Before the
Federal Communications Commission
Washington, D.C. 20554

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

NOTICE OF PROPOSED RULEMAKING

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Comment Date: [60 days after publication in the Federal Register]
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By the Commission: Chairman Martin, and Commissioners Abernathy, Copps and Adelstein issuing separate statements.

I. INTRODUCTION

1. In this Notice of Proposed Rulemaking ("NPRM" or "Notice"), we solicit comment on how we should implement Section 621(a)(1) of the Communications Act of 1934, as amended (the "Communications Act" or the "Act"). Section 621(a)(1) states in relevant part that "a franchising authority … may not unreasonably refuse to award an additional competitive franchise."[1] While the Commission has found that, "[t]oday, almost all consumers have the choice between over-the-air broadcast television, a cable service, and at least two DBS providers,"[2] greater competition in the market for the delivery of multichannel video programming is one of the primary goals of federal communications policy.[3] Increased competition can be expected to lead to lower prices and more choices for consumers and, as marketplace competition disciplines competitors' behavior, all competing cable service providers could require less federal regulation. Moreover, for all competitors in the marketplace, the abilities to offer video to consumers and to deploy broadband networks rapidly are linked intrinsically.[4] However, potential competitors seeking to enter the multichannel video programming

[1] 47 U.S.C. § 541(a)(1).

[2] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 20 FCC Rcd 2755, 2757 (2005).

[3] *See* 47 U.S.C. § 521(6) (stating that one of the purposes of Title VI is "to promote competition in cable communications").

[4] The construction of modern telecommunications facilities requires substantial capital investment, and such networks, once completed, are capable of providing not only voice and data, but video as well. As a consequence, the ability to offer video offers the promise of an additional revenue stream from which deployment costs can be recovered.

distributor ("MVPD") marketplace have alleged that in many areas the current operation of the local franchising process serves as a barrier to entry. Accordingly, this *Notice* is designed to solicit comment on implementation of Section 621(a)(1)'s directive that LFAs not unreasonably refuse to award competitive franchises, and whether the franchising process unreasonably impedes the achievement of the interrelated federal goals of enhanced cable competition and accelerated broadband deployment and, if so, how the Commission should act to address that problem.

II. BACKGROUND

2. The Communications Act provides new entrants four options for entry into the MVPD market.[5] They can provide video programming to subscribers via radio communication,[6] a cable system[7] or an open video system,[8] or they can provide transmission of video programming on a common carrier basis.[9] Any new entrant opting to offer "cable service"[10] as a "cable operator"[11] becomes subject to the requirements of Title VI. Section 621 of Title VI sets forth general cable franchise requirements. Subsection (b)(1) of Section 621 prohibits a cable operator from providing cable service in a particular area without first obtaining a cable franchise,[12] and Subsection (a)(1) grants to local franchising authorities ("LFAs") the authority to award such franchises.[13] Other provisions of Section 621 provide 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;"[14] "shall allow [a] cable system a reasonable period of time to become capable of providing cable service to all households in the franchise area;"[15] and "may require adequate assurance that the cable operator will provide adequate public, educational and governmental access channel capacity, facilities, or financial support."[16]

3. The initial purpose of Section 621(a)(1), which was added to the Communications Act by the Cable Communications Policy Act of 1984 (the "1984 Cable Act"),[17] was to both affirm and delineate

[5] *See* 47 U.S.C. § 571(a).

[6] *See* 47 U.S.C. § 571(a)(1).

[7] *See* 47 U.S.C. § 571(a)(3)(A).

[8] *See* 47 U.S.C. § 571(a)(3)(B).

[9] *See* 47 U.S.C. § 571(a)(2).

[10] 47 U.S.C. § 542(6) (defining "cable service" as "(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service").

[11] 47 U.S.C. § 542(5) (defining "cable operator" as "any person or group of persons (A) who provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in a cable system, or (B) who otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system").

[12] 47 U.S.C. § 541(b)(1) ("Except to the extent provided in paragraph (2) and subsection (f), a cable operator may not provide cable service without a franchise.").

[13] 47 U.S.C. § 541(a)(1) (stating that "[a] franchising authority may award, in accordance with the provisions of this title, 1 or more franchises within its jurisdiction").

[14] 47 U.S.C. § 541(a)(3).

[15] 47 U.S.C. § 541(a)(4)(A).

[16] 47 U.S.C. § 541(a)(4)(B).

[17] Cable Communications Policy Act of 1984, Pub. L No. 98-549, 98 Stat. 2779.

the role of local franchising authorities ("LFAs") in the franchising process.[18] A few years later, however, the Commission prepared a report to Congress on the cable industry pursuant to the requirements of the 1984 Cable Act.[19] In that Report, the Commission concluded that in order "[t]o encourage more robust competition in the local video marketplace, the Congress should … forbid local franchising authorities from unreasonably denying a franchise to potential competitors who are ready and able to provide service."[20]

4. In response,[21] Congress revised Section 621(a)(1) through the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act")[22] to read as follows: "A franchising authority may award, in accordance with the provisions of this title, 1 or more franchises within its jurisdiction; except that a franchising authority may not grant an exclusive franchise *and may not unreasonably refuse to award an additional competitive franchise*."[23] As the legislative history

[18] *See*, *e.g.*, H.R. REP. NO. 98-934, at 59 (1984) ("Subsection 621(a) grants a franchising authority the authority to award one or more franchises within its jurisdiction. This grant of authority to a franchising authority to award a franchise establishes the basis for state and local regulation of cable systems."); *see also id*. ("This provision grants to the franchising authority the discretion to determine the number of cable operators to be authorized to provide service in a particular geographic area."); *id*. at 19 ("Primarily, cable television has been regulated at the local government level through the franchise process…. [The 1984 Cable Act] establishes a national policy that clarifies the current system of local, state and federal regulation of cable television. This policy continues reliance on the local franchising process as the primary means of cable television regulation, while defining and limiting the authority that a franchising authority may exercise through the franchise process. The bill establishes franchise procedures and standards to encourage the growth and development of cable systems, and assure that cable systems are responsive to the needs and interests of the local communities they service. Municipal authority to franchise and regulate cable television systems has been under an increasing number of challenges on three fronts: in the courts, at the Federal Communications Commission, and at the state public utility commissions. [This legislation] will preserve the critical role of municipal governments in the franchise process, while providing appropriate deregulation in certain respects to the provision of cable service."); *id*. at 24 ("It is the Committee's intent that the franchise process take place at the local level where city officials have the best understanding of local communications needs and can require cable operators to tailor the cable system to meet those needs. However, if that process is to further the purposes of this legislation, the provisions of these franchises, and the authority of the municipal governments to enforce these provisions, must be based on certain important uniform federal standards that are not continually altered by Federal, state and local regulation.").

[19] *See generally Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service*, 5 FCC Rcd 4962 (1990) ("Report").

[20] *Id*. at 4974; s*ee also id*. at 5012 ("This Commission is convinced that the most effective method of promoting the interests of viewers or consumers is through the free play of competitive market forces."). The Report also recommended that Congress "prohibit franchising rules whose intent or effect is to create unreasonable barriers to the entry of potential competing multichannel video providers," "limit local franchising requirements to appropriate governmental interests (*e.g.*, public health and safety, repair and good condition of public rights-of-way, and the posting of an appropriate construction bond)," and "permit competitors to enter a market pursuant to an initial, time-limited suspension of any 'universal service' obligation." *Id*. at 4974.

[21] *See* H.R. REP. NO. 102-628, at 47 (1992) ("The Commission recommended that Congress, in order to encourage more robust competition in the local video marketplace, prevent local franchising authorities from unreasonably denying a franchise to potential competitors who are ready and able to provide service."). The Commission has recognized that its recommendations to Congress were implemented through the language added to Section 621(a)(1): "Congress incorporated the Commission's recommendations in the 1992 Cable Act by amending § 621(a)(1) of the Communications Act …." *Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992 (Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming)*, 9 FCC Rcd 7442, 7469 (1994).

[22] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460.

