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June 23, 2006

VIA ELECTRONIC SUBMISSION

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Ex Parte, *IP-Enabled Services*, WC Docket No. 04-36; *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Protection and Competition Act of 1992*, MB Docket No. 05-311

Dear Ms. Dortch:

On Wednesday, May 24, 2006, AT&T Inc. filed an ex parte letter with the Commission in WC Docket No. 04-36. Although the letter also referenced the caption for MB Docket No. 05-311, the letter was inadvertently not filed in that docket. Attached is a copy of the original ex parte letter for submission into MB Docket No. 05-311.

If you have any questions please do not hesitate to contact me at 202-326-8895.

Sincerely,

/s/ Jim Lamoureux
General Attorney
AT&T Services, Inc.

Attachment

cc: Donna Gregg
Rosemary Harold
William Johnson
Deborah Klein
Natalie Roisman
Tom Navin
Julie Veach
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May 24, 2006

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Re: Ex Parte, *IP-Enabled Services,* WC Docket No. 04-36; *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Protection and Competition Act of 1992,* MB Docket No. 05-311

Dear Ms. Dortch:

The purpose of this *ex parte* letter is to alert the Commission to recent developments that threaten the nation's core video competition and broadband investment policies and further underscore the need for urgent Commission action. AT&T's multi-billion dollar Project Lightspeed will offer to more than 19 million households – including more than 5.5 million low-income households – in the initial 41 target markets, a vastly expanded range of new and integrated IP-enabled services, including next-generation IP-based video services ("IPTV"). Unimpeded rollout of these services will bring enormous benefits to consumers that today lack any wireline alternative to the video programming services offered by the incumbent cable operators. Within the past few months, however, municipalities have begun to organize and implement concerted campaigns to block AT&T from maintaining or acquiring even the physical capability of moving forward with Project Lightspeed.

Several large trade associations of municipalities have issued "alerts" urging their members to delay, or deny outright, the permits AT&T needs to upgrade its local network facilities. In particular, these interest groups have encouraged municipalities to (1) give AT&T's permit applications extra scrutiny, (2) require AT&T to obtain a cable franchise agreement as a condition for even installing upgraded *assets* in AT&T's existing rights of way, and (3) adopt ordinances that single out AT&T for a moratorium on permits for such construction activity, while exempting the placement of similar assets by other, more favored entities. To date, at least nine municipalities have enacted absolute moratoria on deployment of equipment in the right of way, or otherwise refused to grant AT&T the permits necessary to deploy fiber network facilities, even though this deployment would use existing AT&T rights-of-way and would otherwise conform to applicable zoning requirements. Moreover, the moratoria purport to apply regardless of what services AT&T offers over its upgraded network and thus effectively bar AT&T from making upgrades that support all broadband services *regardless of whether AT&T*

has marketed or offered video programming over the network. Other municipalities have indicated that they will follow suit when AT&T seeks to upgrade its network in their territories.

This strategy, unless preempted by the Commission, threatens to stop wireline video competition and broadband deployment dead in its tracks. AT&T is vigorously protecting its rights to offer competitive IP-enabled services to consumers, and it has sued each of the municipalities that has unlawfully refused to allow the necessary network upgrades. But it should be obvious that the nation's broadband investment and video competition policies will be thwarted if the Commission fails to act promptly and competitive video providers are left with the prospect of prosecuting thousands of individual lawsuits against municipalities to uphold the right merely to make physical improvements to their existing network using existing authorizations to place facilities in public rights-of-way.

AT&T believes that its own deployment of video services using new, Internet-based technologies does not trigger local cable franchising requirements, because AT&T will not be a "cable operator" offering "cable service" over "cable systems" within the meaning of the Communications Act.[1] Regulators in Connecticut recently issued a draft decision endorsing this view, and the Oklahoma Attorney General recently issued an A.G. Opinion in which it concluded that a telephone company that already possesses statewide authority to place its telephone lines in the public rights-of-way need not obtain a separate municipal franchise to provide additional services, including video programming, over its telephone lines. But many other local authorities continue to insist that wireline video competition may occur, if at all, only if any new wireline entrants, regardless of the nature of their video offerings, are burdened with the full terms and conditions of incumbent cable franchises. For that reason, AT&T and others have urged the Commission to adopt uniform national rules that would streamline the franchising process and prohibit the most clearly anticompetitive franchise conditions. These proposals have gained broad support, most recently from the United States Department of Justice.[2] The recent developments detailed here remove any doubt that immediate Commission action is urgently needed.

