Competition Report*").

[13] *2004 Competition Report* ¶ 4; *see also 2003 Competition Report* ¶ 4 (same); News Release, Federal Communications Commission, *FCC Issues 12th Annual Report To Congress On Video Competition* (Feb. 10, 2006) ("In this year's Video Competition Report, the FCC finds that the competitive MVPD market continues to provide consumers with increased choice, better picture quality, and greater technological innovation."); Martin Statement (noting that MVPD competition "helps increase innovation to make services better for consumers and to ultimately drive prices down").

[14] *See 2004 Competition Report* ¶ 6 (noting that in response to the competitive marketplace, cable operators "have made upgrades and advances in their offerings").

B. LFAs Are Welcoming Additional Competitors To Incumbent Cable Operators.

As the *Notice* reports, local and state government officials have made plain that they welcome further competition in the MVPD marketplace.[15] In fact, over 100 LFAs have already filed comments in this proceeding, and all have underscored their commitment to awarding additional franchises in their service areas. For example, Ohio-based LFAs stated that they were "eager to provide their residents with a greater degree of cable choice, and are ready to expedite entry into the video market in their communities."[16] Likewise, the City of Indianapolis "has been on record in its enthusiasm and encouragement to competition in the multi-channel video market."[17] And Rockingham County, North Carolina is one of several communities that noted its track record of approving competitive franchises in a timely fashion.[18]

The National Association of Telecommunications Officers and Advisors ("NATOA") and other groups representing local governments have made the same basic point in recent testimony before the Commission and Congress on the franchising issue. For example:

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[15] *See Notice* ¶ 7 (citing congressional testimony of Mayor Kenneth Fellman on behalf of the National Association of Telecommunications Officers and Advisors and other local governmental entities). *See also* Adelstein Statement ("The good news is that both the LFAs and the Commission share the goals of promoting vigorous competition.").

[16] Comments of Forest Park/Greenhills/Springfield (Ohio) Townships, filed in MB Dkt. No. 05-311, at 7 (Jan. 20, 2006).

[17] Comments of City of Indianapolis (Indiana), filed in MB Dkt. No. 05-311, at 8 (Jan. 24, 2006).

[18] *See* Comments of Rockingham County (North Carolina), filed in MB Dkt. No. 05-311, at 4 (Jan. 17, 2005) (noting that, with respect to a competitive franchisee, the LFA "completed the negotiations within 90 days of the initial request under the general terms of the existing Time Warner agreement").

- At the recent Commission hearing in Keller, Texas, Lori Panzino-Tillery stated: "Local franchising authorities nationwide welcome competition and are eager to issue additional franchises to compete with existing cable operators."[19]

- Mayor Kenneth Fellman testified at a congressional hearing last May: "We want and welcome real communications competition in video, telephone, and broadband services. And, I am here to commit that we support a technology-neutral approach that promotes broadband deployment and competitive service offerings."[20]

- And Marilyn Praisner stated at a congressional hearing last November: "[L]et there be no mistake, local governments want competition, as fast and as much as the market and some state laws will sustain."[21]

C. ILECs Are Obtaining Local Franchises In A Timely Fashion.

Marketplace evidence demonstrates that LFAs are following through on that commitment. Contrary to the vague and unsubstantiated claims made by the ILECs in the video competition proceeding and referenced by the Commission in the *Notice*,[22] *ILECs that want franchises are having little or no difficulty obtaining them*. That's why Verizon Chairman and CEO Ivan Seidenberg asserted to *BusinessWeek* that "We haven't been turned down anywhere

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[19] Ms. Lori Panzino-Tillery, on behalf of NATOA *et al.*, Testimony before the Federal Communications Commission, Keller, TX, 1 (Feb. 10, 2006) ("Panzino-Tillery Testimony").

[20] The Hon. Kenneth Fellman, on behalf of NATOA *et al.*, Testimony before the House Energy and Commerce Committee and Subcommittee on Telecommunications and the Internet, 3 (Apr. 27, 2005) ("Fellman Testimony").

[21] *See* The Hon. Marilyn Praisner, on behalf of NATOA *et al.*, Testimony before the House Energy and Commerce Committee, 2 (Nov. 9, 2005) ("Praisner Testimony").

[22] Tellingly, ILECs complain about LFAs without identifying a single LFA by name or providing any specific details about the problems that were allegedly encountered. Yet, in some places, the *Notice* treats these unsubstantiated claims as evidence of a pervasive problem. *See*, *e.g.*, *Notice* ¶ 5 ("[T]here have been indications that in many areas the current operation of the local franchising process is serving as an unreasonable barrier to entry.").

we've gone."[23] He also told Wall Street analysts in January that, with respect to the franchising process, "We don't feel there's *any* impediment to our rolling out FiOS during the year."[24]

Verizon has been successful in obtaining franchises in numerous communities in Texas, New York, Virginia, Maryland, Massachusetts, Florida, Pennsylvania, and California. In Howard County, MD, for example, the City Council voted on January 3, 2006 to approve a franchise for Verizon's FiOS TV service.[25] More recently, Verizon has been granted franchises in such communities as Falls Church, VA,[26] Reading, MA,[27] Hillsborough County, FL,[28] and Hulmeville Borough, PA.[29] Verizon also recently announced it had begun sales of FiOS TV in markets in Massachusetts, New York, and Florida,[30] and just last week announced that it is

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[23] Olga Kharif, *Verizon's Muddy TV Picture*, Business Week Online, Sept. 28, 2005, *available at* http://www.businessweek.com/print/technology/content/sep2005/tc20050928_4147.htm?chan=tc.

[24] *See* Q42005 Verizon Earnings Conference Call, Thomson StreetEvents, Conference Call Transcript, at 11 (Jan. 26, 2006) ("Verizon 4Q05 Earnings Call") (emphasis added).

[25] Verizon News Release, *Howard County Council Grants Verizon Authority to Offer FiOS TV to More Than 265,000 Potential Viewers* (Jan. 4, 2006).

[26] Verizon News Release, *Falls Church City Council Grants Verizon Franchise to Offer FiOS TV to Nearly 11,000 Potential Viewers* (Jan. 24, 2006).

[27] Verizon News Release, *Reading, Mass. Board of Selectmen Grants Verizon Authority to Offer FiOS TV to More Than 23,000 Potential Viewers* (Jan. 26, 2006).

[28] Verizon News Release, *Verizon Is Granted Authority to Offer FiOS TV to 735,000 Residents of Hillsborough County, Fla., and Launches the Service in Manatee County, Fla.* (Feb. 1, 2006).

[29] Verizon News Release, *Pennsylvania's First Municipality to Grant Local Franchise Agreement, Opening the Door for Cable Competition, Consumer Choice and Value* (Feb. 7, 2006).

[30] *See* Verizon News Release, *Verizon Is Granted Authority to Offer FiOS TV to 735,000 Residents of Hillsborough County, Fla., and Launches the Service in Manatee County, Fla.* (Feb. 1, 2006); Verizon News Release, *Verizon Launches FiOS TV in Woburn; First Rollout in Massachusetts* (Jan. 24, 2006). *See also* Verizon News Release, *Verizon Communications Reports Strong 4Q 2005 Results, Driven by Continued Growth in Wireless and Broadband* (Jan. 26, 2006) (noting that market penetration in Keller, Texas – Verizon's first video market – is 21 percent in the first four months of operation) ("Verizon 4Q05 Earnings Release"), *available at* http://investor.verizon.com/news/view.aspx?NewsID=718.

offering service in California.[31] Nationwide, Verizon has franchises covering approximately two million households for FiOS video services.[32]

Obtaining these franchises has generally not been an onerous process for the ILECs. For example, in Virginia, Verizon applied for two franchises -- one for Fairfax City and one for Fairfax County -- in mid-July 2005. By early October -- a mere 80 days later -- Verizon had *both* franchises in hand. An even more vivid example is Beaumont, CA, where Verizon applied for a franchise on October 14, 2004, and was granted the franchise on November 2, 2004 -- a mere 19 day interval.[33] Likewise, in Nyack Village, NY, South Nyack, NY, and Massapequa Park, NY, the time interval between formal application and LFA approval of the franchise was approximately one month.[34]

It is unsurprising that ILECs have met with such a warm reception *since this is exactly how the LFAs responded to the ILECs' franchise applications the last time they entered the video business*. During the 1990s, several ILECs applied for, and received, local cable franchises in communities around the country. Ameritech, the industry leader in pursuing a cable business at

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[31] Verizon News Release, *Verizon Launches FiOS TV in Beaumont, Calif.; City First in State to Receive New Service* (Feb. 7, 2006).

[32] Verizon's 4Q05 Earnings Release indicated that Verizon had franchises covering approximately one million households. Only one month later, the award of franchises in Florida and elsewhere has pushed that number closer to two million households. Verizon expects "to have passed a cumulative total of six million premises" by the end of 2006 and going forward "to pass about 3 million per year." Verizon 4Q05 Earnings Call, at 6 (quoting Doreen Toben, Verizon's Executive Vice President and Chief Financial Officer).

[33] *See A Resolution of the City Council of the City of Beaumont, California, Granting a Non-Exclusive Franchise to Provide Cable Service to Verizon California Inc.* (Nov. 2, 2004), *available at* http://www.ci.beaumont.ca.us/agendas/110204/2a.PDF.