[23] 47 U.S.C. § 541(a)(1) (emphasis added). In the House version of the 1992 Cable Act, the provision that eventually became Section 621 included specific examples of reasonable grounds to deny additional franchises: (continued....)

makes plain, the purpose of this abridgement of local government authority was to promote greater cable competition:

> Based on the evidence in the record taken as a whole, it is clear that there are benefits from competition between two cable systems. Thus, the Committee believes that local franchising authorities should be encouraged to award second franchises. Accordingly, [the 1992 Cable Act,] as reported, prohibits local franchising authorities from unreasonably refusing to grant second franchises.[24]

Section 621(a)(1), as revised, established a clear, federal-level limitation on the authority of LFAs in the franchising process.[25] In that regard, Congress provided 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…."[26] 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.[27]

5. As potential new entrants seek to enter the MVPD marketplace, there have been indications that in many areas the current operation of the local franchising process is serving as an unreasonable barrier to entry.[28] For example, Verizon recently filed comments in the Commission's

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"For purposes of this paragraph, refusal to award a franchise shall not be unreasonable if, for example, such refusal is on the ground (A) of technical infeasibility; (B) of inadequate assurance that the cable operator will provide adequate public, educational and governmental access channel capacity, facilities, or financial support; (C) of inadequate assurance that the cable operator will, within a reasonable period of time, provide universal service throughout the entire franchise area under the jurisdiction of the franchising authority; (D) that such award would interfere with the right of the franchising authority to deny renewal; or (E) of inadequate assurance that the cable operator has the financial, technical, or legal qualifications to provide cable service." H.R. REP. No. 102-628, at 9 (1992). This version of the amended Section 621 ultimately was not adopted.

[24] S. REP. NO. 102-92, at 47 (1991).

[25] *Cf. City of Dallas, Texas v. FCC*, 165 F.3d 341, 347 (holding that Section 653(c)(1)(C)'s directive that the federal franchise requirement found in Section 621(b)(1) does not apply to open video systems did not constitute the "clear statement" required by the Supreme Court to expressly preempt the traditional authority of LFAs to impose franchise requirements).

[26] 47 U.S.C. § 541(a)(1).

[27] 47 U.S.C. § 555(a). *See also Charter Communications, Inc. v. County of Santa Cruz*, 304 F.3d 927, 931, 935 (2002) (noting that, "[w]hen reviewing disputes emerging from this franchise agreement, a court must determine whether the County could have deemed it reasonable to deny consent" and stating that "even if we thought the County had acted unreasonably, our view would be deferential not only because precedent so commands, but also because methods exist to promote self-correction in the future: citizens can vote out their local representatives and cable operators can refuse to enter into franchise agreements with notoriously difficult LFAs"); *Board of County Comm'rs v. Umbehr*, 518 U.S. 668, 678 (1996) (noting the government's "interest in being free from intensive judicial supervision of its daily management functions" and finding "[d]eference is therefore due to the government's reasonable assessment of its interests").

[28] *See*, *e.g.*, Comments of the Broadcast Service Providers Assoc., MB Docket No. 05-255 at 19 (filed Sept. 19, 2005) (arguing that build-out requirements are "inherently anticompetitive" because, in most instances, "the incumbent has had decades to build, upgrade and expand its network with limited or no competition"); Comments of Consumers for Cable Choice, Inc., MB Docket No. 05-255 at 3 (filed Sept. 19, 2005) (observing that, to compete nationally, new entrants must negotiate agreements with 33,000 LFAs); Comments of Alcatel, MB Docket No. 05-255 at 9 (filed Sept. 19, 2005) (reasoning that because each LFA adheres to its own processes and timelines, (continued....)

annual investigation into the state of video competition arguing that "[t]he single biggest obstacle to widespread competition in the video services market is the requirement that a provider obtain an individually negotiated local franchise in each area where it intends to provide service."[29] In its comments, Verizon contends that the local franchising process impedes cable competition in the following ways: (1) it "forces a new entrant to telegraph its deployment plans to the incumbent video competitor," thereby "allow[ing] the incumbent not only to take steps to prolong the franchise process and delay the onset of competition, but also to entrench its position in the market before the new entrant has the opportunity to compete;"[30] (2) it "simply takes too long," as a result of "factors such as inertia, arcane or lengthy application procedures, bureaucracy or, in some cases, inattentiveness or unresponsiveness at the LFA level;"[31] (3) it triggers so-called "level playing field" laws, "which require the new entrant to build-out and serve an entire franchise area on an expedited basis or to match all of the concessions previously provided by the incumbent in order for it to gain its original monopoly position in the local area, despite the vastly different competitive situation facing the new entrant;"[32] and (4) it involves "outrageous demands by some LFAs," which "are in no way related to video services or to the rationales for requiring franchises."[33]

6. The efficient operation of the local franchising process is especially significant with respect to potential new entrants with existing facilities, for a number of reasons. First, because they seek to provide video programming to large portions of the country, they contend that the sheer number of franchises they first must obtain serves as a competitive roadblock. Verizon, for example, has stated that it would have to negotiate with more than 10,000 municipalities in order to offer service throughout its current service area.[34] Second, because the existing service areas of potential new entrants with existing facilities do not always coincide perfectly with those covered by incumbent cable operators' franchises, they argue that build-out requirements demanded by LFAs create disincentives for them to enter the marketplace.[35] We note that SBC has told investors that Project Lightspeed, an "initiative to expand its fiber-optics network deeper into neighborhoods to deliver SBC U-verse[SM] TV, voice and high-speed Internet access services,"[36] will be deployed to approximately ninety percent of its "high-value," seventy

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securing agreements from several LFAs "could delay competitive wireline video service entry for years"); Comments of BellSouth Corp., et. al., MB Docket No. 05-255 at 3 (filed Sept. 19, 2005) (stating that, on average, it takes eleven months to finalize a franchise agreement and that in some cases it has taken three years to conclude negotiations); *id*. at 6 (arguing that the franchising process is "costly, time-consuming, and susceptible to abuse by a variety of parties, but especially by incumbent cable operators which have every incentive to use all measures to delay or burden new entrants through regulatory gamesmanship").

[29] Comments of Verizon, MB Docket No. 05-255 at 6 (filed Sept. 19, 2005).

[30] *Id*. at 7-8.

[31] *Id*. at 8-9.

[32] *Id*. at 9-12.

[33] *Id*. at 12-14.

[34] David Ranii, *Options abound for phone TV*, THE NEWS & OBSERVER, Jul. 28, 2005, available at http://www.newsobserver.com/business/technology/story/2633725p-9070222c.html (visited Sept. 15, 2005) (stating that "if Verizon offered TV service in every market it now offers phone service, [the alternative to federal or state legislation] would be to negotiate with more than 10,000 municipalities").

[35] *See*, *e.g.*, Linda Haugsted, *Franchise War in Texas*, MULTICHANNEL NEWS, May 2, 2005 (noting that, although Verizon has negotiated successfully a cable franchise with the city of Keller, Texas, "it will not build out all of Keller: It only has telephone plant in 80% of the community. SBC serves the rest of the locality").

[36] News Release, *SBC CIO Confirms Project Lightspeed Timing, Milestones at Analyst Conference*, Nov. 3, 2005, available at http://www.sbc.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=21874 (visited Nov. 9, 2005).

percent of its "medium-value," and less than five percent of its "low-value" customers.[37]

7. According to the National Association of Telecommunications Officers and Advisors, the National League of Cities, the United States Conference of Mayors, and the National Association of Counties, local governments "want and welcome real communications competition in video, telephone and broadband services,"[38] and they "support a technology-neutral approach that promotes broadband deployment and competitive service offerings."[39] While acknowledging that consumers "demand real competition to increase their options and improve the quality of services,"[40] local governments argue that franchising "need not be a complex or time-consuming process."[41] They argue that the current framework "[s]afeguards [a]gainst [a]buse and [p]rotects [c]ompetition."[42] Furthermore, local governments maintain that local franchisors take their fiduciary responsibilities seriously and strive to "manage and facilitate in an orderly and timely fashion the use of [local] property."[43]

8. Anecdotal evidence suggests that new entrants have been able to obtain cable franchises. In that regard, we note that SNET[44] and Ameritech[45] both obtained cable franchises before being acquired by SBC. Bellsouth[46] and Qwest[47] have obtained franchises, as have many cable overbuilders – RCN has

[37] *See* Leslie Cauley, *Cable, phone companies duke it out for customers*, USA TODAY, May 22, 2005, available at http://www.usatoday.com/money/media/2005-05-22-telco-tv-cover-usat_x.htm (visited Nov. 9, 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.").

