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

REPORT AND ORDER AND FURTHER NOTICE OF PROPOSED RULEMAKING

Adopted: December 20, 2006 **Released: March 5, 2007**

Comment Date: [30 days after date of publication in the Federal Register]
Reply Comment Date: [45 days after date of publication in the Federal Register]

By the Commission: Chairman Martin, Commissioners Tate and McDowell issuing separate statements; Commissioners Copps and Adelstein dissenting and issuing separate statements.

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I. INTRODUCTION

1. In this Report and Order ("*Order*"), we adopt rules and provide guidance to implement Section 621(a)(1) of the Communications Act of 1934, as amended (the "Communications Act"), which prohibits franchising authorities from unreasonably refusing to award competitive franchises for the provision of cable services.[1] We find that the current operation of the local franchising process in many jurisdictions constitutes an unreasonable barrier to entry that impedes the achievement of the interrelated federal goals of enhanced cable competition and accelerated broadband deployment.[2] We further find that Commission action to address this problem is both authorized and necessary. Accordingly, we adopt measures to address a variety of means by which local franchising authorities, i.e., county- or municipal-level franchising authorities ("LFAs"), are unreasonably refusing to award competitive franchises. We anticipate that the rules and guidance we adopt today will facilitate and expedite entry of new cable competitors into the market for the delivery of video programming,[3] and accelerate broadband deployment consistent with our statutory responsibilities.

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[1] 47 U.S.C. § 541(a)(1).

[2] While there is a sufficient record before us to generally determine what constitutes an "unreasonable refusal to award an additional competitive franchise" at the local level under Section 621(a)(1), we do not have sufficient information to make such determinations with respect to franchising decisions where a state is involved, either by issuing franchises at the state level or enacting laws governing specific aspects of the franchising process. We therefore expressly limit our findings and regulations in this *Order* to actions or inactions at the local level where a state has not specifically circumscribed the LFA's authority. In light of the differences between the scope of franchises issued at the state level and those issued at the local level, we do not address the reasonableness of demands made by state level franchising authorities, such as Hawaii, which may need to be evaluated by different criteria than those applied to the demands of local franchising authorities. Additionally, what constitutes an unreasonable period of time for a state level franchising authority to take to review an application may differ from what constitutes an unreasonable period of time at the local level. Moreover, as discussed *infra*, many states have enacted comprehensive franchise reform laws designed to facilitate competitive entry. Some of these laws allow competitive entrants to obtain statewide franchises while others establish a comprehensive set of statewide parameters that cabin the discretion of LFAs. *Compare* TEX. UTIL. CODE ANN. §§ 66.001-66.017 *with* VA. CODE ANN. §§ 15.2-2108.19 et seq. In light of the fact that many of these laws have only been in effect for a short period of time, and we do not have an adequate record from those relatively few states that have had statewide franchising for a longer period of time to draw general conclusions with respect to the operation of the franchising process where there is state involvement, we lack a sufficient record to evaluate whether and how such state laws may lead to unreasonable refusals to award additional competitive franchises. As a result, our *Order* today only addresses decisions made by county- or municipal-level franchising authorities. *See U.S. Cellular Corp. v. FCC*, 254 F.3d 78, 86 (D.C. Cir. 2001) ("agencies need not address all problems in one fell swoop") (citations and internal quotation marks omitted); *Personal Watercraft Industry Assoc. v. Dept. of Commerce*, 48 F.3d 540, 544 (D.C. Cir. 1995) ("An agency does not have to 'make progress on every front before it can make progress on any front.') (quoting *United States v. Edge Broadcasting Co*., 509 U.S. 418, 434 (1993)); *National Association of Broadcasters v. FCC*, 740 F.2d 1190, 1207 (D.C. Cir. 1984) ("[A]gencies, while entitled to less deference than Congress, nonetheless need not deal in one fell swoop with the entire breadth of a novel development; instead, 'reform may take place one step at a time, addressing itself to the phase of the problem which seems most acute to the [regulatory] mind.'") (citations and internal quotation marks omitted, alteration in original). Moreover, it does not address any aspect of an LFA's decision-making to the extent that such aspect is specifically addressed by state law. For example, the state of Massachusetts provides LFAs with 12 months from the date of their decision to begin the licensing process to approve or deny a franchise application. 207 Mass. Code Regs. 3.02 (2006). These laws are not addressed by this decision. Consequently, unless otherwise stated, references herein to "the franchising process" or "franchising" refer solely to processes controlled by county- or municipal-level franchising authorities, including but not limited to the ultimate decision to award a franchise.