[34] State approval of these franchises, as required in New York, took an additional 2-1/2 months.

that time, obtained 111 cable franchises.[35] Likewise, SNET had a statewide cable franchise in Connecticut,[36] and GTE had 11 franchises in early 1999.[37] U S West (now Qwest) obtained franchises in Phoenix, Arizona, Denver and Boulder, Colorado, and Omaha, Nebraska,[38] and BellSouth obtained franchises in Alabama, Georgia, and Florida.[39]

Most of these forays into the cable business were short-lived. Once SBC acquired Ameritech, it promptly divested itself of Ameritech's cable assets, and it shut down SNET's cable business soon after that acquisition as well.[40] Likewise, after GTE merged with Bell Atlantic, the newly-formed Verizon quickly divested itself of those cable assets.[41] The record is clear: where these businesses were shuttered or sold off, the decisions to abandon the video business were made by the ILECs, for their own business reasons, and cannot credibly be blamed on LFAs. As NATOA noted in its recent testimony before the Commission, "That's a bit like the lottery player who complains that the game must be rigged because he never wins, even

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35 *See 1999 Competition Report* ¶ 123.

36 *See In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eighth Annual Report, 17 FCC Rcd. 1244 ¶ 102 (2002) ("*2001 Competition Report*").

37 *See In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, Fifth Annual Report, 13 FCC Rcd. 24284 ¶ 114 (1998) ("*1998 Competition Report*").

38 *See In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, Fourth Annual Report, 13 FCC Rcd. 1034 ¶ 113 (1998) ("*1997 Competition Report*"); *see also 2004 Competition Report* ¶ 127. Qwest recently obtained franchises to provide video service in the Salt Lake City, Utah metropolitan area. *See* Qwest Comments, filed in MB Dkt. No. 05-255, at 2, 12 (Sept. 19, 2005).

39 *See 1997 Competition Report* ¶ 113; *see also 2004 Competition Report* ¶ 126; BellSouth Comments, filed in MB Dkt. No. 05-255, at 1-2 (Sept. 19, 2005) (noting that BellSouth currently holds 20 franchises passing approximately 1.4 million households).

40 *See 2001 Competition Report* ¶ 102.

41 *See In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Ninth Annual Report, 17 FCC Rcd. 26901 ¶ 97 n.338 (2002) ("*2002 Competition Report*").

though he never buys a ticket. You can't compete if you throw your ticket away or don't even take the field."[42]

If past is prologue, the ILECs will have no great difficulty obtaining franchises from LFAs. The LFAs are holding the door wide open to additional competitive entry. Whether the ILECs elect to enter the business on a long-term basis -- or enter and exit as they have done before -- only time will tell.

* * * *

In sum, marketplace evidence demonstrates that the current franchising process is working and that the ILECs are having no difficulty obtaining franchises where they have applied for them. The Commission should not hesitate to confirm this.

III. ILEC COMPLAINTS ABOUT THE FRANCHISING PROCESS ARE UNFOUNDED.

The ILECs have spent the better part of the last year lobbying at every level of government for "relief" from the franchising rules that apply to them and all other cable operators. The lobbying script varies depending on which governmental entity they are lobbying on any given day. Take Verizon, for example. At the local level, Verizon has been trying to strong-arm LFAs into signing Verizon's "model" franchise agreement; at the state level, Verizon has been joining AT&T in promoting legislation to curtail the power of local governments; and at the federal level, Verizon has been lobbying for legislation to take power away from both the states and local governments.[43]

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[42] Panzino-Tillery Testimony at 1.

[43] *See* Todd Wallack, *Verizon CEO Sounds Off On Wi-Fi, Customer Gripes*, S.F. Chronicle, Apr. 16, 2005 (quoting Verizon CEO Ivan Seidenberg as saying: "The first thing we'd do is pre-empt the states . . . That's priority (footnoted continued…)

What all of these lobbying efforts have in common is the repeated claim that the current franchising process allegedly places too many obstacles in the way of ILEC entry into the video business.[44] As noted above, marketplace facts undermine this position. Verizon, for one, has been announcing new franchise approvals and new FiOS deployments just about every day for the last month now. But, even putting to one side this uncomfortable marketplace evidence, the ILECs' "parade of horribles" about the franchising process is completely unfounded. First, obtaining a cable franchise is a straightforward process and any disputes can typically be resolved in the normal course of dealing between LFAs and cable operators. Second, the ILECs cannot complain about the franchising process where they have refused to apply for franchises. Third, there is no marketplace evidence that reasonable build-out timelines and anti-redlining requirements are barriers to ILEC entry.

A. The Franchising Process Generally Works Well For Companies That Accept Their Legal And Social Responsibilities And Negotiate In Good-Faith.

As numerous local officials have stated in testimony before Congress and in comments in this proceeding, the approval of cable franchises today is a relatively simple and straightforward process. According to one official:

> Many states have level playing field statutes, and even more cable franchises contain these provisions as contractual obligations on the local government. So when a new provider comes in and seeks a competitive cable franchise, there is not much to negotiate about. If the new competitor is seriously committed to providing as high a quality of

(…footnote continued)

No. 1, No. 2 and No. 3."), *available at* http://www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2005/04/16/BUGJ1C9R091.DTL&type=business.

[44] *See Notice* ¶ 5.

> service as the incumbent, the franchise negotiations will be neither complicated nor unreasonably time consuming.[45]

According to another official:

> Franchising need not be a complex or time-consuming process. In some communities the operator brings a proposed agreement to the government based on either the existing incumbent's agreement or a request for proposals, and with little negotiation at all an agreement can be adopted.[46]

The numerous LFAs that have already filed comments in this proceeding have made a similar point. Each has developed franchise agreements tailored to meet the needs of that particular community, and many of these commenters point out that they already have experience negotiating with competitive franchise holders or, at least, have mechanisms in place to grant a competitive franchise should they be approached.[47]

This efficient process contrasts with the often difficult and time consuming franchising process that cable operators encountered in securing initial franchises in the 1970s and 1980s. During that period, LFAs and operators engaged in extensive negotiations -- sometimes for periods measured in years, not months -- to define the scope of the franchise agreement and the obligations of the operator.[48] (And while these negotiations were pending, the would-be

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[45] Praisner Testimony at 2 n.4.

[46] Fellman Testimony at 14. *See also* Panzino-Tillery Testimony at 1 ("Instead, we believe there is ample evidence to suggest that what has caused this lag in the growth of competition is the insistence by new applicants for franchise terms that are often materially different from those in existing cable franchises and are frequently contrary to municipal code.").

[47] *See*, *e.g.*, Comments of Winston-Salem (North Carolina), filed in MB Dkt. No. 05-311 (Feb. 1, 2006); Comments of Vass (North Carolina), filed in MB Dkt. No. 05-311 (Jan. 25, 2006); Comments of Renton (Washington), filed in MB Dkt. No. 05-311 (Jan. 24, 2006); Comments of Guilford County (North Carolina), filed in MB Dkt. No. 05-311 (Jan. 20, 2006); Comments of Richmond (Kentucky), filed in MB Dkt. No. 05-311 (Jan. 18, 2006); Comments of Burlington (North Carolina), filed in MB Dkt. No. 05-311 (Jan. 18, 2006); Comments of Monterey Park (California), filed in MB Dkt. No. 05-311 (Jan. 13, 2006).

[48] *See* Mark Robichaux, *Cable Cowboy: John Malone and the Rise of the Modern Cable Business*, 64-66 (2002) (noting that during the "franchise wars" of the 1970s and 1980s, "Cable companies battled head-to-head

(footnoted continued…)

operators had no customers and no income.) But now that the franchising process has matured, and decades of experience has been gained, LFAs and operators have developed settled expectations as to what franchise agreements should encompass. New franchise applicants, be they ILECs or other overbuilders, are the chief beneficiaries of this stable regulatory environment and can, as a result, obtain franchises very quickly. (And, in the interim, the ILECs continue to have customer relationships with the vast majority of the households in their regions and healthy revenue flows to sustain them.)

The ILECs' claims that LFAs are slowing the approval process with unreasonable demands simply ring hollow. To be sure, having secured over 4,600 franchises around the country, Comcast has encountered its share of difficult franchise negotiations with LFAs, and some problems continue to arise in the context of franchise renewals and transfers. But experience has taught that negotiation and compromise -- not threats and intimidation -- almost always enable Comcast and LFAs to reach an accord.[49] It is difficult to believe that the ILECs, with their considerable experience working with state and local governments and with the vast resources and revenue streams available to them, are incapable of working through franchise-related issues in a similar fashion.

(…footnote continued)

before city councils and aldermen, spending millions on lawyers, studies, and elaborate presentations to win them over").

[49] Since Congress established the right of appeal in the 1992 Cable Act, there have been less than 20 reported state and federal cases involving disputes between LFAs and cable entrants. Only once has an LFA approval process been found to violate the terms of Section 621(a), and that case involved a highly unusual set of facts. *See Qwest v. Boulder*, 151 F. Supp. 2d. 1236 (D. Col. 2001). Qwest, a cable operator providing service under a revocable permit, challenged a local requirement that franchises be approved by a vote of the electorate. The court concluded that the requirement conflicted with the Act because the electorate did not qualify as a "franchising authority" (*i.e.*, "a governmental entity empowered by Federal, State, or local law to grant a franchise") and only a franchising authority can approve franchises under the terms of the Act. *See id.* at 1242.