[38] Testimony of Kenneth Fellman, Mayor, Arvada, California, on behalf of the National Association of Telecommunications Officers and Advisors, the National League of Cities, the United States Conference of Mayors, and the National Association of Counties, before the U.S. House of Representatives Committee on Energy and Commerce, Apr. 27, 2005, at 3, available at http://energycommerce.house.gov/108/Hearings/04272005hearing1488/Fellman.pdf (visited Nov. 15, 2005).

[39] *Id*.

[40] *Id*. at 12.

[41] *Id*. at 13.

[42] *Id*. at 16.

[43] *Id*. at 11.

[44] *See Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Southern New England Telecommunications Corporation, Transferor, To SBC Communications, Inc., Transferee*, 13 FCC Rcd 21292, 21294 (1998) (noting that a subsidiary of SNET at the time was providing cable service throughout the state of Connecticut "pursuant to a statewide franchise that was granted in September 1996") (citation omitted).

[45] *See In re Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules*, 14 FCC Rcd 14712, 14720 (1999) (describing how Ameritech's "cable television subsidiary, Ameritech New Media, Inc., provides competitive cable service to more than 200,000 consumers in over 75 communities in the Chicago, Cleveland, Columbus, and Detroit metropolitan areas") (citation omitted).

[46] *See* Comments of BellSouth Corporation, MB Docket No. 05-255 at 1-2 (filed Sept. 19, 2005) ("BellSouth currently holds 20 franchises to provide cable 'overbuild' service in local markets throughout its telephone service area, representing approximately 1.4 million potential cable households.").

[47] Comments of Qwest Communications International Inc., MB Docket No. 05-255 at 2-3 (filed Sept. 19, 2005) (describing how, "[u]ntil recently, Qwest has been focusing its efforts on obtaining either geographically limited (continued....)

acquired over 100.[48] Verizon has stated that it "has obtained nine local cable franchises for FiOS TV from various local franchising authorities ("LFAs") in California, Florida, Virginia, and Texas"[49] and "is negotiating franchises with more than 200 municipalities."[50] According to a survey of 161 National Telecommunications Cooperative Association ("NTCA") members, "[f]orty-two percent of survey respondents offer video service to their customers. Ninety-four percent of those offer video under a cable franchise, while six percent offer video as an Open Video System (OVS)…."[51]

9. In addition, there have been recent efforts at the state level to facilitate entry by competitive cable providers. For example, legislation was passed in Texas in September 2005 enabling new entrants in the video programming distribution marketplace to provide service pursuant to state-issued certificates of franchising authority.[52] Upon the submission of a completed affidavit by an applicant, Texas regulators now are required to issue a certificate of franchising authority within seventeen business days.[53] Similar bills have been introduced in Virginia and New Jersey although they are yet to be enacted.[54]

10. With this *Notice*, we seek to determine whether, in awarding franchises, LFAs are carrying out legitimate policy objectives allowed by the Act or are hindering the federal communications policy objectives of increased competition in the delivery of video programming and accelerated broadband deployment and, if that is the case, whether and how we can remedy the problem.[55]

III. DISCUSSION

11. Potential competitive cable providers have alleged that the local franchising process serves as a barrier to entry, and that State and local franchise requirements serve to unreasonably delay competitive entry. Given the interrelated federal goals of enhanced cable competition and rapid

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'pocket' franchises to serve newly constructed communities or 'market' franchises where Qwest obtains a city-wide agreement with the ability to overbuild the incumbent operator at its own pace" and noting that "Qwest already is in the process of obtaining CATV franchises in a number of … communities throughout the western United States").

[48] *See New competitors still drawn to U.S. business telecom field*, TELEPHONY, Oct. 24, 2005, available at http://lw.pennnet.com/news/display_news_story.cfm?Section=WIREN&Category=&NewsID=126977 (visited Nov. 7, 2005) ("RCN operates a total of 130 video franchises in its market areas, which include the metropolitan areas of Boston, Chicago, Los Angeles, San Francisco and Washington, along with New York/New Jersey and eastern Pennsylvania.").

[49] Comments of Verizon, MB Docket No. 05-255 at 5 (filed Sept. 19, 2005).

[50] News Release, *Verizon Seeks Franchise to Bring Fairfax County Residents Choice for Their Cable TV Service*, July 28, 2005, available at http://newscenter.verizon.com/proactive/newsroom/release.vtml?id=92782 (visited Nov. 9, 2005).

[51] *NTCA Broadband/Internet Availability Survey Report*, Sept. 2005, available at http://www.ntca.org/content_documents/2005NTCABroadbandSurveyReport.pdf (visited Nov. 9, 2005). NCTA represents more than 560 small and rural telephone cooperatives and commercial companies. *See generally* http://www.ntca.org/ka/ka-3.cfm?content_item_id=60&folder_id=44 (visited Nov. 9, 2005).

[52] *See* TEX. UTIL. CODE ANN. § 66.003 (West 2005).

[53] *See* TEX. UTIL. CODE ANN. § 66.003(b) (West 2005).

[54] *See Bells Get Another Shot With Texas Bill*, CBS News, July 24, 2005, available at http://www.cbsnews.com/stories/2005/07/24/ap/business/mainD8BI1TF82.shtml?CMP=OTC-RSSFeed&source=RSS&attr=Business-APDigital_D8BI1TF82 (visited Nov. 2, 2005).

[55] We note that the Commission previously has neither adopted rules implementing this specific provision of Section 621 nor had the opportunity to interpret its impact on the local franchising process.

broadband deployment, below we seek comment on a number of issues relating to the cable franchising process generally, and, in particular, the process by which competitive cable franchises are awarded.

A. Potential Competitors' Current Ability to Obtain Franchises

12. We request comment on the current environment in which would-be new entrants attempt to obtain competitive cable franchises. How many franchising authorities are there nationally?[56] How many franchises are needed to reach 60 or 80 percent of cable subscribers?[57] In how many of these franchise areas do new entrants provide or intend to provide competitive video services? Are cable systems generally equivalent to franchise areas? To what extent does the regulatory process involved in obtaining franchises – particularly multiple franchises covering broad territories, such as those today served by facilities-based providers of telephone and/or broadband services – impede the realization of our policy goals? Are potential competitors obtaining from LFAs the authority needed to offer video programming to consumers in a timely manner? What is the impact of state-wide franchise authority on the ability of the competitive provider to access the market? Is there evidence that such state-wide franchises are causing delay? What impact has state-level legislative or regulatory activity had on the franchising process? Are competitors taking advantage of new opportunities provided by state legislatures and regulators? How many competitive franchises have been awarded to date? How many competitive franchises have potential new entrants requested to date? How much time, on average, has elapsed between the date of application and the date of grant, and during that time period, how much time, on average, was spent in active negotiations? How many applications have been denied?

13. How many negotiations currently are ongoing? Are the terms being proffered consistent with the requirements of Title VI? How has the cable marketplace changed since the passage of the 1992 Cable Act, and what effect have those changes had on the process of obtaining a competitive cable franchise? Are current procedures or requirements appropriate for any cable operator, including existing cable operators? What problems have cable incumbents encountered with LFAs? Should cable service requirements vary greatly from jurisdiction to jurisdiction? Are certain cable service requirements no longer needed in light of competition in the MVPD marketplace? To what extent are LFAs demanding concessions that are not relevant to providing cable services?[58] Commenters arguing that such abuses are occurring are asked to provide specific examples of such demands. Parties should submit empirical data on the extent to which LFAs unreasonably refuse to award competitive franchises. We seek record evidence of both concrete examples and broader information that demonstrate the extent to which any problems exist.

14. We also ask commenters to address the impact that state laws have on the ability of new entrants to obtain competitive franchises. Some parties state that so-called "level-playing-field" statutes,[59] which typically impose upon new entrants terms and conditions that are neither "more

[56] We note that the Television & Cable Factbook indicates that, excluding wireless cable systems, there are 8,409 operating cable systems in the United States. TELEVISION & CABLE FACTBOOK 2005 at F-13.

[57] According to the Television & Cable Factbook, 301 cable systems serve 60 percent of total cable subscribers; while 706 cable systems serve approximately 80 percent of total cable subscribers. *Id*. at F-2.

[58] *See*, *e.g.*, Comments of Verizon, MB Docket No. 05-255 at 12 (filed Sept. 19, 2005) (arguing that "[m]any local franchising authorities unfortunately view the franchising process as an opportunity to garner from a potential new video entrant concessions that are in no way related to video services or to the rationales for requiring franchises").

