Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, See 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR Part 73 as follows:

PART 73—RADIO BROADCAST SERVICES

1. The authority citation for Part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334, and 336.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under California, is amended by removing Channel 240A at Arnold and by adding City of Angels, Channel 240A.

Federal Communications Commission.

John A. Karousos,

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. 05–23804 Filed 12–13–05; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 76

[MB Docket No. 05–311; FCC 05–189]

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

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: In this document, the Commission seeks comment on how to implement section 621(a)(1) of the Communications Act. Because several potential competitors seeking to enter the multichannel video programming distributor (MVPD) marketplace have alleged that in many areas the current operation of the local franchising process serves as a barrier to entry, the Commission solicits comment on section 621(a)(1)'s directive that local franchising authorities (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.

DATES: Comments for this proceeding are due on or before February 13, 2006; reply comments are due on or before March 14, 2006.

ADDRESSES: You may submit comments, identified by MB Docket No. 05–311, by any of the following methods:

- Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the instructions for submitting comments.
- Federal Communications Commission's Web Site: *http://www.fcc.gov/cgb/ecfs/*. Follow the instructions for submitting comments.
- People with Disabilities: Contact the FCC to request reasonable accommodations (accessible format documents, sign language interpreters, CART, etc.) by e-mail: *FCC504@fcc.gov* or phone: 202–418–0530 or TTY: 202–418–0432.

For detailed instructions for submitting comments and additional information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: For additional information on this proceeding, contact John Norton, *John.Norton@fcc.gov* or Natalie Roisman, *Natalie.Roisman@fcc.gov* of the Media Bureau, Policy Division, (202) 418–2120.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Notice of Proposed Rulemaking (NPRM)*, FCC 05–189, adopted on November 3, 2005, and released on November 18, 2005. The full text of this document is available for public inspection and copying during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street, SW., CY–A257, Washington, DC 20554. These documents will also be available via ECFS (*http://www.fcc.gov/cgb/ecfs/*). (Documents will be available electronically in ASCII, Word 97, and/or Adobe Acrobat.) The complete text may be purchased from the Commission's copy contractor, 445 12th Street, SW., Room CY–B402, Washington, DC 20554. To request this document in accessible formats (computer diskettes, large print, audio recording, and Braille), send an e-mail to *fcc504@fcc.gov* or call the Commission's Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).

Initial Paperwork Reduction Act of 1995 Analysis

This *NPRM* 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).

Summary of the Notice of Proposed Rulemaking

I. Introduction

1. In this Notice of Proposed Rulemaking (*NPRM*), the Commission seeks comment on how to 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.'' 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,'' greater competition in the market for the delivery of multichannel video programming is one of the primary goals of federal communications policy. 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. Specifically, 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. However, potential competitors seeking to enter the MVPD marketplace have alleged that in many areas the current operation of the local franchising process serves as a barrier to entry. Accordingly, this *NPRM* 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. They can provide video programming to subscribers via radio communication, a cable system or an open video system, or they can provide transmission of video programming on a common carrier basis. Any new entrant opting to offer ''cable service'' as a ''cable operator'' becomes subject to the requirements of Title VI of the Communications Act (*See* 47 U.S.C. 542(6); 47 U.S.C. 542(5)). 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, and subsection (a)(1) grants to LFAs the authority to award such franchises. 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'' (47 U.S.C. 541(a)(3)); ''shall allow [a] cable system a reasonable period of time to become capable of providing cable service to all households in the franchise area'' (47 U.S.C. 541(a)(4)(A)); and ''may require adequate assurance that the cable operator will provide adequate public, educational and governmental access channel capacity, facilities, or financial support'' (47 U.S.C. 541(a)(4)(B)).

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), was to both affirm and delineate the role of LFAs in the franchising process (*See, e.g.*, H.R. Rep. No. 98–934, at 59 (1984)). 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 (*See generally Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service,* 55 FR 32631, August 10, 1990) (Report). 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.''

4. In response, Congress revised section 621(a)(1) through the Cable Television Consumer Protection and Competition Act of 1992 (the 1992 Cable Act) 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.'' (47 U.S.C. 541(a)(1)). As the legislative history 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.

Section 621(a)(1), as revised, established a clear, federal-level limitation on the authority of LFAs in the franchising process. 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. * * *'' 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 (47 U.S.C. 555).

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. For example, Verizon recently filed comments in the Commission's 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.'' 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;'' (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;'' (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;'' 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.''