Also, to the extent the ILECs have encountered delays with their franchise applications, those delays often result from the ILECs' own unreasonable behavior. Mayor Fellman explained this last year in congressional testimony: "[E]verywhere Verizon has applied for a franchise, it insists that the community use Verizon's own model franchise, without regard to the terms and conditions of the community's incumbent franchise agreement."[50] As Mayor Fellman pointed out, while Verizon may have the right to pursue hard-bargaining with the LFAs, "[I]t can't fairly complain about delays resulting from its own, self-interested negotiating strategy. Rather, if Verizon would simply work from the community's existing franchises that actually reflect the community's needs and interests . . . they'd find it much faster and easier to obtain a franchise agreement."[51]

Manatee County, Florida described exactly this situation in its recent filing in this proceeding. The county sent Verizon its standard franchise agreement in February 2005. Rather than negotiate regarding that agreement, Verizon insisted that the county sign the franchise agreement Verizon negotiated in Keller, Texas. The county explained that it could not sign the Keller agreement consistent with Florida's level-playing-field statute. After some further discussion, the parties reached agreement in July 2005 (still less than a six-month process). As the county pointed out, while it was "ultimately able to work with Verizon's draft, after

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[50] Fellman Testimony at 15.

[51] *Id.* *See also* Praisner Testimony at 2 n.4 ("It is also important to recognize that every negotiation has two parties at the table. Some new entrants have proposed franchise agreements that violate the current state or federal law and open local franchis[ing] authorities to liability for unfair treatment of the incumbent cable operator vis-à-vis new providers. Some also seek waiver of police powers as a standard term of their agreement. Local government can no more waive its police power to a private entity than the federal government can waive the constitutional rights [for] its citizens.").

significant modifications, this issue caused the process to be somewhat longer than otherwise would have been needed."[52]

Delays in the franchising process may be attributable not only to an ILEC's intransigence on contract terms, but also to an ILEC's delay in seeking franchises. For example, had SBC (now AT&T) begun to apply for franchises in November 2004 when it announced its intention to re-enter the MVPD marketplace -- instead of sitting on its hands and complaining -- it could have obtained hundreds, if not thousands, of franchises by now.[53]

The bottom line is that, if franchise applicants negotiate in a reasonable manner, they can expect to reach agreement in a reasonable period of time. This certainly seems to be the ILECs' experience thus far, as detailed at various points throughout this pleading. That has also been Comcast's experience. Even when Comcast has needed to work with a large number of LFAs in a relatively tight timeframe, the vast majority of LFAs have responded in a reasonable manner. For example, when Comcast acquired AT&T Broadband, the companies received timely approval from nearly 1,800 LFAs within merely eight months. In the Adelphia transaction, Comcast and Time Warner are well along in securing approvals of the requested transfers from over 1,500 LFAs. There is no reason to believe that the ILECs, with their ample resources and

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[52] Comments of Manatee County (Florida), filed in MB Dkt. No. 05-311, at 6 (Jan. 3, 2006).

[53] As the recent LFA comments in this proceeding also indicate, ILECs have thus far declined to seek franchises in numerous communities in their service territories. *See, e.g.*, Comments of Town of Vass (North Carolina), filed in MB Dkt. No. 05-311 (Jan. 20, 2006) (noting that LFA has not been approached by a competitive provider); Comments of Town of Tabor City (North Carolina), filed in MB Dkt. No. 05-311 (Jan. 19, 2006) (same); Comments of City of Atascadero (California), filed in MB Dkt. No. 05-311 (Jan. 25, 2006) (same).

experience dealing with state and local officials, are incapable of obtaining a substantial number of franchise approvals in a relatively short period of time.[54]

Furthermore, were ILECs actually to encounter difficulties that they are unable to resolve through the normal give-and-take with the LFAs, they have ready recourse to state or federal courts. Congress has already made it unlawful for an LFA to unreasonably refuse to award an additional competitive franchise,[55] and it has established an appeals process -- which does not involve the Commission -- to remedy any violations.[56] That same appeals process is available for appeals of franchise modifications and renewals, and Comcast has brought a handful of actions using this mechanism in the rare instances where it was necessary. Certainly, if Comcast and the other cable operators can use Section 635, so can the ILECs.

B. An ILEC Cannot Claim That A Franchising Authority Has Unreasonably Refused To Grant A Franchise When The ILEC Unreasonably Refuses To Apply For One.

AT&T has raised numerous complaints about the local franchising process at the Commission and in Congress.[57] But AT&T's problems are entirely of its own making. To the

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[54] It is absurd for Verizon to say, "If we got one [franchise] every business day, it would take 40 years to get through that process." *See* Drew Clark, *Bells Prepare Counterattack on Video Services Issue*, Technology Daily, June 8, 2005 (quoting Verizon Executive Vice President Tom Tauke). Had Comcast chosen to work at such an absurdly slow pace on the franchise transfers associated with its acquisition of AT&T Broadband, it would have taken over seven years -- not eight months.

[55] *See* 47 U.S.C. § 541(a)(1) ("A franchising authority . . . may not unreasonably refuse to award an additional competitive franchise.")

[56] *See id.* ("Any applicant whose application for a second franchise has been denied by a final decision of the franchising authority may appeal such final decision pursuant to the provisions of section 635 for failure to comply with this subsection."); *id.* § 555(a) ("Any cable operator adversely affected by any final determination made by a franchising authority under section 621(a)(1), 625, or 626 may commence an action [in federal or state court] within 120 days after receiving notice of such determination[.]").

[57] *See, e.g.*, SBC Comments, filed in MB Dkt. No. 05-255 (Sept. 19, 2005); SBC Reply Comments, filed in MB Dkt. No. 05-255 (Oct. 11, 2005); Testimony of Ms. Lea Ann Champion, Senior Executive Vice President, SBC, before the House Energy and Commerce Subcommittee on Telecommunications and the Internet (Apr. 20, 2005).

best of our knowledge, *AT&T has refused to apply for a single local cable franchise anywhere in the country*.[58] Rather, AT&T has persisted in the strained view that the service it plans to deploy will not qualify as a cable service and therefore will not be subject to local franchising requirements.[59] Under such circumstances, AT&T cannot assert that LFAs have unreasonably refused to grant it a franchise. Federal courts have made plain that a claimant has no standing to file a complaint under Section 621(a)(1) where the claimant has not even applied for a franchise.[60] The Commission must take the same view of any AT&T filings in this proceeding.

In all events, AT&T's position is completely incorrect as a legal matter. NCTA has demonstrated in filings at the Commission that AT&T's legal arguments have no basis or support in the plain language of the Communications Act.[61] As the Commission correctly observed in the *Notice*, Section 651 of the Communications Act gives AT&T and other telephone companies four options for the delivery of video programming: broadcast, common carrier, cable, and Open Video System ("OVS").[62] To the extent AT&T chooses not to offer video programming under

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[58] AT&T has obtained state-awarded franchises to serve a handful of Texas communities under a strained law that does not require AT&T to admit that it is providing a cable service.

[59] *See* SBC *Ex Parte*, filed in WC Dkt. No. 04-36 (Sept. 14, 2005) (detailing legal arguments with respect to regulatory treatment of IP video services) ("SBC *Ex Parte*").

[60] *NEPSK, Inc. v. Town of Houlton*, 167 F. Supp. 2d 98, 102 (D. Me. 2001) ("A natural reading of § 541 requires that Houlton Cable apply for a second franchise before it can ask this Court to review whether it is reasonable to refuse one."); *see also NEPSK, Inc. v. Town of Houlton*, 283 F.3d 1 (1st Cir. 2002).

[61] *See* NCTA *Ex Parte*, filed in WC Dkt. No. 04-36 (Sept. 9, 2005) (explaining the applicability of Title VI to telco provision of IP video services); NCTA *Ex Parte*, filed in WC Dkt. No. 04-36 (Nov. 1, 2005) (responding to SBC legal arguments regarding regulatory treatment of IP video services) ("NCTA Response").

[62] *See Notice* ¶ 2 (citing 47 U.S.C. § 571); *ECI*, Memorandum Opinion and Order, 13 FCC Rcd. 14277 ¶ 46 (1998) (noting that Section 651 sets out four options for the provision of video programming services provided by telephone companies), *aff'd sub nom.*, *City of Chicago v. FCC*, 199 F.3d 424 (7th Cir. 1999); *Metropolitan Fiber Systems/New York, Inc.*, Consolidated Order, 12 FCC Rcd. 3536 ¶ 35 n.104 (1997) (Cable Servs. Bur.) (same).

Title II, Title III, or as an OVS, by default it will have to offer such programming as a cable operator subject to Title VI franchising and other requirements.[63]

Furthermore, AT&T's claim that its video service will not be a Title VI cable service is groundless. Shorn of all the hyperbole about features and functions that may "ultimately" or "eventually" be offered, the video service AT&T has described (it is not yet commercially available on any significant scale) looks, walks, and quacks like the cable services that Comcast and other cable operators provide today. Even AT&T has admitted that its video service will have the "look and feel of standard cable services."[64] Stated simply, AT&T will combine linear and on-demand video programming choices just like those found on other digital cable systems, including Comcast's and Verizon's.[65] In addition, there is no merit to AT&T's claim that the switched nature of its planned network removes it from the definition of cable service.[66] The customer experience in surfing channels on the AT&T system will be no different than the customer's experience on a typical cable system. When the viewer pushes the channel change button on the remote, the new channel is what will be delivered to the viewer's TV set. This kind of functionality still fits squarely within the definition of cable service; whether the channel-

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[63] Verizon apparently does not agree with AT&T either. Verizon Chairman and CEO Ivan Seidenberg was quoted recently as saying, with respect to the local franchising process, "I think that the law is the law. I think we have to go out and . . . get franchise approvals and we're doing that and we're doing it aggressively." Verizon 4Q05 Earnings Call, at 11.