For example, the Metropolitan Mayors Caucus ("MMC") – which represents 272 Illinois municipalities with over 8 million people[3] – recently issued a "tool kit" urging MMC's members to enact construction moratoria similar to those discussed above.[4] In particular, the MMC recommends that local municipalities (i) "issue[] temporary moratoria on utility boxes with

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

[2] In its recent ex parte, the Department of Justice advocates that the Commission should establish maximum time frames for processing franchise applications, should prohibit municipalities from requesting concessions beyond those authorized by the Communications Act, and prohibit build-out requirements "except to prevent income discrimination the statute [already] prohibits." *See generally* Ex Parte Submission of the Department of Justice (May 10, 2006).

[3] http://www.mayorscaucus.org.

[4] Metropolitan Mayors Caucus, *Video Programming and Internet Protocol Service Took Kit*, § 2 (May 4, 2006) ("MMC Tool Kit") (Exhibit 1).

exterior dimensions greater than 50" x 36 ½ " x 17 ½" based on the model ordinance provided with the "tool kit"; (ii) adopt a definition of cable system broader than the federal definition; and/or (iii) deny all rights-of-way authority unless the carrier waives any right to provide any video programming without a municipal franchise (apparently regardless of whether this programming is a "cable service" under the Act).[5] Similarly, the DuPage Mayors and Managers Conference – "an association of municipalities representing 1,000,000 people"– recently issued an "alert" to its members regarding AT&T's Project Lightspeed,[6] in which it advocated that its members adopt a variety of ordinances and processes that are designed to prevent AT&T from deploying Project Lightspeed facilities.[7] Indeed, the DuPage association expressly recommends that its members should simply "*delay[]*" the issuance of any such "franchise agreement" "while the MMC Task Force is working on the topic."[8]

As noted, a growing number of municipalities have responded by taking the very anticompetitive actions advocated by these associations. Six municipalities in Illinois – Itasca, Geneva, North Aurora, Roselle, Wheaton, and Wood Dale – have enacted moratoria on the granting of permits for "ground mounted utility installation," even on private property.[9] The ordinances are clearly targeted at AT&T alone: while they effectively prevent AT&T from deploying the cabinets used in Project Lightspeed, they exempt many similar types of fixtures – *e.g.*, "ground mounted electric substations, power off emergency electric generators, ground mounted traffic light control cabinets or utility poles" – that logically would also be covered if the ordinances were truly motivated by the goals of public safety or aesthetics that the

[5] *Id.*

[6] *See generally* March 28, 2006 Memorandum from Mark Baloga, Executive Director, DuPage Mayors and Managers Conference regarding "Alert and Recommendations and Workshop for AT&T's Project Lightspeed" ("DuPage Alert") (Exhibit 2).

[7] *Id.* at 2-3. Like the MMC, the DuPage association recommends that members (i); give all AT&T's permit requests extra scrutiny; (ii) require AT&T to obtain a cable franchise agreement as a condition of obtaining any rights of way that might be connected with Project Lightspeed; and (iii) "adopt an ordinance to create a temporary moratorium on the construction of any large ground mounted utility installations on both public and private property."

[8] *Id.* at 2.