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. 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. SBC has told investors that Project Lightspeed, an ''initiative to expand its fiber-optics network deeper into neighborhoods to deliver SBC U-verseSM TV, voice and high-speed Internet access services,'' will be deployed to approximately ninety percent of its ''high-value,'' seventy percent of its ''medium-value,'' and less than five percent of its ''low-value'' customers.

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,'' and they ''support a technology-neutral

approach that promotes broadband deployment and competitive service offerings.'' While acknowledging that consumers ''demand real competition to increase their options and improve the quality of services,'' local governments argue that franchising ''need not be a complex or time-consuming process.'' They argue that the current framework ''[s]afeguards [a]gainst [a]buse and [p]rotects [c]ompetition.'' 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.''

8. Anecdotal evidence suggests that new entrants have been able to obtain cable franchises. SNET and Ameritech both obtained cable franchises before being acquired by SBC. BellSouth and Qwest have obtained franchises, as have many cable overbuilders—RCN has acquired over 100. 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'' and ''is negotiating franchises with more than 200 municipalities.'' 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) * * *.''

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. 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. Similar bills have been introduced in Virginia and New Jersey although they are yet to be enacted.

10. With this *NPRM*, the Commission seeks to determine whether, in awarding franchises, LFAs are carrying out legitimate policy objectives allowed by the Communications 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 to remedy the problem.

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 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. The Commission requests comment on the current environment in which would-be new entrants attempt to obtain competitive cable franchises. How many franchising authorities are there nationally? How many franchises are needed to reach sixty or eighty percent of cable subscribers? 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 the Commission's 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? 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. The Commission seeks record evidence of both concrete examples and broader information that demonstrate the extent to which any problems exist.

14. The Commission also asks 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, which typically impose upon new entrants terms and conditions that are neither ''more favorable'' nor ''less burdensome'' that those to which existing franchises are subject, create unreasonable regulatory barriers to entry. Others state that they create comparability among all providers. The Commission seeks comment on these issues. The Commission also seeks comment on the impact of state laws establishing a multi-step franchising process. Do such laws create unreasonable delays in the franchising process?

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

15. The Commission tentatively concludes that it 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. Moreover, the Commission believes 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, 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. 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. 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.'' Thus, the Commission tentatively concludes 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, the Commission 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 of this title.'' Finally, the Commission notes that it is empowered by section 1 of the Act ''to execute and enforce the provisions of this Act'' 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.'' The Commission seeks input from commenters on the tentative conclusion that the Commission is authorized to implement section 621(a)(1) as amended. The Commission also seeks comment on the manner in which the Commission should proceed. Do the Commission have the authority to adopt rules or is it 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.'' The Commission tentatively concludes that section 621(a)(1) empowers it 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. The Commission seeks 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.'' Section 635, in turn, sets forth the specific procedures for such judicial proceedings. Apart from those remedies available to aggrieved cable operators under section 635, the Commission tentatively concludes 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. The Commission seeks 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, the Commission seeks 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. The Commission seeks comment on how to should define what constitutes an unreasonable refusal to 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,'' the Commission tentatively concludes 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). The Commission tentatively finds that this interpretation is consistent with the language in the statute and appropriate because it captures more appropriately the range of behavior that would constitute an ''unreasonable refusal to award an additional competitive franchise.'' The Commission seeks comment on this tentative conclusion.

20. Further, the Commission tentatively concludes 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;'' ''allow [a] cable system a reasonable period of time to become capable of providing cable service to all households in the franchise area;'' and ''require adequate assurance that the cable operator will provide adequate public, educational and governmental access channel capacity, facilities, or financial support.'' These powers and limitations on franchising authorities promote important public policy goals.

21. The Commission solicits comment on what, if any, specific rules, guidance or best practices should be adopted 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? Are there certain practices that should be found unreasonable through rules or guidelines? If so, what are these practices?

22. In addition, 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, the Commission seeks comment on 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. The Commission also seeks comment on whether build-out requirements are creating unreasonable barriers to entry for facilities-based providers of telephone and/or broadband services. The areas served by such entities frequently do not coincide perfectly with the areas under the jurisdiction of the relevant LFAs. 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.'' (For purposes of this discussion, there is a distinction 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.) The Commission seeks 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.'' 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. Commenters should address whether it may be appropriate to preempt such state-level legislation to the extent that the Commission finds it serves as an unreasonable barrier to the grant of competitive franchises.