[64] *See* SBC *Ex Parte* at 17.

[65] In this respect, AT&T's claim that it will be providing an "interactive on-demand service," *see* SBC *Ex Parte* at 24, is laughably erroneous. The Communications Act specifically states that an "interactive on-demand service . . . does not include services providing video programming prescheduled by the programming provider." 47 U.S.C. § 522(12). Linear programming channels are by definition "prescheduled" by the programmer (*i.e.*, if the viewer tunes to the local CBS affiliate at 7 p.m. on Sundays, the viewer will receive *60 Minutes*). So long as AT&T wishes to offer consumers the option to view linear broadcast and cable networks -- all of whose programming is prescheduled by the program provider -- the exclusion for "interactive on-demand service" plainly does not apply.

[66] *See* SBC *Ex Parte* at 15-16.

change is effectuated by the TV set, a set-top box, or equipment at a cable head-end is utterly immaterial.[67]

Despite the ferocity of its arguments, AT&T seems to appreciate that its legal position is not tenable. As a result, it has been lobbying at the state and federal levels to change or eviscerate the local franchising process. In its home state of Texas, AT&T successfully promoted enactment of a state law establishing a state-administered franchising process for new entrants,[68] and consistent with that law AT&T obtained "video service" franchises to serve multiple communities within a matter of days.[69] Clearly, if AT&T genuinely believed it could operate entirely outside the franchising process, it would not have bothered to lobby for the change in Texas law and then file for franchises under the terms of the new statute. Tellingly, however, although the Texas law makes it extremely -- and unlawfully -- easy for ILECs to offer video services, they have made only limited use of this authority.[70]

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[67] *See* NCTA Response at 8-10 (explaining, among other things, that: "As the legislative history of the Cable Act makes clear, a simple menu selection from an SBC-provided line-up of linear program channels -- which is all that an SBC customer would be doing by changing channels -- does not remove the transmission of video programming from the definition of 'cable service.'").

[68] *See* Tex. Util. Code Ann. § 66.003 (West 2005). Consistent with the view taken by the Texas Cable Association in its pending lawsuit, Comcast believes the Texas law violates the Communications Act. The ILECs have been lobbying for statewide franchises in other states as well, including Indiana, New Jersey, and Virginia. *See, e.g.*, *Indiana Telecom Bill Gets Senate Nod*, Telecomweb,(Jan. 25, 2006) (noting the Indiana State Senate approval of statewide franchising bill), *available at* http://www.telecomweb.com/news/1138217973.htm; Linda Haugsted, *Franchise Battle Heats Up In N.J.*, Multichannel News, at 12, Oct. 31, 2005 (discussing legislative efforts in New Jersey); Linda Haugsted, *Verizon: Bills, Franchise, Launch*, Multichannel News, Feb. 7, 2006 (detailing progress of franchise-related legislation in the Virginia General Assembly).

[69] *See Cable Industry Sues Again Over Law; AT&T, Verizon Don't Face Same Burdens As Industry, Lawsuit Says*, Austin American-Statesman, at 12, Jan. 28, 2006 (noting that AT&T and Verizon have each obtained franchises for certain communities in Texas).

[70] To date, Verizon and AT&T have sought and obtained video franchises under the Texas law for a total of only 22 Texas communities -- mostly selected suburbs of two large cities. *See* David Cohen, *Texas PUC OKs Verizon Franchise*, Multichannel News, Oct. 21, 2005 (noting that Verizon obtained approval to serve 21 communities in the Dallas/Fort Worth Metroplex and AT&T obtained approval to provide service in and around San

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C. Build-Out And Anti-Redlining Requirements Are Not Barriers To Entry.

The Commission invites comment on whether build-out requirements are creating "unreasonable barriers to entry" for new entrants.[71] The short answer is that they do not. As the Commission tentatively concluded in the *Notice*, build-out requirements, anti-redlining requirements, and public, educational, and governmental access requirements are all reasonable requirements to place on cable operators, including new entrants.[72] Comcast urges the Commission to affirm these tentative conclusions, which are compelled by explicit statutory requirements consciously established by Congress.

Prohibitions against discrimination have been an integral component of the Cable Act since its passage in 1984. In that Act, Congress said: "In 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."[73] Congress explicitly anticipated that this language would be used by local franchise authorities to mandate build-out: "Under this provision, a franchising authority in the franchise process shall require the wiring of all areas of the franchise area to avoid this type of practice."[74] Congressman John Dingell, one of the principal authors of the 1984 Cable Act,

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(…footnote continued)

Antonio). Verizon also obtained a handful of conventional local cable franchises, including the one in Keller, Texas, before the Texas law was enacted.

[71] *Notice* ¶ 23.

[72] *Id.* ¶ 20.

[73] Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 2, 98 Stat. 2779, 2786 ("1984 Cable Act") (amending the Communications Act to include Section 621(a)(3), codified at 47 U.S.C. § 541(a)(3)).

[74] H. Rep. No. 09-934 at 59 (1984) ("1984 House Report").

noted "the crucial role that the local communities must continue to play in assuring that the cable system in their community does, indeed, serve the interests and the needs of the citizens in the community."[75] The anti-redlining prohibition was reinforced by the addition of statutory language in 1992 that required franchises 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."[76]

There is no marketplace evidence that the build-out and anti-redlining requirements are creating barriers to entry for the ILECs. As the statutory language makes plain, cable operators are not required to build out all the areas of a franchise at once; rather, local governments must provide cable operators a reasonable period of time to construct their systems. In fact, that is exactly what the LFAs are doing in the franchise agreements that have been negotiated with Verizon and other ILECs. For example:

- Manatee County, Florida was able to work with Verizon to establish a build-out schedule that both gave Verizon a more-than-reasonable amount of time to complete the build-out and ensured that Verizon's network "will include passing homes in both well off and lower income neighborhoods."[77]
- Fairfax County approved a franchise that requires Verizon to offer service to a significant number of residential subscribers in its initial service area within 12 months, to all of the initial service area within three years, and to the entire county within seven years.[78]

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[75] 130 Cong. Rec. H10442 (daily ed. Oct 1, 1984) (remarks of Rep. Dingell).

[76] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 7(b), 106 Stat. 1460, 1483 ("1992 Cable Act") (amending the Communications Act to include Section 621(a)(4)(A), codified at 47 U.S.C. § 541(a)(4)(A)).

[77] Comments of Manatee County (Florida), filed in MB Dkt. No. 05-311, at 7 (Jan. 3, 2006).

[78] *See Cable Franchise Agreement by and between Fairfax Count, Virginia and Verizon Virginia Inc.* § 3.1 (Sept. 26, 2005) *available at* www.Fairfaxcounty.gov/cable/regulation/franchise/verizon/verizon_franchise_2005.pdf (detailing build-out requirements in Fairfax County).

- By contrast, Qwest's franchise in Salt Lake City requires build-out of the franchise *only when Qwest has obtained more subscribers in the franchise area than Comcast, DIRECTV, and EchoStar, combined* -- a highly improbable scenario.[79] This requirement would be comical, but for the unfortunate fact that the additional competition sought by Salt Lake City's City Council will only be enjoyed in those neighborhoods that Qwest *chooses* to serve.

While there is no marketplace evidence that build-out requirements are creating barriers to ILEC entry, there is substantial evidence that many neighborhoods will likely be denied the benefits of additional competition. Policymakers at all levels of government should be concerned by statements and practices by the ILECs that reflect a clear intent to limit deployment and to target their limited investment to wealthier communities. The most jarring example of this discriminatory intent was the announcement by AT&T that it would target its video deployments to reach "90% of high-value and 70% of medium-value customers," while bypassing all but 5% of "low-value customers."[80] While Verizon has not made such blatant representations, it is noteworthy that its FiOS service is being introduced primarily in wealthier communities.[81]

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[79] *See* Kimberly S. Johnson, *Dueling for TV customers*, Denver Post, at C1, Nov. 22, 2005, *available at* http://www.freepress.net/news/12524. The lawfulness of the franchise is further placed in doubt by the fact that Salt Lake City's City Council approved Qwest's franchise application without providing any advance public notice or opportunity for public comment. *See id.*

[80] *See Project Lightspeed*, SBC Communications Conference Call, at 14 (Nov. 11, 2004); *see also* Leslie Cauley, *Cable, Phone Companies Duke It Out For Customers*, USA Today (May 22, 2005) ("During a slide show for analysts, SBC said it planned to focus almost exclusively on affluent neighborhoods. SBC broke out its deployment plans by customer spending levels: It boasted that Lightspeed would be available to 90% of its 'high-value' customers — those who spend $160 to $200 a month on telecom and entertainment services — and 70% of its 'medium-value' customers, who spend $110 to $160 a month. SBC noted that less than 5% of Lightspeed's deployment would be in 'low-value' neighborhoods — places where people spend less than $110 a month. SBC's message: It would focus on high-income neighborhoods, at least initially, to turn a profit faster.").