[59] *See* CONN. GEN. STAT. § 16-331(f) ("Each certificate of public convenience and necessity for a franchise issued pursuant to this section shall be nonexclusive, and each such certificate issued for a franchise in any area of the state where an existing franchise is currently operating shall not contain more favorable terms or conditions than those imposed on the existing franchise."). We note that LFAs themselves sometimes incorporate "level-playing field" provisions into their cable ordinances or the franchises they award.

favorable" nor "less burdensome" that those to which existing franchises are subject,[60] create unreasonable regulatory barriers to entry. Others state that they create comparability among all providers.[61] We seek comment on these issues. We also seek comment on the impact of state laws establishing a multi-step franchising process.[62] Do such laws create unreasonable delays in the franchising process?

B. The Commission's Authority to Adopt Rules Implementing Section 621(a)(1)

15. We tentatively conclude that the Commission has authority to implement Section 621(a)(1)'s directive that LFAs not unreasonably refuse to award competitive franchises. As an initial matter, the Commission is charged by Congress with the administration of Title VI, which, as courts have held, necessarily includes the authority to interpret and implement Section 621.[63] Moreover, we believe that the 1992 Cable Act's revisions to Section 621(a)(1) indicate that Congress considered the goal of greater cable competition to be sufficiently important to justify the Commission's adoption of rules. Under the Supremacy Clause,[64] the enforcement of a state law or regulation may be preempted by federal law when it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.[65] The Supreme Court has held that federal regulations properly adopted in accordance with an agency's statutory authorization have no less preemptive effect than federal statutes and, applying this principle, the Court has approved the preemptive authority that the Commission has asserted over the regulation of cable television systems.[66] In addition, Section 636(c) of the Act states that "any provision of law of any State, political subdivision, or agency thereof, or franchising authority or any provision of any franchise granted by such authority, which is inconsistent with [the Communications] Act shall be deemed to be preempted and superseded."[67] Thus, we tentatively conclude that, pursuant to the authority granted under Sections 621(a) and 636(c) of the Act, and under the Supremacy Clause, the Commission may deem to be preempted and superceded 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). At the same time, however, we recognize that Section 636(a) states that "[n]othing in this title 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

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[60] In *The Fallacy of Regulatory Symmetry: An Economic Analysis of the "Level Playing Field" in Cable TV Franchising Statutes*, Thomas W. Hazlett and George S. Ford characterize level-playing-field statutes as "mandat[ing] that municipal governments not license a second cable TV operator in their community without imposing franchise requirements as 'burdensome' as those levied on the first entrant, and typically require formal public hearings to determine the impact of new rivalry." 3 BUSINESS AND POLITICS 21, 22 (2001). According to Hazlett and Ford, as of 2001 at least 11 states had passed such laws. *Id*. at 27.

[61] *See*, *e.g.*, Position Paper of the California Cable and Telecommunications Association opposing California Assembly Bill 903, available at http://www.senate.ca.gov/ftp/SEN/COMMITTEE/STANDING/ENERGY/_home/03-15-05mangers.htm (visited Nov. 9, 2005) (stating that California's "Legislature passed the level playing field statute to insure regulatory neutrality as video competition evolved").

[62] *See* MASS. REGS. CODE tit. 207, § 3.03 (establishing a number of steps in the franchising process, each providing the LFA between seven and 90 days to act).

[63] *See City of Chicago v. FCC*, 199 F.3d 424 (7th Cir. 1999) (rejecting the townships' argument that the Commission was not granted regulatory authority over Section 621, the statute setting out general franchise requirements, and finding the FCC is charged by Congress with the administration of the Cable Act which includes the authority to interpret section 621 and to determine what systems are exempt from franchising requirements).

[64] U.S. Const., Art. VI, cl.2.

[65] *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 698-99 (1984).

[66] *See id.* at 700, 708.

[67] 47 U.S.C. § 556(c).

of this title."[68] Finally, we note that the Commission is empowered by Section 1 of the Act "to execute and enforce the provisions of this Act"[69] and by Section 4(i) "to perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions."[70] We seek input from commenters on our tentative conclusion that the Commission is authorized to implement Section 621(a)(1) as amended. We also seek comment on the manner in which the Commission should proceed. Do we have the authority to adopt rules or are we limited to providing guidance?

16. The first sentence of Section 621(a)(1) states that a franchising authority may award "1 or more franchises" and may not unreasonably refuse to award "an additional competitive franchise."[71] We tentatively conclude that Section 621(a)(1) empowers the Commission to ensure that the local franchising process does not unreasonably interfere with the ability of any potential new entrant to provide video programming to consumers. We seek comment on this tentative conclusion.

17. Section 621(a)(1) states in relevant part 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 for failure to comply with this subsection."[72] Section 635, in turn, sets forth the specific procedures for such judicial proceedings.[73] Apart from those remedies available to aggrieved cable operators under Section 635, we tentatively conclude that Section 621(a)(1) authorizes the Commission to take actions, consistent with Section 636(a), to ensure that the local franchising process does not undermine the well-established policy goal of increased MVPD competition and, in particular, greater cable competition within a given franchise territory.[74] We seek comment on this tentative conclusion as well. How might the Commission best assure that the local franchising process is not inhibiting the ability of incumbent cable operators to invest in broadband services?

18. Finally, we seek comment on possible sources of Commission authority, other than Section 621(a)(1), to address problems caused by the local franchising process. For example, given the relationship between the ability to offer video programming and the willingness to invest in broadband facilities identified above, could the Commission take action to address franchise-related concerns pursuant to Section 706?

C. Steps the Commission Should Take to Ensure that the Local Franchising Process Does Not Unreasonably Interfere with Competitive Cable Entry and Rapid Broadband Deployment

19. We seek comment on how we should define what constitutes an unreasonable refusal to

[68] 47 U.S.C. § 556(a).

[69] 47 U.S.C. § 151.

[70] 47 U.S.C. § 154(i).

[71] 47 U.S.C. § 541(a)(1).

[72] 47 U.S.C. § 541(a)(1).

[73] *See* 47 U.S.C. § 555 ("(a) Any 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, which may be brought in (1) the district court of the United States for any judicial district in which the cable system is located; or (2) in any State court of general jurisdiction having jurisdiction over the parties. (b) The court may award any appropriate relief consistent with the provisions of [Section 621(a)(1)] and with the provisions of subsection (a).").

[74] *See* ¶ 14, *infra*, for a discussion of the range of state and local government actions Section 621(a)(1) authorizes the Commission to address.

award an additional competitive franchise under Section 621(a)(1). While that section refers to the "unreasonable refus[al] to *award* an additional competitive franchise,"[75] we tentatively conclude that Section 621(a)(1) prohibits not only the ultimate refusal to award a competitive franchise, but also the establishment of procedures and other requirements that have the effect of unreasonably interfering with the ability of a would-be competitor to obtain a competitive franchise, either by (1) creating unreasonable delays in the process, or (2) imposing unreasonable regulatory roadblocks, such that they effectively constitute a *de facto* "unreasonable refusal to award an additional competitive franchise" within the meaning of Section 621(a)(1). We tentatively find that this interpretation is consistent with the language in the statute and appropriate because it allows us to capture more appropriately the range of behavior that would constitute an "unreasonable refusal to award an additional competitive franchise."[76] We seek comment on this tentative conclusion.

20. Further, we tentatively conclude that it is not unreasonable for an LFA, in awarding a franchise, to "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;"[77] "allow [a] cable system a reasonable period of time to become capable of providing cable service to all households in the franchise area;"[78] and "require adequate assurance that the cable operator will provide adequate public, educational and governmental access channel capacity, facilities, or financial support."[79] These powers and limitations on franchising authorities promote important public policy goals.

21. We solicit comment on what, if any, specific rules, guidance or best practices we should adopt to ensure that the local cable franchising process does not unreasonably impede competitive cable entry. What would the appropriate remedy or remedies be for violations of such rules, guidance or best practices? Should the Commission establish specific rules to which LFAs must adhere or specific guidelines for LFAs? For example, should the Commission address maximum timeframes for considering an application for a competitive franchise?[80] Are there certain practices that we should find unreasonable through rules or guidelines? If so, what are these practices?

22. In addition, we note that it is not clear how the primary justification for a cable franchise – *i.e.*, the locality's need to regulate and receive compensation for the use of public rights of way – applies to entities that already have franchises that authorize their use of those rights of way. Does Section 621(a)(1) provide the Commission with the authority to establish different – specifically, higher – standards for "reasonableness" with respect to such entities? In that context, we seek comment on

[75] 47 U.S.C. § 541(a)(1) (emphasis added).