[3] References throughout this *Order* to "video programming" or "video services" are intended to mean cable services.

2. New competitors are entering markets for the delivery of services historically offered by monopolists: traditional phone companies are primed to enter the cable market, while traditional cable companies are competing in the telephony market. Ultimately, both types of companies are projected to offer customers a "triple play" of voice, high-speed Internet access, and video services over their respective networks. We believe this competition for delivery of bundled services will benefit consumers by driving down prices and improving the quality of service offerings. We are concerned, however, that traditional phone companies seeking to enter the video market face unreasonable regulatory obstacles, to the detriment of competition generally and cable subscribers in particular.

3. The Communications Act sets forth the basic rules concerning what franchising authorities may and may not do in evaluating applications for competitive franchises. Despite the parameters established by the Communications Act, however, operation of the franchising process has proven far more complex and time consuming than it should be, particularly with respect to facilities-based telecommunications and broadband providers that already have access to rights-of-way. New entrants have demonstrated that they are willing and able to upgrade their networks to provide video services, but the current operation of the franchising process at the local level unreasonably delays and, in some cases, derails these efforts due to LFAs' unreasonable demands on competitive applicants. These delays discourage investment in the fiber-based infrastructure necessary for the provision of advanced broadband services, because franchise applicants do not have the promise of revenues from video services to offset the costs of such deployment. Thus, the current operation of the franchising process often not only contravenes the statutory imperative to foster competition in the multichannel video programming distribution ("MVPD") market, but also defeats the congressional goal of encouraging broadband deployment.

4. In light of the problems with the current operation of the franchising process, we believe that it is now appropriate for the Commission to exercise its authority and take steps to prevent LFAs from unreasonably refusing to award competitive franchises. We have broad rulemaking authority to implement the provisions of the Communications Act, including Title VI generally and Section 621(a)(1) in particular. In addition, Section 706 of the Telecommunications Act of 1996 directs the Commission to encourage broadband deployment by removing barriers to infrastructure investment, and the U.S. Court of Appeals for the District of Columbia Circuit has held that the Commission may fashion its rules to fulfill the goals of Section 706.[4]

5. To eliminate the unreasonable barriers to entry into the cable market, and to encourage investment in broadband facilities, we: (1) find that an LFA's failure to issue a decision on a competitive application within the time frames specified herein constitutes an unreasonable refusal to award a competitive franchise within the meaning of Section 621(a)(1); (2) find that an LFA's refusal to grant a competitive franchise because of an applicant's unwillingness to agree to unreasonable build-out mandates constitutes an unreasonable refusal to award a competitive franchise within the meaning of Section 621(a)(1); (3) find that unless certain specified costs, fees, and other compensation required by LFAs are counted toward the statutory 5 percent cap on franchise fees, demanding them could result in an unreasonable refusal to award a competitive franchise; (4) find that it would be an unreasonable refusal to award a competitive franchise if the LFA denied an application based upon a new entrant's refusal to undertake certain obligations relating to public, educational, and government ("PEG") and institutional networks ("I-Nets") and (5) find that it is unreasonable under Section 621(a)(1) for an LFA to refuse to grant a franchise based on issues related to non-cable services or facilities. Furthermore, we preempt local laws, regulations, and requirements, including level-playing-field provisions, to the extent they permit LFAs to impose greater restrictions on market entry than the rules adopted herein. We also adopt

[4] *See USTA v. FCC*, 359 F.3d 554, 579-80 (D.C. Cir. 2004).

a Further Notice of Proposed Rulemaking ("FNPRM") seeking comment on how our findings in this *Order* should affect existing franchisees. In addition, the FNPRM asks for comment on local consumer protection and customer service standards as applied to new entrants.

II. BACKGROUND

6. ***Section 621.*** Any new entrant seeking to offer "cable service"[5] as a "cable operator"[6] 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,[7] and subsection (a)(1) grants to franchising authorities the power to award such franchises.[8]

7. 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"),[9] was to delineate the role of LFAs in the franchising process.[10] As originally enacted, Section 621(a)(1) simply stated that "[a] franchising authority may award, in accordance with the provisions of this title, 1 or more franchises within its jurisdiction."[11] 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.[12] In that Report, the Commission concluded

[5] Section 602(6) of the Communications Act, 47 U.S.C. § 522(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").

[6] Section 602(5) of the Communications Act, 47 U.S.C. § 522(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").

[7] 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.").