[81] The contrast between the approach taken by cable operators in the past and the approach currently being adopted by ILECs is striking: "When Comcast Corp. launched cable-modem service in Washington, D.C., in 2002, it rolled out the high-speed product first to the District's Southeast area. Known as the poorest area in Washington, the Southeast contains many public housing developments, and its residents are predominantly black. Verizon hasn't yet deployed FiOS in Washington. But in February [2005], it began marketing FiOS in several of the

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The ILECs are enormous companies, whose revenues and customer base dwarf those of the largest cable operators[82] and whose regional footprints are substantially larger than any incumbent cable operator.[83] They have made no showing that they are incapable of complying with congressional directives ensuring that the benefits of additional competition are available to all households in a franchise area, not merely high-end neighborhoods. And, if one accepts their claim that their ability to broadly deploy broadband Internet access services depends upon their ability to roll out cable services, it is astonishing that they would demand "relief" from build-out and antidiscrimination requirements in light of an Administration's firmly-stated goal that such broadband-based services should be available to all consumers, not just the well-to-do: "We ought to have a *universal*, affordable access for broadband technology by the year 2007";[84] "I believe there ought to be broadband in *every* community, and available to *every* house by the year 2007";[85] and "[t]he objective of this administration is to make sure that *every* American has

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wealthiest suburbs just outside the Capitol, including McLean, VA, where the median family income is $137,610, and Chevy Chase View, MD, where it is $139,468," as compared to the national median income of $41,994. Steve Donohue, *Wealthy Targets*, Multichannel News, Apr. 18, 2005, at 1, *available at* http://www.multichannel.com/article/CA525531.html. A snapshot of the franchises that Verizon has recently acquired, *see* Section II.C *supra*, shows that Verizon continues to target predominantly wealthy communities. According to the U.S. Census Bureau's web site, the median incomes in Falls Church, VA and Reading, MA are $74,924 and $77,059, respectively -- both almost double the national median income. *See* Census Bureau Facts Sheets for Falls Church, VA and Reading CDP, MA, *available at* http://factfinder.census.gov/servlet/SAFFFacts?_submenuId=factsheet_0&_sse=on.

[82] Verizon's revenue last year was more than the top five MVPDs combined.

[83] *See* Applications and Public Interest Statement of Comcast, Time Warner, and Adelphia, filed in MB Dkt. No. 05-192, at 53 n.129 & Exhibits EE and FF (May 18, 2005) (comparing regional footprints of ILECs and cable operators); Reply of Comcast, Time Warner, and Adelphia, filed in MB Dkt. No. 05-192, at 17-18 & Exhibit D (Aug. 5, 2005) (same).

[84] *Remarks by the President on Homeownership*, Albuquerque, New Mexico, Mar. 26, 2004 (emphasis added), *available at* http://www.whitehouse.gov/news/releases/2004/03/20040326-9.html.

[85] *Remarks by the President on Tax Relief and the Economy*, Des Moines, Iowa, Apr. 15, 2004 (emphasis added), *available at* http://www.whitehouse.gov/news/releases/2004/04/20040415-7.html.

access by the year 2007."[86] Given the sharp contrast between such clearly articulated social policies and the real-world conduct of the ILECs, how can an ILEC credibly advocate elimination of redlining prohibitions -- or defend a build-out requirement that does not begin to go into effect until the ILEC has obtained more subscribers in the franchise area than Comcast, DIRECTV, and EchoStar, *combined*?[87]

IV. THE COMMISSION'S AUTHORITY TO INTERFERE IN THE FRANCHISING PROCESS IS EXTREMELY DOUBTFUL.

Even if the franchising process was serving as a barrier to ILEC entry, a careful statutory analysis demonstrates that there is no statutory basis for the Commission to promulgate the kinds of rules it is proposing in this proceeding. The plain language of Section 621(a)(1) gives the courts, not the Commission, the power to determine whether LFAs have unreasonably refused to award a competitive franchise. The legislative history confirms that Congress intended to make LFA control over the franchising process a cornerstone of the statutory scheme. Further, Section 706 of the Telecommunications Act does not provide the Commission with a jurisdictional basis to alter the franchising process. And the federal preemption being proposed in the *Notice* may only be undertaken at the explicit direction of Congress, and no such directive has been given in this case. For all these reasons, should the Commission conclude (contrary to the evidence) that the franchising process needs to be changed, its proper role would be to offer Congress recommendations as to how the franchising process might be revised. Comcast provides some ideas for such recommendations in these comments.

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[86] *Remarks by the President at the Newspaper Association of America Annual Convention*, Washington, D.C., Apr. 21, 2004 (emphasis added), *available at* http://www.whitehouse.gov/news/releases/2004/04/20040421-5.html.

[87] *See* Kimberly S. Johnson, *supra* note 79.

A. Section 621(a)(1) Gives The Courts, Not The Commission, The Authority To Determine Whether LFAs Have Unreasonably Refused To Award A Competitive Franchise.

The statutory language is clear on two points. First, there must be a final determination by an LFA before action can be taken, and, second, the courts, not the Commission, have the power to determine what constitutes an unreasonable refusal to award a competitive franchise. Section 621(a)(1) states that "[a]ny applicant whose application for a second franchise has been denied by a *final decision* of the franchising authority may appeal such final decision pursuant to the provisions of Section 635."[88] Section 635, in turn, states that "[a]ny cable operator adversely affected by any final determination made by a franchising authority under Section 621(a)(1) . . . may commence an action within 120 days after receiving notice of such determination" in federal court or a state court of general jurisdiction.[89] The *Notice* acknowledges this statutory framework for appealing LFA decisions.[90]

There is no evidence that Congress contemplated a role for the Commission in this process. Under the statutory scheme, the prospective franchisee files its application; the LFA makes a decision; and if the applicant believes the application was unreasonably refused, the applicant can appeal the decision to state or federal court. If Congress had intended to give aggrieved parties redress through the Commission's administrative process, it would have done so through an express statutory directive. In other contexts, Congress has done exactly that -- either by giving the Commission regulatory power over a particular process or by directing

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88 47 U.S.C. § 541(a)(1) (emphasis added).

89 *Id.* § 555(a).

90 *See Notice* ¶ 4.

parties to bring their grievances before the Commission.[91] Congress's omission of this kind of redress in the case of franchising demonstrates that it intended to put power in the hands of LFAs and the courts, not the Commission.[92]

B. The Legislative History Indicates That Congress Intended To Make Local Control Over The Franchising Process A Cornerstone Of The Statutory Scheme.

An assertion of broad rulemaking authority for the Commission in franchising matters would also conflict with the legislative history of Section 621. Congress has enacted three laws relating to cable franchising over the last 22 years: the 1984 Cable Act; the 1992 Cable Act; and the 1996 Telecommunications Act. On each occasion, Congress has clearly entrusted administration of that process to local authorities.[93] To the extent Congress perceived a need for

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[91] *See, e.g.*, 47 U.S.C. § 534(d) (establishing adjudicatory remedies in must-carry disputes); *id.* § 532(e)(1) (in leased access context, authorizing parties to file petitions for relief at the Commission "upon a showing of prior adjudicated violations of this section"); *id.* § 548 (authorizing the Commission to adjudicate program access complaints).

[92] The *Notice* does not provide any evidence that *Congress* intended to give the Commission a role in the franchising process. Rather, it simply cites a prior statement from the *Commission* itself as proof "that the purpose of Section 621(a)(1) is broader than simply providing would-be entrants with a civil remedy upon the ultimate denial of a request for a competitive franchise." *Notice* ¶ 19 n.76. Specifically, the *Notice* refers to a footnote in the Commission's First Video Competition Report in 1994 where the Commission – as it often does in these reports – noted a concern raised by a commenting party and invited further comment on the matter. *See In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, First Annual Report, 9 FCC Rcd. 7442 ¶ 56 n.127 (1994) ("*First Competition Report*"). The Commission noted further on in the Report that it would "monitor" whether undue delays in the LFA application review process "interfere with Section 621 of the Act." *Id.* ¶ 250. There are three basic points worth making about this reference. First, the statements in the report are irrelevant to the question of whether Congress has given the Commission the requisite authority to promulgate rules. Second, the statements in the report did not imply (as the *Notice* appears to suggest) that the Commission believed in 1994 that Section 621(a)(1) gives it rulemaking authority. Nowhere in the report did the Commission elaborate on the "purpose" of Section 621(a)(1) or opine on what the Commission's role should be beyond monitoring LFA activity. Third, in subsequent years the Commission has made no findings that the franchising process is acting as a barrier to additional competitive entry.

[93] Senators Conrad Burns and Daniel Inouye confirmed their commitment to this approach in their recent statement of principles on franchising. The Senators stated that: "The regulation of video services under Title VI relies upon a type of 'deliberately structured dualism' where state and local authorities have primary responsibility for administration of the franchising process within certain federal limits. Because each community may be unique, this framework recognizes that the local franchising authority is uniquely positioned to ensure that video providers meet each community's needs and interests in a fair and equitable manner, and are most effective in seeing that

(footnoted continued…)

federal guidance in that process, it has supplied that guidance itself, through express statutory commands to the LFAs. At no point has Congress ever indicated that the Commission should have the authority to revisit these congressional judgments or involve itself in the franchising process along the lines suggested in the *Notice*.[94]

1984 Cable Act: The 1984 Cable Act was designed, among other things, to delineate clearly the respective roles of local, state, and federal authorities in cable regulation. The statute's drafters believed that this division of responsibilities was needed to remedy an unstable regulatory environment which impeded cable's growth.[95] Initially, municipalities regulated cable through "franchises" or "licenses."[96] Eventually, the Commission began to insert itself into the process, thus creating jurisdictional tensions. In this unsettled regulatory environment,

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(…footnote continued)

provider obligations are enforced. The Federal government has neither the resources nor the expertise to address such issues." John Eggerton, *Burns, Inouye Team on Video Franchise Principles*, Broad. & Cable, Feb. 2, 2006.