[9] Complaint for Declaratory and Other Relief, *Illinois Bell Tel. Co.* v. *Village of Roselle, IL* (Apr. 6, 2006, N.D. Ill. No. 06C-1922), ¶ 14 ("Roselle Complaint"); *see also* Complaint for Declaratory and Other Relief, *Illinois Bell Tel. Co.* v. *City of Geneva, IL* (May 11, 2006, N.D. Ill. No. 06C-2436), ¶ 14 ("Geneva Complaint");Complaint for Declaratory and Other Relief, *Illinois Bell Tel. Co.* v. *Village of Itasca, IL* (May 11, 2006, N.D. Ill. No. 06C-2439), ¶ 15 ("Itasca Complaint"); Complaint for Declaratory and Other Relief, *Illinois Bell Tel. Co.* v. *Village of North Aurora, IL* (May 11, 2006, N.D. Ill. No. 06C-2438), ¶ 14 ("North Aurora Complaint"); Complaint for Declaratory and Other Relief, *Illinois Bell Tel. Co.* v. *Village of City of Wheaton, IL* (Apr. 10, 2006, N.D. Ill. No. 06C-2008), ¶ 14 ("Wheaton Complaint"); Complaint for Declaratory and Other Relief, *Illinois Bell Tel. Co.* v. *Village of City of Wood Dale, IL* (May 11, 2006, N.D. Ill. No. 06C-2437), ¶ 14 ("Wood Dale Complaint") (Exhibits 3-8).

municipalities invoke.[10] Another municipality – Carpentersville, IL – took the alternative route described in the MMC "tool kit": it simply denied AT&T's permit request outright, asserting that, because the upgrade "will enable residents to receive television services," a franchise agreement between AT&T and the municipality "must be in place prior to permission being granted" for AT&T to undertake even the physical upgrading of its network.[11] Other Illinois municipalities appear poised to follow suit.[12] Most recently another Illinois municipality – Addison, IL – passed two ordinances targeted at AT&T. One Ordinance terminated AT&T's existing franchise to use public rights-of-way, effective 60 days from May 15, 2006. The other Ordinance amended the Village Code and required telecommunications providers that provide "community antenna television service" to obtain a cable franchise and comply with the Illinois "level playing field" statute, 65 ILL. COMP. STAT. 5/11-42-11, apparently without regard to whether AT&T is a "cable operator" or providing "cable service."[13] Finally, and also related to the Illinois "level playing field" statute, some Illinois municipalities have informally advised AT&T Illinois that no permits for Project Lightspeed facilities will be issued until the Company obtains a cable franchise agreement. These municipalities have advised they are concerned about the repercussions from the incumbent cable providers if they permit AT&T to upgrade its existing network to provide video services without a cable franchise agreement.

Similarly, after AT&T began its network upgrades in the City of Lodi, California, the city counsel there adopted an ordinance that conditioned all of AT&T's permits on the company's waiver of any right to operate without a cable franchise from the city.[14] The City of Walnut Creek likewise refused to grant AT&T access to public rights-of-way unless AT&T agreed to

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[10] Roselle Complaint ¶ 14; *see also* Geneva Complaint ¶ 14; Itasca Complaint ¶ 15; North Aurora Complaint ¶ 14; Wheaton Complaint ¶ 14; Wood Dale Complaint ¶ 14.

[11] *See* March 23, 2005 Letter from Bob Cole, Public Works Director, Village of Carpentersville, IL to Pam Summers, Project Manager-Project Lightspeed, AT&T Illinois (March 23, 2005) (Exhibit 9); *see also* Complaint for Declaratory and Other Relief, *Illinois Bell Tel. Co.* v. *Village of Carpentersville, IL* (Apr. 6, 2006, N.D. Ill. No. 06C-1919), ¶ 18 ("Carpentersville Complaint") (Exhibit 10).

[12] *See* March 30, 2006 Memo from Joseph Breinig, Village Manager, Village of Carol Stream, to Mayor and Trustees of Village of Carol Stream regarding Project Lightspeed, at 1-2 (March 30, 2006) (Exhibit 11) (recommending that Carol Stream adopt the recommendations of the DuPage association). Indeed, the Village of Carol Stream has even sent a letter to other "local taxing bodies" accusing AT&T – falsely – of being "less than forthcoming in their dealings with communities"; recommending that the entity force AT&T to obtain a "local franchise" to undertake "development of Project Lightspeed"; and requesting that the entity inform Carol Stream if AT&T has even "contacted" that jurisdiction about Project Lightspeed. *See* March 29, 2006 Letter from Ross Ferraro, Mayor of Carol Stream to Local Taxing Bodies, at 1 (March 30, 2006) (Exhibit 12); *see also* March 30, 2006 Letter from Ross Ferraro, Mayor, Village of Carol Stream to Timothy Peterson, Senior Account Manager, AT&T Illinois (March 30, 2006) (Exhibit 13).