[76] 47 U.S.C. § 541(a)(1). The Commission in the past has emphasized 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. *See Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992 (Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming)*, 9 FCC Rcd 7442, 7469 n.127 (1994) (noting that "[a] concern has been raised that the provision of Section 621 that allows an appeal only from a *final* decision of denial by a franchising authority potentially could be used by a franchising authority to delay or preclude a potential entrant from availing itself of the remedies of the Act" and soliciting comment regarding whether "any such alleged frustration of the purpose of Section 621" has occurred).

[77] 47 U.S.C. § 541(a)(3).

[78] 47 U.S.C. § 541(a)(4)(A).

[79] 47 U.S.C. § 541(a)(4)(B).

[80] We note that Section 617 of the Communications Act limits the time in which an LFA may consider a request for approval of the sale or transfer of a cable franchise to 120 days. 47 U.S.C. § 537. If the LFA does not rule upon the request within that window, "such request shall be deemed granted unless the requesting party and the franchising authority agree to an extension of time." *Id*.

whether Section 621(a)(1) permits the imposition of greater restrictions on the authority of LFAs with respect to those entities (*e.g.*, facilities-based providers of telephone and/or broadband services) that already have permission to access public rights of way.

23. We also seek comment on whether build-out requirements are creating unreasonable barriers to entry for facilities-based providers of telephone and/or broadband services. It is our understanding that the areas served by such entities frequently do not coincide perfectly with the areas under the jurisdiction of the relevant LFAs. We also note that Section 621(a)(4)(A) states that, "[i]n awarding a franchise, the franchising authority shall allow the applicant's cable system a reasonable period of time to become capable of providing cable service to all households in the franchise area."[81] (For purposes of this discussion, we distinguish between (1) requirements that may function as barriers to competitive entry for providers of telephone and/or broadband services with existing facilities, and (2) prohibitions against discriminatory deployment of cable services based upon economic considerations.[82]) We seek comment on the FCC's authority in this area. Given the language of Section 621(a)(4)(A), does the Commission have authority under Section 621(a)(1) to direct LFAs to allow such new entrants a specific, minimum amount of time to expand their networks beyond their current footprints? If so, and in light of the fact that a new entrant generally faces competition from at least one incumbent cable operator and two direct broadcast satellite ("DBS") providers, what would constitute a reasonable amount of time to do so?

24. Finally, Section 602 of the Act defines "franchising authority" as "any governmental entity empowered by Federal, State, or local law to grant a franchise."[83] In some cases it may be the state itself, rather than the LFA, that has taken steps which unreasonably interfere with new entrants' ability to obtain a competitive franchise. We ask commenters to address whether it may be appropriate for us to preempt such state-level legislation to the extent that we find it serves as an unreasonable barrier to the grant of competitive franchises.[84]

IV. PROCEDURAL MATTERS

A. Initial Regulatory Flexibility Analysis

25. With respect to this *Notice*, an Initial Regulatory Flexibility Analysis ("IRFA"), *see generally* 5 U.S.C. § 603, is contained in the attached Appendix. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the NPRM specified *infra*. The Commission will send a copy of the *Notice*, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.[85]

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[81] 47 U.S.C. § 541(a)(4)(A).

[82] *Cf.* 47 U.S.C. § 541(a)(3) ("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.").

[83] 47 U.S.C. § 522(10).

[84] In this regard, we note that at least one court has found that Section 621(a)(1) preempts inconsistent local requirements. *See Qwest Broadband Services, Inc. v. City of Boulder*, 151 F. Supp. 2d. 1236, 1243 (D. Colo. 2001) (holding that a franchise provision in the Boulder, Colorado charter requiring voters to approve any cable franchise was preempted by Section 621(a)(1) because it conflicted directly with that provision's mandate that the "franchising authority" be responsible for granting the franchise).

[85] *See* 5 U.S.C. § 603(a). In addition, *the Notice* and the IRFA (or summaries thereof) will be published in the Federal Register.

B. Initial Paperwork Reduction Act of 1995 Analysis

26. This document does not contain proposed information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, therefore, it does not contain any new or modified "information collection burden for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4).

C. Ex Parte Rules

27. *Permit-But-Disclose.* This proceeding will be treated as a "permit-but-disclose" proceeding subject to the "permit-but-disclose" requirements under section 1.1206(b) of the Commission's rules.[86] *Ex parte* presentations are permissible if disclosed in accordance with Commission rules, except during the Sunshine Agenda period when presentations, *ex parte* or otherwise, are generally prohibited. Persons making oral *ex parte* presentations are reminded that a memorandum summarizing a presentation must contain a summary of the substance of the presentation and not merely a listing of the subjects discussed. More than a one- or two-sentence description of the views and arguments presented is generally required.[87] Additional rules pertaining to oral and written presentations are set forth in section 1.1206(b).

D. Filing Requirements

28. *Comments and Replies*. Pursuant to Sections 1.415 and 1.419 of the Commission's rules,[88] interested parties may file comments on or before the dates indicated on the first page of this document. Comments may be filed using: (1) the Commission's Electronic Comment Filing System ("ECFS"), (2) the Federal Government's eRulemaking Portal, or (3) by filing paper copies.[89]

29. *Electronic Filers:* Comments may be filed electronically using the Internet by accessing the ECFS: http://www.fcc.gov/cgb/ecfs/ or the Federal eRulemaking Portal: http://www.regulations.gov. Filers should follow the instructions provided on the website for submitting comments. For ECFS filers, if multiple docket or rulemaking numbers appear in the caption of this proceeding, filers must transmit one electronic copy of the comments for each docket or rulemaking number referenced in the caption. In completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions, filers should send an e-mail to ecfs@fcc.gov, and include the following words in the body of the message, "get form." A sample form and directions will be sent in response.

30. *Paper Filers:* Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

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[86] *See* 47 C.F.R. § 1.1206(b); *see also* 47 C.F.R. §§ 1.1202, 1.1203.

[87] *See* 47 C.F.R. § 1.1206(b)(2).

[88] *See id*. §§ 1.415, 1419.

[89] *See Electronic Filing of Documents in Rulemaking Proceedings*, 13 FCC Rcd 11322 (1998).

- The Commission's contractor will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE., Suite 110, Washington, DC 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail should be addressed to 445 12th Street, SW, Washington DC 20554.

31. *Availability of Documents*. Comments, reply comments, and *ex parte* submissions will be available for public inspection during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street, S.W., CY-A257, Washington, D.C., 20554. These documents will also be available via ECFS. Documents will be available electronically in ASCII, Word 97, and/or Adobe Acrobat.

32. *Accessibility Information.* To request information in accessible formats (computer diskettes, large print, audio recording, and Braille), send an e-mail to fcc504@fcc.gov or call the FCC's Consumer and Governmental Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (TTY). This document can also be downloaded in Word and Portable Document Format (PDF) at: http://www.fcc.gov.

33. *Additional Information*. For additional information on this proceeding, contact John Norton, John.Norton@fcc.gov, or Andrew Long, Andrew.Long@fcc.gov, of the Media Bureau, Policy Division, (202) 418-2120.

V. ORDERING CLAUSES

34. Accordingly, IT IS ORDERED that, pursuant to Sections 1, 4(i), 621(a)(1), and 636(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 541(a)(1), and 556(c), this Notice of Proposed Rulemaking is hereby ADOPTED.

35. IT IS FURTHER ORDERED that the Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX

Initial Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (the "RFA"),[1] the Commission has prepared this Initial Regulatory Flexibility Analysis ("IRFA") of the possible significant economic impact of the policies and rules proposed in this *Notice* on a substantial number of small entities.[2] Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the *Notice* provided in paragraph 28 of the item. The Commission will send a copy of the *Notice*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration ("SBA").[3] In addition, the *Notice* and IRFA (or summaries thereof) will be published in the Federal Register.[4]

A. Need for, and Objectives of, the Proposed Rules

2. The *Notice* initiates a process to implement Section 621(a)(1) of the Communications Act of 1934, as amended, in order to further the interrelated goals of enhanced cable competition and accelerated broadband deployment. Specifically, the *Notice* solicits comment on how to best ensure that local franchising authorities ("LFAs"), which are the governmental entities responsible for regulating cable providers at the local level,[5] do not "unreasonably refuse to award … additional competitive franchise[s]."[6] The *Notice* also seeks comment on the specific approach the Commission should take in order to implement Section 621(a)(1). Specifically, it asks whether the Commission should establish (1) specific guidelines and/or model terms for competitive cable franchises, or (2) general principles that are designed to provide LFAs with the guidance necessary to ensure that competitive franchises are awarded in a timely fashion.