[94] There has been one prior instance where the Commission interpreted a provision of Section 621. In a 1985 proceeding implementing the 1984 Act, the Commission adopted an interpretation of the anti-redlining requirement in Section 621(a)(3), saying that it did not "require the wiring of those homes that are too remote to be wired economically." *In the Matter of Amendment of Parts 1, 63, and 76 of the Commission's Rules to Implement the Provisions of the Cable Communications Policy Act of 1984*, Report and Order, 58 Rad. Reg. 2d (P&F) ¶ 82 (1985). As an initial matter, it is uncertain whether this was a valid exercise of Commission authority in light of the plain language of the statute and the accompanying legislative history. In all events, the Commission's determination in the 1985 order was superseded by the build-out language in the 1992 Act. *See* 47 U.S.C. § 541(a)(4)(A) (provision added in 1992 Act clarifying that LFAs "shall allow the applicant's cable system a reasonable period of time to become capable of providing cable service to all households in a franchise area"). To the extent the Commission's interpretation of the anti-redlining provision in 1985 was appropriate, it is easily distinguishable from the proposed actions in the *Notice*. In the 1985 decision, the Commission had been asked by commenting parties to answer a narrow question relating to application of the anti-redlining provision. Here, in contrast, the Commission is proposing to rework the core decision-making responsibilities of the LFA, contrary to congressional intent. Moreover, the statutory ambiguity which may have justified the Commission's decision in the redlining context is not present here. As noted, there is simply no ambiguity as to what Section 621(a)(1) requires. *See supra* Section IV.A; *see also NEPSK, Inc. v. Town of Houlton*, 167 F. Supp. 2d 98, 102 (D. Me. 2001) ("A natural reading of § 541 requires that Houlton Cable apply for a second franchise before it can ask this Court to review whether it is reasonable to refuse one."); *NEPSK, Inc. v. Town of Houlton*, 283 F.3d 1 (1st Cir. 2002).

[95] *See* S. Rep. No. 98-67, at 9-11 (1983) ("1984 Senate Report"); 1984 House Report at 23.

[96] *See* 1984 House Report at 23.

some LFAs started to address issues that the Commission perceived to be beyond the reach of local authorities (*e.g.*, technical standards for cable systems) while the Commission in turn strayed more into local issues (*e.g.*, prescribing limits on franchise fees and specifying requirements for system capacity and for public, educational, and governmental channels).[97]

The 1984 Cable Act provided clarity and certainty to cable regulation and delineated the respective roles for federal, state, and local governments on franchising and other cable-related matters. Congress intended the 1984 Act to achieve an "appropriate balance" that would give local governments authority "over areas of local concern and . . . to protect local needs" while maintaining the federal government's ability to "protect the Federal interest . . . in a competitive marketplace."[98] Congress specifically intended that "the franchise process take place at the local level where city officials have the best understanding of local communications needs."[99] Congress was also determined to ensure that the franchise process was "not continually altered by Federal, state or local regulation" as had happened when the Commission established detailed regulations governing franchising authorities in the early 1970s and then dramatically scaled them back in the late 1970s.[100] To that end, Congress required that "the provisions of [] franchises, and the authority of the municipal governments to enforce these provisions . . ., be

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97 *See id.*

98 1984 Senate Report at 11; *see also* 130 Cong. Rec. S11 (daily ed. Oct. 11, 1984) (Remarks of Sen. Packwood) (noting that comprehensive cable legislation is "needed to preserve the legitimate regulatory role of local and State authorities").

99 1984 House Report at 24.

100 *Id. See Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to Community Antenna Television Systems*, Report and Order, 36 FCC 2d 143 (1972) (establishing regulations for cable franchising); *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*, Report and Order, 66 FCC 2d 380 (1977) (eliminating many franchise requirements).

based on [] uniform Federal standards" that were established *by Congress*.[101] Among other key provisions, Congress directed that in awarding a franchise, an LFA "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."[102]

1992 Cable Act: The 1992 Cable Act strengthened the central role played by LFAs in the franchising process, while making some adjustments to the franchising rules to facilitate competitive entry. Congress amended certain provisions of the Act "to give franchising authorities more control over the franchise renewal process" by allowing LFAs to consider factors such as the franchisee's level of compliance with the existing franchise agreement and the level of service provided during the franchise term.[103] At the same time, to facilitate competitive entry, Congress added provisions: (1) forbidding LFAs from awarding exclusive franchises and ordering them not to unreasonably refuse to grant an additional competitive franchise;[104] (2) directing 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;"[105] and (3) allowing

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[101] 1984 House Report at 24; *see* 1984 Senate Report at 7 ("It is not in the public interest for the States to replace the regulation that has been consciously abandoned at the Federal level with their own regulatory scheme.").

[102] 1984 Cable Act § 2 (codified at 47 U.S.C. § 541(a)(3)).

[103] S. Rep. No. 102-92, at 47, 82 (1991); *see* 47 U.S.C. § 546(c)(1) (provisions relating to LFA renewal process).

[104] 1992 Cable Act § 7(a)(1) (codified at 47 U.S.C. § 541(a)(1)). The 1984 Cable Act had permitted, but not required, LFAs to grant multiple franchises.

[105] *Id.* § 7(b) (codified at 47 U.S.C. § 541(a)(4)(A)).

applicants that believe their applications for franchises have been unreasonably denied to seek remedy through an appeal to state or federal court.[106]

1996 Telecommunications Act: A chief objective of the Telecommunications Act of 1996 was to aid ILEC entry into lines of business they had previously been prevented from entering -- in exchange for promises of ILEC cooperation in enabling competitive entry into the telephone business.[107] At the request of the ILECs, Congress repealed the prohibition on telephone company provision of video programming services in their telephone service areas, eliminated the requirement that telephone companies obtain authority under Section 214 prior to constructing cable facilities, and authorized telephone companies to provide video service under any one of the four options set forth in Section 651 of the Communications Act, including as cable operators under the Title VI rules.[108] Notably, Congress made no changes in the 1996 Act to the local franchising rules established in 1984 and 1992.

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In sum, Congress has established -- and reaffirmed -- ground rules for the franchising process. Under the basic statutory framework, LFAs play the central role in administering and enforcing local franchises. Where Congress has made changes to the franchising process, it has

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106 *See id.* § 7(a)(1) (codified at 47 U.S.C. § 541(a)(1)) & § 23 (codified at 47 U.S.C. § 555(a)).

107 *See* S. Rep. No. 104-23, at 6-7 (1995) (listing "Telephone company entry into cable" as one of the key objectives of the legislation).

108 *See* S. Rep. No. 104-230, at 171-179 (Feb. 1, 1996) (Conf. Rep.) (describing provisions of the 1996 Act relating to entry by telephone companies into the video marketplace). *See id.* at 171-172 ("New Section 651 of the Communications Act specifically addresses the regulatory treatment of video programming services provided by telephone companies. Recognizing that there can be different strategies, services and technologies for entering video markets, the conferees agree to multiple entry options to promote competition, to encourage investment in new technologies and to maximize consumer choice of services that best meet their information and entertainment needs.").

done so through express and direct commands to the LFAs. There is no indication in the statute or the legislative history that Congress intended to authorize the Commission to remake the franchising process in the ways proposed in the *Notice*, including, among other things, by circumscribing LFA authority with respect to build-out and anti-redlining requirements. In fact, the legislative history is entirely to the contrary.[109]

C. Section 706 Does Not Provide The Commission With A Jurisdictional Basis For Preempting State Or Local Franchising Laws.

The Commission seeks comment on whether Section 706 of the Telecommunications Act of 1996 provides the Commission with authority to address franchising-related matters.[110] The clear answer is that it does not. As an initial matter, that provision deals with the deployment of "advanced telecommunications capability," -- that is, broadband *transmission* services, devoid of content -- not the regulation of *cable* services by state or local governments.[111] There is no indication that Congress intended for Section 706 to be used in this manner. And the

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[109] The *Notice* invites comment on whether the Commission has the authority to define what constitutes a "reasonable period of time" for purposes of build-out requirements. *See Notice* ¶ 23. Congress knows how to set specific time limits, *see, e.g.*, 47 U.S.C. § 537 (providing for a 120-day "shot clock" for decisions on franchise transfers), and expressly elected not to do so in Section 621. The language in Section 621 certainly cannot be construed as an invitation for the Commission to set its own deadline.

[110] *See Notice* ¶ 18.

[111] *See* Telecommunications Act of 1996, Pub. L. 104-104, §706(c), 110 Stat. 56, 153 (1996) ("1996 Act") (defining "advanced telecommunications capability" as "high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology"). The Commission has in turn defined "advanced telecommunications capability" as "infrastructure capable of delivering a speed in excess of 200 kbps in each direction." *See In the Matter of Availability of Advanced Telecommunications Capability in the United States*, Fourth Report to Congress, 19 FCC Rcd. 20540, at 10 (2004).