IV. Procedural Matters

A. Initial Regulatory Flexibility Analysis

25. As required by the Regulatory Flexibility Act of 1980, as amended (the RFA), the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact of the policies and rules proposed in this *NPRM* on a substantial number of small entities. 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 *NPRM* provided in paragraph 28 of the item. The Commission will send a copy of the *NPRM*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA) (*See* 5 U.S.C. 603(a)).

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

26. The *NPRM* initiates a process to implement section 621(a)(1) of the Communications Act in order to further the interrelated goals of enhanced cable competition and accelerated broadband deployment. Specifically, the *NPRM* solicits comment on how to best ensure that LFAs, which are the governmental entities responsible for regulating cable providers at the local level, do not ''unreasonably refuse to award * * * additional competitive franchise[s].'' The *NPRM* 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

27. The *NPRM* 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.'' The item notes that the Commission is empowered by section 1 of the Communications Act ''to execute and enforce [its] provisions'' 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.'' Finally, the *NPRM* 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.'' The *NPRM* is adopted pursuant to sections 1, 4(i), 621(a)(1), and 636(c) of the Communications Act of 1934, as amended.

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

28. 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. The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act. 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).

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

30. *Small Organizations.* Nationwide, there are approximately 1.6 million small organizations.

31. 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 *NPRM*.

1. Small Governmental Jurisdictions

32. 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.'' As of 1997, there were approximately 87,453 governmental jurisdictions in the United States. This number includes 39,044 county governments, municipalities, and townships, of which 37,546 (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

33. The entities described in this section are affected merely indirectly by the *NPRM*, and therefore are not formally a part of this RFA analysis. They are included, however, to broaden

the record in this proceeding and to alert them to the Commission's tentative conclusions.

aa. Cable Operators

34. 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. 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. 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.

35. *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. The most recent estimates indicate that there were 1,439 cable operators who qualified as small cable system operators at the end of 1995. 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.

36. *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.'' The Commission has determined that there are 67,700,000 subscribers in the United States. Therefore, an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed $250 million in the aggregate. Based on available data, the Commission estimates that the number of cable operators serving 677,000 subscribers or fewer, totals 1,450. The Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed $250 million, 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.

37. *Open Video Services.* Open Video Service (OVS) systems provide subscription services. As noted above, the SBA has created a small business size standard for Cable and Other Program Distribution. 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. Affiliates of Residential Communications Network, Inc. (RCN) received approval to operate OVS systems in New York City, Boston, Washington, DC, 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.

bb. Telecommunications Service Entities

38. 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.'' 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.

39. *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. According to Commission data, 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.

40. *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. According to Commission data, 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.

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

41. The Commission anticipates 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 *NPRM* 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

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

43. As discussed in the *NPRM*, section 621(a)(1) states that LFAs must not unreasonably refuse to award competitive franchises. 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). The Commission seeks comment on the impact that such rules might have on small entities, and on what effect alternative rules would have on those entities. The Commission also invites 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

44. None.

B. Initial Paperwork Reduction Act of 1995 Analysis

45. 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

46. *Permit-But-Disclose*. This proceeding will be treated as a ''permit-but-disclose'' proceeding subject to the ''permit-but-disclose'' requirements under § 1.1206(b) of the Commission's rules. *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. Additional rules pertaining to oral and written presentations are set forth in § 1.1206(b).

D. Filing Requirements

47. *Comments and Replies.* Pursuant to §§ 1.415 and 1.419 of the Commission's rules, 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.

48. *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 Web site 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.

49. *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.

- 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 a.m. to 7 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.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 05–24029 Filed 12–13–05; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 635

[Docket No. 051202320–5320–01; I.D. 040605D]

Atlantic Highly Migratory Species; Commercial Shark Management Measures

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Petition for rulemaking; decision.

SUMMARY: NMFS has decided not to initiate the rulemaking requested by the North Carolina Department of Environment and Natural Resources, Division of Marine Fisheries (Petitioner), to amend the current time/area closure for Atlantic sharks off the Mid-Atlantic region. NMFS does not have any new information to support the Petitioner's proposal of a closure inside of 15 fathoms along the North Carolina coast nor the assertion that such a closure would still attain the management goal of protecting juvenile sandbar and prohibited dusky sharks.

NMFS will consider new information concerning the impacts of the current time/area closure (which has been in place for one time period from January 1 to July 31, 2005) and the results of upcoming large coastal shark (LCS) and dusky shark stock assessments to determine whether changes to the time/area closure are appropriate. In addition, NMFS will monitor any changes to shark regulations by coastal states and will continue to work with the Atlantic States Marine Fisheries Commission (ASMFC) in terms of development of an interstate shark plan, which may warrant a review of existing Federal regulations and consideration of further changes to the time/area closure.