B. Legal Basis

3. The *Notice* tentatively concludes that the Commission has authority to implement Section 621(a)(1)'s mandate that LFAs do not "unreasonably refuse to award … additional competitive franchises." In that regard, the *Notice* finds that Section 636(c) makes plain that "any provision of law of any State, political subdivision, or agency thereof, or franchising authority or any provision of any franchise granted by such authority, which is inconsistent with this Act shall be deemed to be preempted and superceded."[7] Finally, the item notes that the Commission is empowered by Section 1 of the Communications Act "to execute and enforce [its] provisions"[8] and by Section 4(i) "to perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be

[1] The RFA, *see* 5 U.S.C. §§ 601 – 612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

[2] *See* 5 U.S.C. § 603. Although we are conducting an IRFA at this stage in the process, it is foreseeable that ultimately we will certify this action pursuant to the RFA, 5 U.S.C. § 605(b), because we anticipate at this time that any rules adopted pursuant to this *Notice* will have no significant economic impact on a substantial number of small entities.

[3] *See* 5 U.S.C. § 603(a).

[4] *See* 5 U.S.C. § 603(a).

[5] The Communications Act defines "franchising authority" as "any governmental entity empowered by Federal, State, or local law to grant a franchise." 47 U.S.C. § 522(10).

[6] 47 U.S.C. § 541(a)(1).

[7] 47 U.S.C. § 556(c).

[8] 47 U.S.C. § 151.

necessary in the execution of its functions."[9] The *Notice* is adopted pursuant to Sections 1, 4(i), 621(a)(1), and 636(c) of the Communications Act of 1934, as amended.[10]

C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

4. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.[11] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[12] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[13] A "small business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration ("SBA").[14]

5. *Small Businesses*. Nationwide, there are a total of approximately 22.4 million small businesses, according to SBA data.[15]

6. *Small Organizations*. Nationwide, there are approximately 1.6 million small organizations.[16]

7. The Commission has determined that the group of small entities possibly directly affected by the proposed rules herein, if adopted, consists of small governmental entities (which, in some cases, may be represented in the local franchising process by not-for-profit enterprises). A description of these entities is provided below. In addition the Commission voluntarily provides descriptions of a number of entities that may be merely indirectly affected by any rules that result from the *Notice*.

1. Small Governmental Jurisdictions

8. The term "small governmental jurisdiction" is defined as "governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand."[17] As of 1997, there were approximately 87,453 governmental jurisdictions in the United States.[18] This number includes 39,044 county governments, municipalities, and townships, of which 37,546

[9] 47 U.S.C. § 154(i).

[10] 47 U.S.C. §§ 151, 154(i), 541(a)(1), and 556(c).

[11] 5 U.S.C. § 603(b)(3).

[12] 5 U.S.C. § 601(6).

[13] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small-business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

[14] 15 U.S.C. § 632.

[15] *See* SBA, Programs and Services, SBA Pamphlet No. CO-0028, at page 40 (July 2002).

[16] Independent Sector, The New Nonprofit Almanac & Desk Reference (2002).

[17] 5 U.S.C. § 601(5).

[18] U.S. Census Bureau, Statistical Abstract of the United States: 2000, Section 9, pages 299-300, Tables 490 and 492.

(approximately 96.2 percent) have populations of fewer than 50,000, and of which 1,498 have populations of 50,000 or more. Thus, we estimate the number of small governmental jurisdictions overall to be 84,098 or fewer.

2. Miscellaneous Entities

9. The entities described in this section are affected merely indirectly by our current action, and therefore are not formally a part of this RFA analysis. We have included them, however, to broaden the record in this proceeding and to alert them to our tentative conclusions.

a. Cable Operators

10. The "Cable and Other Program Distribution" census category includes cable systems operators, closed circuit television services, direct broadcast satellite services, multipoint distribution systems, satellite master antenna systems, and subscription television services. The SBA has developed small business size standard for this census category, which includes all such companies generating $12.5 million or less in revenue annually.[19] According to Census Bureau data for 1997, there were a total of 1,311 firms in this category, total, that had operated for the entire year.[20] Of this total, 1,180 firms had annual receipts of under $10 million and an additional 52 firms had receipts of $10 million or more but less than $25 million. Consequently, the Commission estimates that the majority of providers in this service category are small businesses that may be affected by the rules and policies adopted herein.

11. *Cable System Operators (Rate Regulation Standard)*. The Commission has developed its own small-business-size standard for cable system operators, for purposes of rate regulation. Under the Commission's rules, a "small cable company" is one serving fewer than 400,000 subscribers nationwide.[21] The most recent estimates indicate that there were 1,439 cable operators who qualified as small cable system operators at the end of 1995.[22] Since then, some of those companies may have grown to serve over 400,000 subscribers, and others may have been involved in transactions that caused them to be combined with other cable operators. Consequently, the Commission estimates that there are now fewer than 1,439 small entity cable system operators that may be affected by the rules and policies adopted herein.

12. *Cable System Operators (Telecom Act Standard)*. The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000."[23] The Commission has determined that there are 67,700,000 subscribers in the United States.[24] Therefore, an operator serving fewer than 677,000 subscribers shall be deemed a small

[19] 13 C.F.R. § 121.201, North American Industry Classification System (NAICS) code 513220 (changed to 517510 in October 2002).

[20] U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form of Organization)," Table 4, NAICS code 513220 (issued October 2000).

[21] 47 C.F.R. § 76.901(e). The Commission developed this definition based on its determination that a small cable system operator is one with annual revenues of $100 million or less. *See Implementation of Sections of the 1992 Cable Act: Rate Regulation, Sixth Report and Order and Eleventh Order on Reconsideration*, 10 FCC Rcd 7393 (1995).

[22] Paul Kagan Associates, Inc., Cable TV Investor, February 29, 1996 (based on figures for December 30, 1995).

[23] 47 U.S.C. § 543(m)(2).

[24] *See* FCC Announces New Subscriber Count for the Definition of Small Cable Operator, Public Notice DA 01-158 (2001).

operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed $250 million in the aggregate.[25] Based on available data, the Commission estimates that the number of cable operators serving 677,000 subscribers or fewer, totals 1,450.[26] The Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed $250 million,[27] and therefore is unable, at this time, to estimate more accurately the number of cable system operators that would qualify as small cable operators under the size standard contained in the Communications Act of 1934.

13. *Open Video Services*. Open Video Service ("OVS") systems provide subscription services.[28] As noted above, the SBA has created a small business size standard for Cable and Other Program Distribution.[29] This standard provides that a small entity is one with $12.5 million or less in annual receipts. The Commission has certified approximately 25 OVS operators to serve 75 areas, and some of these are currently providing service.[30] Affiliates of Residential Communications Network, Inc. (RCN) received approval to operate OVS systems in New York City, Boston, Washington, D.C., and other areas. RCN has sufficient revenues to assure that they do not qualify as a small business entity. Little financial information is available for the other entities that are authorized to provide OVS and are not yet operational. Given that some entities authorized to provide OVS service have not yet begun to generate revenues, the Commission concludes that up to 24 OVS operators (those remaining) might qualify as small businesses that may be affected by the rules and policies adopted herein.

b. Telecommunications Service Entities

14. As noted above, a "small business" under the RFA is one that, *inter alia*, meets the pertinent small business size standard (*e.g.*, a telephone communications business having 1,500 or fewer employees), and "is not dominant in its field of operation."[31] The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent local exchange carriers are not dominant in their field of operation because any such dominance is not "national" in scope.[32]

15. *Incumbent Local Exchange Carriers ("LECs")*. Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[33] According to

[25] 47 C.F.R. § 76.901(f).

[26] *See* FCC Announces New Subscriber Count for the Definition of Small Cable Operators, Public Notice, DA 01-0158 (2001).

[27] The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to § 76.901(f) of the Commission's rules. *See* 47 C.F.R. § 76.909(b).

[28] *See* 47 U.S.C. § 573.

[29] 13 C.F.R. § 121.201, NAICS code 513220 (changed to 517510 in October 2002).