[13] Village of Addison, Ordinance No. 0-06-35 and Ordinance No. 0-06-36, approved on May 15, 2006 (Exhibits 14-15).

[14] Verified Petition for Writ of Mandamus and Complaint for Declaratory Judgment, *Pacific Bell Tel. Co.* v. *City of Lodi, CA*, ¶ 25 (Feb. 3, 2006, Cal. Sup. Court CV028523).

surrender its rights and accept unlawful and burdensome local cable television regulation of its IP video services in advance of any attempt by AT&T to actually offer such services.[15]

These attempts to block AT&T's Project Lightspeed upgrades are *ultra vires*, and the Commission should so find. Even assuming *arguendo* that AT&T's IPTV service would be a "cable service," the municipal franchise authority conferred by the Act does not authorize a municipality to forbid AT&T, or any other carrier with an existing telephone franchise, from deploying network *facilities* that are used for telecommunications and Internet access services, merely because AT&T could also those same facilities to offer video programming services at some point in the future.[16]

Moreover, even if (contrary to fact), the municipalities' had the legal authority to bar the mere upgrading of assets in this context, the policy justifications offered by the municipalities—protection of local rights of way, and the revenue streams enjoyed by the municipalities from franchise fees, and PEG access—are without substance.[17] First, AT&T has operated responsibly in the public rights of way for a century, complying with all local requirements, and will continue to do so. Indeed, it is noticeable that the municipal documents justifying the proposed moratoria do not make any claim whatsoever that AT&T has failed to comply with existing local rights of way or zoning ordinances. To the contrary, it is because AT&T has fully complied with such ordinances in the past (*e.g.,* with its Project Pronto deployment), and because its deployment of Project Lightspeed would be consistent with such ordinances, that the municipalities must resort to adopting new ordinances designed solely to block AT&T's Project Lightspeed deployment. There is clearly no justification for new ordinances that single AT&T out and that are designed solely to prevent network upgrades because they will support video services along with the expanded telecommunications and information services AT&T will provide over the same facilities.

Second, AT&T has repeatedly made clear its willingness to accommodate the municipalities' interests in reasonable franchise fees and PEG access. As AT&T explained in its reply comments in this proceeding, "[n]o one is asking the Commission to forbid LFAs from requiring PEG access or collecting appropriate franchise fees. To the contrary, . . . AT&T is fully committed to providing appropriate PEG access and reasonable, nondiscriminatory franchise fees. So too are other new entrants."[18] "AT&T, like other new entrants, has no

[15] First Amended Complaint, *Pacific Bell Tel. Co.* v. *City of Walnut Creek, CA*, ¶¶ 36-37 (Nov. 17, 2005 N.D. Ca. No. C-05-4723 MMC) (Exhibit 17). The City of Walnut Creek has not only insisted that AT&T agree to this condition for future work, but has even tried to impose this condition retroactively on work already completed by AT&T under an *existing* permit.

[16] *See generally* AT&T Comments (Feb. 13, 2006) at 71-72 (citing authorities); *Joint Petition of the Town of Babylon, et al.*, 2005 N.Y. PUC LEXIS 253, *5 (June 15, 2005). (Exhibit 18).

[17] MMC Tool Kit, § 1.

[18] AT&T Reply Comments at 34.

objection to paying appropriate and reasonable fees in connection with its provision of IP-enabled video services and to providing required PEG access."[19]

The municipalities' attempt to disrupt even the physical upgrading of AT&T's network underscores the urgent need for a prompt Commission decision on the merits in this rulemaking proceeding. Until the Commission adopts streamlined national rules for review of cable franchise applications – as the Department of Justice recommends – these and similar attempts at regulatory obstructionism will continue to deny American consumers the potential benefits of further broadband deployment as well as wireline competition in video programming distribution.

Sincerely,

/s/ Jim Lamoureux
General Attorney
AT&T Services, Inc.

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[19] AT&T Reply Comments at 44.