ADDRESSES: Copies of NMFS' decision on the North Carolina Department of Environment and Natural Resources, Division of Marine Fisheries' petition are available from Karyl Brewster-Geisz, Highly Migratory Species Management Division, NMFS, 1315 East-West Highway, Silver Spring, MD 20910; telephone 301–713–2347. Copies of NMFS' decision regarding the petition are also available on the internet at *http://www.nmfs.noaa.gov/sfa/hms*.

FOR FURTHER INFORMATION CONTACT: Karyl Brewster-Geisz or Margo Schulze-Haugen by phone: 301–713–2347 or by fax: 301–713–1917.

SUPPLEMENTARY INFORMATION:

Background

In 2002, NMFS conducted an LCS stock assessment that was peer-reviewed by three independent reviewers (67 FR 64098, October 17, 2002). While the peer reviews indicated areas that could be improved, they concluded that the stock assessment constituted the best available science. Based on the results of this stock assessment and the status determination criteria in the 1999 Fishery Management Plan (FMP) for Atlantic Tunas, Swordfish, and Sharks, NMFS determined that the LCS complex was overfished and overfishing was occurring. NMFS also determined that sandbar sharks were not overfished and overfishing was occurring, and that blacktip sharks were fully rebuilt. In addition to providing information regarding the status of the stocks, the stock assessment noted, among other things, that a reduction in catches of LCS may be necessary to recover the complex as a whole to the biomass expected to yield maximum sustainable yield (BMSY); that reductions in catch of species other than sandbar and blacktip sharks appeared to be the most appropriate; that individual species are responding differently to exploitation; and that juvenile survival is the vital rate that most affects overall population growth rates, thus supporting the need to protect reproductive females and juveniles.

The 2002 LCS stock assessment did not individually assess the status of dusky sharks. However, in the 1999 FMP, NMFS noted that dusky sharks are highly susceptible and vulnerable to overfishing. This vulnerability is due to several factors including: (1) their age of maturity is approximately 19 years (approximately 12 ft or 3.7 m FL); (2) they have few pups per litter (6 to 14 per litter); (3) they have a long gestation period (approximately 16 months); and (4) approximately 82 percent of those caught in commercial fisheries are brought to the vessel dead, making dusky sharks highly susceptible to dying on longline gear. This vulnerability has resulted in this species being listed as a species of concern under the Endangered Species Act (ESA) since 1997, and in 1999, being placed on the prohibited species list (due to litigation, the dusky shark prohibition did not go into effect until mid–2000). NMFS continues to be concerned about all life stages for dusky sharks and is expecting a final dusky shark assessment to be released later this year.

Shortly after the 2002 LCS stock assessment was released, NMFS began the process of amending the FMP for Atlantic Tunas, Swordfish, and Sharks (67 FR 69180, November 17, 2002). Consistent with the 1999 FMP and the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), the objectives of Amendment 1 were, among other things, to implement management measures to rebuild the LCS complex that were based on the best available science, to amend the rebuilding timeframe based on the best available science given that the 1998 stock assessment, on which the previous rebuilding timeframe was based, was found to be faulty, and to review shark management measures, in general.

During the Amendment 1 process, NMFS held seven scoping meetings in February and March 2003 (68 FR 3853, January 27, 2003), held six public hearings on draft Amendment 1 and the proposed rule (68 FR 45196, August 1, 2003, and 68 FR 54885, September 19, 2003), held one Advisory Panel meeting specific to draft Amendment 1 and the proposed rule (68 FR 51560, August 27, 2003), attended four Regional Fishery Management Council meetings (New England, Mid-Atlantic, and two for the Gulf of Mexico), and attended one ASFMC meeting. In addition to the comments at the public hearings and Council meetings, NMFS received over 30 written comments on draft Amendment 1 and the proposed rule. The final rule published on December 24, 2003 (68 FR 74746). Among other things, final Amendment 1 and its final rule revised the LCS rebuilding timeframe to 26 years, adjusted the LCS commercial quota, established trimester seasons and regional subquotas, removed the commercial minimum size, changed the recreational bag limit and minimum size, established a time/area closure off North Carolina, required line cutters and dipnets on bottom longline vessels, required vessel monitoring systems (VMS) on gillnet and bottom longline vessels during part of the year, and established criteria to use to modify the prohibited species list. Major changes from the proposed rule as a result of public comment included: delaying the effective date for the implementation of trimester seasons; a change in the reduction of the LCS