[30] *See* http://www.fcc.gov/mb/ovs/csovscer.html (visited October 11, 2005), http://www.fcc.gov/mb/ovs/csovsarc.html (visited October 11, 2005).

[31] 15 U.S.C. § 632.

[32] Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, FCC (May 27, 1999). The Small Business Act contains a definition of "small-business concern," which the RFA incorporates into its own definition of "small business." *See* 15 U.S.C. § 632(a) (Small Business Act); 5 U.S.C. § 601(3) (RFA). SBA regulations interpret "small business concern" to include the concept of dominance on a national basis. *See* 13 C.F.R. § 121.102(b).

[33] 13 C.F.R. § 121.201, NAICS code 517110 (changed from 513310 in Oct. 2002).

Commission data,[34] 1,303 carriers have reported that they are engaged in the provision of incumbent local exchange services. Of these 1,303 carriers, an estimated 1,020 have 1,500 or fewer employees and 283 have more than 1,500 employees. Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by our action. In addition, limited preliminary census data for 2002 indicate that the total number of wired communications carriers increased approximately 34 percent from 1997 to 2002.[35]

16. *Competitive Local Exchange Carriers, Competitive Access Providers (CAPs), "Shared-Tenant Service Providers," and "Other Local Service Providers."* Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[36] According to Commission data,[37] 769 carriers have reported that they are engaged in the provision of either competitive access provider services or competitive local exchange carrier services. Of these 769 carriers, an estimated 676 have 1,500 or fewer employees and 93 have more than 1,500 employees. In addition, 12 carriers have reported that they are "Shared-Tenant Service Providers," and all 12 are estimated to have 1,500 or fewer employees. In addition, 39 carriers have reported that they are "Other Local Service Providers." Of the 39, an estimated 38 have 1,500 or fewer employees and one has more than 1,500 employees. Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, "Shared-Tenant Service Providers," and "Other Local Service Providers" are small entities that may be affected by our action. In addition, limited preliminary census data for 2002 indicate that the total number of wired communications carriers increased approximately 34 percent from 1997 to 2002.[38]

D. Description of Projected Reporting, Recordkeeping and Other Compliance Requirements

17. We anticipate that any rules implementing Section 621(a)(1) that result from this action would have at most a *de minimis* impact on small governmental jurisdictions (*e.g.*, one-time proceedings to amend existing procedures regarding the method of granting competitive franchises). LFAs today must review and decide upon competitive cable franchise applications, and will continue to perform that role upon the conclusion of this proceeding; any rules that might be adopted pursuant to this *Notice* likely would require at most only modifications to that process.

E. Steps Taken to Minimize Significant Economic Impact on Small Entities and Significant Alternatives Considered

18. The RFA requires an agency to describe any significant, specifically small business,

[34] FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, "Trends in Telephone Service" at Table 5.3, page 5-5 (June 2005) ("Trends in Telephone Service"). This source uses data that are current as of October 1, 2004.

[35] *See* U.S. Census Bureau, 2002 Economic Census, Industry Series: "Information," Table 2, Comparative Statistics for the United States (1997 NAICS Basis): 2002 and 1997, NAICS code 513310 (issued Nov. 2004). The preliminary data indicate that the total number of "establishments" increased from 20,815 to 27, 891. In this context, the number of establishments is a less helpful indicator of small business prevalence than is the number of "firms," because the latter number takes into account the concept of common ownership or control. The more helpful 2002 census data on firms, including employment and receipts numbers, will be issued in late 2005.

[36] 13 C.F.R. § 121.201, NAICS code 517110 (changed from 513310 in Oct. 2002).

[37] "Trends in Telephone Service" at Table 5.3.

[38] *See supra* note 35.

alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): "(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities."[39]

19. As discussed in the *Notice*, Section 621(a)(1) states that LFAs must not unreasonably refuse to award competitive franchises.[40] Should the Commission conclude ultimately that the procedures by which LFAs currently award competitive franchises conflict with the mandate of Section 621(a)(1), it may adopt rules designed to ensure that the local franchising process does not create unreasonable barriers to competitive entry. Such rules may consist of specific guidelines (*e.g.*, maximum timeframes for considering a competitive franchise application) or general principles designed to provide LFAs with the guidance necessary to conform their behavior to the directive of Section 621(a)(1). As noted above, these rules likely would have at most a *de minimis* impact on small governmental jurisdictions. Even if that were not the case, however, the interrelated, high-priority federal communications policy goals of enhanced cable competition and accelerated broadband deployment would necessitate the establishment of specific guidelines and/or general principles for LFAs with respect to the process by which they grant competitive cable franchises. The alternative (*i.e.*, continuing to allow LFAs to follow procedures that do not ensure that competitive cable franchises are not unreasonably refused) would be unacceptable, as it would be flatly inconsistent with Section 621(a)(1). We seek comment on the impact that such rules might have on small entities, and on what effect alternative rules would have on those entities. We also invite comment on ways in which the Commission might implement Section 621(a)(1) while at the same time impose lesser burdens on small entities.

F. Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rules

20. None.

[39] 5 U.S.C. §§ 603(c)(1)-(4).

[40] 47 U.S.C. § 541(a)(1) ("A franchising authority … may not unreasonably refuse to award an additional competitive franchise.").

STATEMENT OF
CHAIRMAN KEVIN J. MARTIN

Re: 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

Telephone companies and other facilities-based new entrants to the multichannel video programming distribution (MVPD) market have the potential to provide strong competition to incumbent cable operators. These new entrants are making significant investments in the infrastructure that enables them to offer video service along with telephone and broadband services to consumers. We are hearing from some providers that local authorities may be making the process of getting franchises unreasonably difficult. New video entrants, regardless of the technology they employ, should be encouraged – not impeded from entry.

In passing the 1992 Cable Act, Congress recognized that competition between multiple cable systems would be beneficial. Indeed, Congress specifically encouraged local franchising authorities (LFAs) to award competitive franchises. Congress recognized that it is important to have multiple competitors in the video market.

Congress also recognized that LFAs had played, and would continue to play, an important role in the cable franchising process. However, Congress restricted their authority in this area in order to promote cable competition. Specifically, Section 621 of the statute prohibits LFAs from granting exclusive franchises and from unreasonably refusing to award additional competitive franchises.

It is the Commission's responsibility to remove unreasonable roadblocks to competition. Through the proceeding we commence today, we seek to ensure that local authorities are not thwarting competition by unreasonably refusing to award additional competitive franchises. This Notice of Proposed Rulemaking is a critical first step. I look forward to working with my colleagues to conclude the rulemaking process.

STATEMENT OF
COMMISSIONER KATHLEEN Q. ABERNATHY

Re: 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

With the issuance of this *Notice* we begin the process of answering a complex question: when, if ever, do cable franchising requirements become unreasonable barriers to entry by competing cable service providers, and how should "unreasonable" barriers be defined and dealt with?

This question is complex for several reasons. First, as the *Notice* points out, local franchising authorities clearly have authority over many of the operational aspects of local cable service: granting or denying franchises, imposing buildout requirements, and requiring specific access channel facilities and support. Nevertheless, this authority is not absolute: it is limited by the explicit provision of Section 621(a)(1) of the Communications Act, which states that they may not unreasonably refuse to grant a franchise to a competing cable service provider.

Determining what constitutes an "unreasonable" requirement in real-life terms will require a particularly careful study of the legal predicates and the factual record. We need to correctly interpret not only the provisions of the Communications Act, but also the holdings of federal preemption case law. Taken together, these laws require that we accurately separate franchising obligations that are costly and time-consuming from those that are so burdensome and irrelevant that they constitute *de facto* entry barriers. This is an exacting standard, and meeting it will demand that we have a full and fair factual record. I believe the *Notice* we are adopting today will help us compile that record.

And if we can successfully identify and remedy franchising requirements that are precluding competitive entry, we will have accomplished much. Increasing cable competition will help consumers by lowering cable rates and giving consumers more choices and better service. Fully functioning markets invariably do a better job of maximizing consumer welfare than regulators can ever hope to achieve. That is why the added discipline of marketplace competition helps the FCC move in the direction of less federal regulation.

We can move away from economic regulations designed for a monopoly environment and focus our sights more narrowly on regulations designed to respond to social policy concerns that are not addressed by market forces.

Increasing competition and less burdensome regulatory oversight will also help broadband network deployment by all providers. And there is no doubt that cheaper, faster, and more accessible advanced broadband services will further our individual and national welfare.