Commission has already definitively ruled that Section 706 is *not* an independent source of rulemaking authority.[112]

Moreover, the franchising-related issues raised in the *Notice* are completely unrelated to the basic purpose of Section 706. Section 706 provides that, if the FCC determines that broadband capability is not being deployed to all Americans in a reasonable and timely manner, the FCC "shall take immediate action to accelerate the deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market."[113] It is ludicrous to suggest that local franchising rules have any meaningful relationship to the ILECs' broadband investment decisions. For one thing, obtaining local cable franchises is not a barrier to entry, as discussed above. For another, the ILECs are free to deploy broadband networks without obtaining cable franchises, and they are in fact doing so. Verizon, for example, has already deployed its FiOS broadband service in 16 states, passing a cumulative 3 million homes and businesses,[114] and plans to deploy that service to over 6

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[112] *See In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Mem. Opin. & Order, 13 FCC Rcd. 24011 ¶ 77 (1998) ("For the foregoing reasons, we conclude that, in light of the statutory language, the framework of the 1996 Act, its legislative history, and Congress' policy objectives, the most logical statutory interpretation is that section 706 does not constitute an independent grant of authority."); *id.* ¶ 74 ("[W]e conclude that section 706(a) gives the Commission an affirmative obligation to encourage the deployment of advanced services, *relying on our authority established elsewhere in the Act*." (emphasis added)); *see also In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Order on Reconsideration, 15 FCC Rcd. 17044 ¶ 5 (2000) (affirming that Section 706 does not constitute an independent grant of authority).

[113] 1996 Act § 706(b), 110 Stat. at 153.

[114] *See* Verizon 4Q05 Earnings Release.

million homes, or 20% of current Verizon households, by January 2007.[115] Verizon projects that number to climb to 20 million by 2009.[116]

In addition, there is no policy argument less credible than ILEC claims that they need regulatory relief in order to provide broadband. They have already received, on multiple occasions, the expansive regulatory relief they said was necessary to accelerate the deployment of broadband.[117] Time and time again, the ILECs have promised infrastructure investment, fiber optics, broadband, and so forth, if only legislators would give them "relief" from one rule or another. They did this in pursuing price cap regulation from state and federal regulators beginning around 1990.[118] They did this in seeking relief from the Modification of Final Judgment in the 1996 Act. They did this in seeking an exemption from Section 271 for

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[115] *See* John Eggerton, *FiOS Expands in Texas*, Broad. & Cable (Jan. 5, 2006), *available at* http://www.broadcastingcable.com/article/CA6297189.html.

[116] *See id.* AT&T and BellSouth also say they are dedicating significant resources to deploying broadband facilities. *See* AT&T News Release, *AT&T Updates Outlook on Merger Synergies, Details Plans for Growth in Wireless, Broadband and Business Services* (Jan. 31, 2006); BellSouth News Release, *BellSouth Reports Fourth Quarter Earnings* (Jan. 25, 2006) ("BellSouth is focused on driving broadband penetration.").

[117] *See, e.g.*, *In the Matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order, 20 FCC Rcd. 14853 (2005) ("*Wireline Broadband Order*") (eliminating mandated sharing requirement for ILECs' wireline broadband Internet access services); *In the Matter of Petition for Forbearance of Verizon et al. Pursuant to 47 U.S.C. § 160(c)*, Mem. Opin. & Order, 19 FCC Rcd. 21496 (2004) (forbearing from enforcing Section 271 unbundling obligations with regard to broadband elements); *In the Matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Reconsideration, 19 FCC Rcd. 20293 (2004) (providing unbundling relief for fiber-to-the-curb loops); *In the Matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand, 18 FCC Rcd. 16978 (2003) (providing unbundling relief to the ILECs).

[118] "In 1992, . . . Bell Atlantic, predecessor of Verizon, promised to increase its infrastructure investment if only the state would give it greater flexibility on rates. Opportunity New Jersey [('ONJ')] worked well for Bell Atlantic, as BA-NJ's return on equity jumped from 22 percent to 40 percent in the three years following enactment." Duane D. Freese, *Who Do You Trust? Bush or the Bells?*, Tech Central Station, Dec. 13, 2001, *available at* http://www.techcentralstation.com/121301C.html. However, infrastructure investment "dropped in real terms by $76 million in that same period and was $545 million less than promised, New Jersey's ratepayer advocate found." *Id.* Essentially the same thing happened in Pennsylvania -- and elsewhere. Having made and broken these promises a decade ago, the ILECs must recognize that only the willing suspension of disbelief would allow policymakers to accept claims that the franchising requirements for cable services are now the impediment to ILEC broadband deployments.

"interLATA data services." They did this -- multiple times -- in their recurrent efforts to weaken the unbundling rules adopted under Section 251 of the 1996 Act.

The old adage applies here: "Fool me once, shame on you. Fool me twice, shame on me." The adage doesn't say anything about the third and fourth and fifth time, but at this point every policymaker ought to resolve that he or she "won't get fooled again."[119]

D. The Commission Lacks The Authority To Preempt State Franchising Laws, Particularly "Level-Playing-Field" Statutes.

If, in spite of the plain language and legislative history of the statute, the Commission decides that the statute is ambiguous or that its authority under Section 706 somehow bears on this proceeding, the Commission still lacks the necessary statutory authority to preempt the state and local laws which have been the backbone of the local franchising process for decades. The Supreme Court has made it clear that, if Congress intends to preempt a power traditionally exercised by a state or local government, it must be "unmistakably clear" that such is its intention.[120] There is no such clear statement of congressional intent here.[121]

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[119] The Who, *Won't Get Fooled Again*, on *Who's Next* (MCA 1971).

[120] *See Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991); *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989); *see also Nixon v. Missouri Municipal League*, 541 U.S. 125, 141 (2004) (affirming Commission decision not to preempt pursuant to its Section 253 authority since "neither statutory structure nor legislative history points unequivocally to a commitment by Congress to treat governmental telecommunications providers on par with private firms"); *cf.* 1996 Act § 601(c)(1), 110 Stat. at 143 ("This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law *unless expressly so provided in such Act or Amendment*." (emphasis added)).

[121] Congress knows how to write such an express preemption statute. Section 253 of the Communications Act, for example, authorizes the Commission to preempt state or local laws 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. There is no similar provision in Title VI of the Communications Act. Reading such a provision into the statute, as suggested by the *Notice*, would be a clear usurpation of Congress' authority.

State and local governments have been regulating the cable business for well over 40 years,[122] so cable franchising is plainly a power that has historically been exercised by such governmental entities. The critical question, then, is whether Congress has ever explicitly granted the Commission the authority to preempt state or local franchising laws. On three separate occasions, Congress has passed laws affecting cable regulation. *Not once has Congress so much as hinted that the Commission has preemptive power in this area*. To the contrary, as detailed above, Congress has repeatedly affirmed the central role played by LFAs in the franchising process and has taken steps to *curtail* the "continued alter[ation]" of the process by the Commission.

The *City of Dallas* decision illustrates the high hurdle that must be overcome before local authority can be preempted.[123] That case involved a Commission rulemaking implementing the OVS provisions of the 1996 Act. Congress had directed, among other things, that the franchising requirements in Section 621 not apply to OVS providers.[124] The Commission, in turn, construed this provision as preempting local franchising requirements for OVS operators. The Fifth Circuit disagreed, holding that Congress had not provided the clear statement of preemption required by Supreme Court precedent. While Congress had expressly eliminated the *federal* requirement that OVS operators obtain a local franchise, it had not preempted the independent authority of state and local governments to impose franchising requirements.[125]

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122 *See* 1984 Senate Report at 5-6 (detailing history of local regulation of cable systems).

123 *City of Dallas v. FCC*, 165 F.3d 341 (5th Cir. 1999)

124 *See* 47 U.S.C. § 573(c)(1)(C).

125 *See City of Dallas*, 165 F.3d at 348 ("[The legislative history accompanying the 1984 Cable Act suggests] that franchising authority does not depend on or grow out of § 621. While § 621 may have expressly *recognized* the (footnoted continued…)

Any possible claim of preemption authority here would be far weaker than its claim in *City of Dallas*. There, Congress had exempted OVS operators from Section 621 requirements, and the court still found that Congress had not expressly preempted state and local authority to require franchises. Here, *Congress has not said anything* to suggest that state and local authority is preempted, and, in fact, its enactments specifically *confirm* their authority.

The *Notice* tentatively concludes that Section 636(c) of the Communications Act gives the Commission authority to preempt "any law or regulation of a State or LFA that causes an unreasonable refusal to award a competitive franchise in contravention of section 621(a)."[126] This reading of the statute is incorrect for a number of reasons. First, Section 636(c) does not provide general preemption authority to the Commission. Rather, it is limited to situations where the state or local law is "inconsistent" with the Act.[127] State and local franchising laws, including state level-playing-field statutes, are a legitimate and well-established exercise of state and local regulatory authority and are plainly not inconsistent with or violative of the Communications Act.

Furthermore, it is difficult to see how treating ILECs and cable operators equally under a level-playing-field statute would be "inconsistent" with the Act.[128] Ensuring that "like services

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(…footnote continued)

power of localities to impose franchise requirements, it did not *create* that power, and elimination of § 621 for OVS operators does not eliminate local franchising authority." (emphasis in original)).