Both new entrants and incumbent cable providers will benefit from the elimination of terms and conditions found to be unreasonable. Both will be freed to reallocate their resources to more productive uses.

A vigorously competitive market is a marvelous thing, and ensuring that the benefits of competition and new technology flow to cable consumers is one of the best actions the Commission can take. I am happy to support this *Notice* because it will help us do that.

STATEMENT OF
COMMISSIONER MICHAEL J. COPPS

Re: *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

There is no doubt in my mind that more competition in the delivery of video services would bring significant benefits to consumers. When people have more options, they reap big rewards—better services, higher technology and, critically, lower prices. This is precisely why Congress laid out the goal of promoting competition so clearly in the Communications Act.

Cable and telephone companies are beginning to compete to offer consumers the much-heralded triple play—bundles of telephone, video and Internet services. Cable companies have already jumped into the voice service market, and telephone companies are entering the video fray. This crossover is exciting, and it means that old industry boundaries are eroding, giving way to a new and hopefully more consumer-friendly future.

The Communications Act provided a process for entry into the video services marketplace under which cable operators must secure franchises. This process recognizes the important role that franchising authorities play—ensuring public health, safety and welfare; preventing economic red-lining; managing public rights-of-way; and ensuring access for public, educational and governmental channels.

This system has generally worked for consumers, incumbent cable operators and municipalities. It also appears to be working in numerous communities for new entrants. It is important that it works for new entrants if we are going to be able to reap the rewards that competition brings to consumers. In the current environment, it may be that some changes are called for, and certainly we have an ongoing obligation to consider ways to improve the process. That is why we initiate this proceeding today. If we find hard record evidence of problems that need to be repaired, and can be repaired within the parameters of the existing law, then the Commission must consider taking those steps. I would also note that there is Congressional interest in looking more broadly at how the statute itself is accommodating new marketplace developments.

What this Commission decides about the specific issues before it will be significantly influenced by the record this notice elicits, and that is why we seek a full record and why I emphasize the importance of widespread participation in the proceeding. Until we obtain a full record, I do not believe the results of this proceeding are foreordained. At the end of the day, I am hopeful we can develop a thoughtful and balanced approach, one recognizing that local input and diversity are values we are always charged to nurture even as we meet our responsibilities to encourage consumer-friendly competition by promoting more choices in the video services market.

STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN

Re: 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

I support the issues raised in today's item because Congress clearly sought to promote competitive cable offerings and to facilitate the approval of competitive cable franchises in the Cable Act of 1992.[1] While it remains far from clear whether Congress specifically intended any role for the Commission in preempting and superseding the practices of local governments in the local franchising process, the questions we raise in today's NPRM will give us a better record to determine whether we do indeed have such authority, and, if so, a clearer sense of its possible limits.

It is a goal of Congress, this Commission, and me personally to promote video competition and broadband deployment. Consumers will benefit if they are given more choices of video providers in a world where cable and satellite form a duopoly that some have argued has constrained price competition and alternative voices. In my long effort to constrain media consolidation, I have called for more diversity in the distribution and production of video content. Nothing we have seen in recent years offers more hope for consumers to gain new choices than the serious entry of our largest telephone companies into the video marketplace. It is a long-awaited and welcome development that this Commission needs to encourage with all of the tools available to us. We should help new entrants in every reasonable way we can to enter and succeed in providing more consumer choice in video services.

Competition in the video marketplace is not only critical as a means to constrain prices, which in itself is a worthy goal after year upon year of price hikes. It is critical to the future of our democracy itself that our citizens have access to as many forms of video content as possible so they can make up their own minds about the issues of the day and not remain subject to a tiny number of gatekeepers who can decide what deserves airing based on their own financial or ideological interests.

Broadband competition and an open Internet are also critical components of what the Supreme Court called the "uninhibited marketplace of ideas."[2] The award of competitive cable franchises will encourage broadband deployment by new entrants, such as telephone companies, by granting them a new revenue source that helps justify investment in new high capacity fiber networks. So the award of new franchises will improve access not only to innovative new cable services but also to more robust broadband networks. Both of these promote the open exchange of video content, ideas, and indeed all communications. So the decision to enter the video marketplace by some of the largest telephone companies heralds an historic opportunity to improve our communications networks.

The larger question that hangs over this proceeding, though, is whether the local franchising process truly is a hindrance to the deployment of alternative video networks, as some new entrants assert. It is clear that most, if not nearly all, local authorities welcome competition in their communities. Even if for some reason they wanted to resist, it will prove very difficult for local officials to try to prevent services from reaching their citizens who thirst for new choices. As the CEO of one major new entrant recently noted, "Any place it's come to a vote, we win."[3]

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[1] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460. *See* 47 U.S.C. § 521(6) (stating that one of the purposes of Title VI is "to promote competition in cable communications").

[2] *Red Lion Broadcasting v. FCC*, 395 U.S. 367, 390 (1969).

[3] Dionne Searcey, *As Verizon Enters Cable Business, It Faces Local Static Telecom Giant Gets Demands As It Negotiates TV Deals*, Wall St. J., Oct. 28, 2005, at A1.

What I hear from local officials is that they really want to ensure that these new advanced video services are deployed in a fashion that serves all of their communities, in a manner that maximizes the benefits for everyone. This is a vital role, not an anti-competitive one. Most importantly, it is a role granted to them by Congress. The franchising process and the role of local governments are products of specific policy decisions made by Congress. For example, Congress specifically allocated to local franchise authorities (LFAs) the authority to ensure that all households are served; to seek public, educational, and governmental (PEG) channel capacity; and to recover PEG capital costs.[4]

The Commission needs to tread with caution and care before it asserts any authority to interpose itself with LFAs to the extent Congress specifically delegated power to local officials. We are going out on limb already by creating a "de facto" refusal theory and tentatively concluding that the Commission has the ability to determine whether an LFA is "unreasonably refus[ing] to award a competitive franchise." I eagerly await a vigorous debate in the record, a public hearing, and, if necessary, a Commission report, before agreeing to make that tentative conclusion final.

I would not have been willing to support this NPRM if we had not also made clear that we will consider it reasonable for local officials to carry out their basic responsibilities as Congress intended. Specifically, we tentatively conclude that it is "not unreasonable" for an LFA to carry out its statutory mandate to prevent economic redlining, to establish reasonable build-out requirements to "all households in the franchise area," and to "provide adequate public, educational and governmental access channel capacity, facilities or financial support." We should not and indeed cannot usurp for ourselves the authority granted by Congress to local governments. This tentative conclusion makes clear we respect the powers specifically enumerated by Congress for the LFAs.

I am also pleased that we acknowledge the deference the courts have granted to LFAs in making determinations pursuant to the powers granted under Section 621. We ask important questions about how much deference this imputes to the Commission to grant to LFAs in the exercise of their authority. My opinion is that to the extent they are operating in a manner to carry out the responsibilities Congress intended, they deserve substantial deference, and the courts have clearly afforded them such deference.

We can learn more about the LFA process by examining the record we generate. We have heard allegations by some new entrants that LFAs have made demands completely unrelated to what Congress intended. If such "shakedowns" are occurring, and particularly if they are creating unreasonable refusals to award franchises, the Commission is fully justified to explore ways to promote Congressional goals. That should be the focus of our efforts, not a larger undertaking to undermine the entire franchising process, as new entrants have urged upon us. Even if the Commission were to agree from a policy perspective that the franchising process is cumbersome and unwieldy, as competitors argue passionately, those arguments are better made before Congress, not the Commission. The franchising process and local powers are spelled out clearly in statute, and only Congress can provide such relief.

Still, we can play an important role in combating abuse, to the extent it is occurring, and by encouraging best practices. The good news is that both the LFAs and the Commission share the goals of promoting vigorous competition. If all parties would simply apply themselves to working through the process, rather than seeking to subvert it through federal or state regulatory or legislative efforts, they would make greater progress in getting franchises awarded, as many competitors already have done. I support this NPRM because it provides an opportunity to get beyond the rhetoric to the facts of what is actually happening in local communities.

Finally, I am especially pleased we have agreed to hold a hearing to explore these issues directly with the parties involved. That forum should provide an excellent opportunity to explore best practices,

[4] *See* 47 U.S.C. §§ 541(a)(2), (3) and (4).

get to the bottom of what is really happening and encourage progress under the framework that Congress has established.