126 *Notice* ¶ 15.

127 *See* 47 U.S.C. § 556(c).

128 In general, courts which have been presented with the question of whether the Cable Act preempts a level-playing-field statute have found that "express preemption is not applicable" and that the Act's requirements are "not in conflict" with the level-playing-field statutes. *See, e.g., Cable TV Fund 14-A v. Naperville*, 1997 WL 280692 (N.D. Ill. 1997).

are treated alike" is a principle that the Commission has repeatedly endorsed. For example, in its recent *Wireline Broadband Order*, the Commission spoke of "regulating like services in a similar functional manner" and "seeking to create a regime that is technology and competitively neutral."[129] Many other Commission orders portray technological and competitive neutrality as a virtue.[130] It would be arbitrary and capricious for the Commission to now embrace an approach that condemns such equal treatment under the law.

Second, the scope of the Commission's preemption authority under Section 636(c) is also limited by the terms of Section 636(a) of the Act. That provision states that nothing in Title VI of the Act "shall be construed to affect any authority of any State, political subdivision, or agency thereof, or franchising authority, regarding matters of public health, safety, and welfare, to the extent consistent with the express provisions of this subchapter."[131] In explaining this provision, Congress noted that a state may exercise authority "over a whole range of cable activities," including, among other things, negotiations with cable operators, consumer protection, construction requirements, assessment of financial qualifications, and other franchise-

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[129] *Wireline Broadband Order* ¶¶ 1, 3, 16 n.44 & 45 (also noting how "regulat[ing] like services in a similar manner" promotes market-based investment decisions, not ones driven by regulatory disparities).

[130] *See, e.g.*, *In the Matter of Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd. 8776 ¶ 46 (1997) ("Pursuant to section 254(b)(7) and consistent with the Joint Board's recommendations, we establish 'competitive neutrality' as an additional principle upon which we base policies for the preservation and advancement of universal service."); *See In the Matter of Section 68.4(a) of the Commission's Rules Governing Hearing Aid-Compatible Telephones*, Report and Order, 18 FCC Rcd. 16753 ¶ 76 (2003) ("In addition, the Commission is committed to the principle of technological neutrality in its regulatory requirements."); *see also Strategic Plan 2006-2011*, 2005 FCC LEXIS 5325, *6 (2005) ("All Americans should have affordable access to robust and reliable broadband products and services. Regulatory Policies must promote technological neutrality, competition, investment, and innovation to ensure that broadband service providers have sufficient incentive to develop and offer such products and services.").

[131] 47 U.S.C. § 556(a); *see also Notice* ¶ 15 (referencing the language in Section 636(c) in the preemption discussion).

related issues.[132] State level-playing-field statutes are a similar species of well-established, widely-adopted franchise-related regulation and are plainly beyond the scope of the Commission's Section 636 preemption authority.

V. CONSISTENT WITH PAST PRACTICE AND ITS STATUTORY AUTHORITY, THE COMMISSION CAN MAKE RECOMMENDATIONS TO CONGRESS.

Although the Commission does not have the statutory authority to adopt the proposed rules set forth in the *Notice*, the Commission can nonetheless make recommendations to Congress regarding possible changes to the statute.[133] Such recommendations would be timely as Congress is now debating revisions to the Communications Act. Furthermore, this is exactly the approach the Commission has taken during past rewrites of the Act. For example, in 1990, the Commission issued a report to Congress that included a number of legislative proposals regarding the local franchising process, and many of those recommendations were eventually included in the 1992 Act.[134]

Comcast is not opposed to changes that would streamline various aspects of the franchise process for all the parties involved. However, what the ILECs are requesting from the Commission vastly exaggerates any purported justifications for making changes to the law. The key facts bear emphasis:

- Since 1984, the Act has permitted cities and towns to have cable competition.

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[132] 1984 House Report at 94.

[133] The Communications Act expressly empowers the Commission to make legislative recommendations to Congress. 47 U.S.C. § 154(k)(4). And the *Notice* seeks comment on whether its authority is "limited to providing guidance." *Notice* ¶ 15.

[134] *See First Competition Report* ¶¶ 55-56 (detailing contents of the Commission's 1990 report to Congress).

- Since 1992, the Act has expressly prohibited exclusive cable franchises and provided a judicial remedy to address any LFA's unreasonable refusal to grant competitive franchises.

- Since 1996, at the express request of the ILECs, the Act has allowed telephone companies to become cable companies as well.

- Cities and towns have shown they welcome additional video competition, and have fairly and promptly granted franchises to telephone companies that wish to become cable companies.

Based on these facts, one could reasonably conclude that the ILECs have all they need right now. Instead, they want more.

What the ILECs really want is yet *more* "regulatory relief" that would allow them to become cable companies without having to play by the same rules that apply to other cable companies. The question the Commission needs to ask itself is this: should telephone companies that become cable companies be allowed to avoid working with local officials the same way other cable companies are required to? Specifically, should they be able to evade established procedures for addressing local community needs (1) for carriage of public, educational, and governmental channels, (2) for local management of local rights-of-way, and (3) for service to all households, without regard to income? And finally, if the rules of the game are going to be changed for the telephone companies, should they be changed only for the telephone companies, while cable companies that provide the same services remain subject to existing rules? The obvious answer to each of these questions is an emphatic "No!"

Nonetheless, Comcast could support specific and limited legislative approaches that would improve, but not eviscerate, the franchising process. For example, Congress might consider adopting (and the Commission might wish to propose) a "shot clock" that would

establish specific time limits on LFA consideration of franchise applications for new entrants.[135] Under a "shot clock" approach, the LFA and a telephone company would have a certain amount of time to negotiate a franchise agreement. If the parties are deadlocked at the end of that period, federal law would give the parties two options: (1) the telephone company would be awarded the same franchise agreement as the incumbent; or (2) the telephone company would be awarded a franchise with more favorable terms and conditions, provided that the existing operator would obtain the benefit of those more favorable terms and conditions as well.[136] Such an approach would squarely address any legitimate ILEC concerns about the pace of the franchise approval process (even though, as noted, most of those concerns appear to be unfounded), do so in a way that treats like service providers alike,[137] and preserve the legitimate role of local governments in addressing local needs.

But, to the extent that the Commission is making legislative proposals affecting cable services, there is no reason to confine such proposals to the franchising process. In contrast to Section 621, which has already been revised in specific contemplation of additional competitive entry, there are many other sections in Title VI that are rooted in the ancient history of a video

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[135] Such time limits would track in certain respects the basic approach taken in Sections 617 and 626 with respect to franchise transfers and renewals. *See* 47 U.S.C. §§ 537, 546. NCTA has also supported a "shot clock" approach. *See* Drew Clark, *Cable Rolls Out Ad Campaign, Views On Video Franchises*, National Journal, Jan. 31, 2006 (quoting NCTA President Kyle McSlarrow regarding a "shot clock" proposal), *available at* http://www.njtelecomupdate.com/lenya/telco/live/tb-CRHC1138737666293.html.

[136] Senators Burns and Inouye have proposed this basic "shot clock" approach in their statement of principles on cable franchising. The Senators stated: "The franchising process should be designed to promote fairness for consumers in local communities and to promote a level playing field for providers. If a competitive entrant negotiates better terms and conditions for a franchise, other providers in that community should be entitled to adopt those same terms and conditions." *See* Eggerton, *supra* note 93.

[137] *See* NCTA, *Working Toward A Deregulated Video Marketplace*, 4 (June 2005) ("Congress should not pick winners and losers by rewarding or disadvantaging video providers based on the mix of technologies they use.").

marketplace that has become vastly more competitive over intervening years. In comments submitted in the 2004 Video Competition proceeding, Comcast offered several concrete suggestions for legislative changes the Commission should consider advocating to Congress.[138] Among other things, Comcast suggested that the Commission revise the program access rules to better reflect the state of competition in the marketplace; restructure the spectrum eligibility rules to allow for the transfer of assigned spectrum to cable operators; and review its set-top box rules to ensure that the marketplace is not skewed by regulatory disparities.[139] These suggestions are even more relevant today than they were when Comcast first proposed them.

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In sum, a careful review of the plain language of Section 621 and the legislative history surrounding the local franchising process demonstrates that the Commission lacks the authority to pursue the proposals laid out in the *Notice*. Likewise, Section 706 does not provide an independent basis for the Commission to regulate the franchising process, nor does the Commission have the authority to preempt state or local franchising laws, including level-playing field statutes. Rather, consistent with past practice, the Commission should develop legislative recommendations for Congress to consider as it debates possible changes to the Communications Act. However, any such recommendation should reflect an accurate assessment of real-world conditions, not the distorted view presented by the ILECs.

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[138] *See* Comcast Comments, filed in MB Dkt. No. 04-227, at 40-44 (July 23, 2004) (suggesting possible changes in cable rules as well as revisions to the Communications Act to reflect changes in the competitive marketplace).

[139] *Id.*

VI. CONCLUSION

The Commission's inquiry provides a welcome opportunity to dispel the myths the ILECs have created about the franchising process. For the foregoing reasons -- and consistent with the plain language of the statute, legislative history, and marketplace evidence -- Comcast urges the Commission not to attempt to interfere in a process that Congress has reserved to LFAs and the courts and to limit its actions in this proceeding to -- at most -- making recommendations to Congress for potential legislative changes to Title VI.

Respectfully submitted,

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