[8] 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"). A "franchising authority" is defined to mean "any governmental entity empowered by Federal, State, or local law to grant a franchise." Section 602(10) of the Communications Act, 47 U.S.C. § 522(10). As noted above, references herein to "local franchising authorities" or "LFAs" mean only the county or municipal governmental entities empowered to grant franchises.

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

[10] *See, e.g.*, H.R. REP. NO. 98-934, at 19 (1984) ("[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. … [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.").

[11] Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779, § 621 (1984).

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

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."[13]

8. In response,[14] Congress revised Section 621(a)(1) through the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act")[15] 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*."[16] In the Conference Report on the legislation, Congress found that competition in the cable industry was sorely lacking:

> For a variety of reasons, including local franchising requirements and the extraordinary expense of constructing more than one cable television system to serve a particular geographic area, most cable television subscribers have no opportunity to select between competing cable systems. Without the presence of another multichannel video programming distributor, a cable system faces no local competition. The result is undue market power for the cable operator as compared to that of consumers and video programmers.[17]

To address this problem, Congress abridged local government authority over the franchising process 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.[18]

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[13] *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 [build-out]' obligation." *Id*.

[14] *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 previously recognized that "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).

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

[16] 47 U.S.C. § 541(a)(1) (emphasis added).

[17] H.R. CONF. REP. NO. 102-862, at 1231 (1992).

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

As revised, Section 621(a)(1) establishes a clear, federal-level limitation on the authority of LFAs in the franchising process in order to "promote the availability to the public of a diversity of views and information through cable television and other video distribution media," and to "rely on the marketplace, to the maximum extent feasible, to achieve that availability."[19] Congress further recognized that increased competition in the video programming industry would curb excessive rate increases and enhance customer service, two areas in particular which Congress found had deteriorated because of the monopoly power of cable operators brought about, at least in part, by the local franchising process.[20]

9. In 1992, Congress also revised Section 621(a)(1) to provide 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."[21] 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.[22] Congress did not, however, provide an explicit judicial remedy for other forms of unreasonable refusals to award competitive franchises, such as an LFA's refusal to act on a pending franchise application within a reasonable time period.

10. ***The Local Franchising NPRM.*** Notwithstanding the limitation imposed on LFAs by Section 621(a)(1), prior to commencement of this proceeding, the Commission had seen indications that the current operation of the franchising process still serves as an unreasonable barrier to entry[23] for potential new cable entrants into the MVPD market.[24] In November 2005, the Commission issued a Notice of Proposed Rulemaking ("*Local Franchising NPRM*") to determine whether LFAs are unreasonably refusing to award competitive franchises and thereby impeding achievement of the statute's goals of increasing competition in the delivery of video programming and accelerating broadband deployment.

11. The Commission sought comment on the current environment in which new cable entrants attempt to obtain competitive cable franchises. For example, the Commission requested input on

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[19] *Id.*

[20] S. REP. NO. 102-92, at 9 (quoting members of the cable industry who acknowledged that "because the franchise limits the customers to a single provider in the market, other 'customer-oriented' intangibles relating to the expectation of future patronage do not exist for a cable system. There is a goodwill in a monopoly. Customers return, not because of any sense of satisfaction with the monopolist, but rather because they have no other choices"); *see also id*. at 3-9, 13-14, 20-21.

[21] 47 U.S.C. § 541(a)(1).

[22] 47 U.S.C. § 555(a).

[23] *See 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*, 20 FCC Rcd 18581, 18584 (2005) ("*Local Franchising NPRM*") (citing comments of Alcatel, BellSouth, Broadcast Service Providers Assoc., and Consumers for Cable Choice, filed in MB Docket No. 05-255).

[24] We refer herein to "new entrants," "new cable entrants," and "new cable competitors" interchangeably. Specifically, we intend these terms to describe entities that opt to offer "cable service" over a "cable system" utilizing public rights-of-way, and thus are defined under the Communications Act as "cable operator[s]" that must obtain a franchise. Although we recognize that there are numerous other ways to enter the MVPD market (*e.g.*, direct broadcast satellite ("DBS"), wireless cable, private cable), our actions in this proceeding relate to our authority under Section 621(a)(1) of the Communications Act, and thus are limited to competitive entrants seeking to obtain cable franchises.

the number of: (a) LFAs in the United States; (b) competitive franchise applications filed to date;[25] and (c) ongoing franchise negotiations.[26] To determine whether the current operation of the franchising process discourages competition and broadband deployment, the Commission also sought information regarding, among other things:

- how much time, on average, elapses between the date a franchise application is filed and the date an LFA acts on the application, and during that period, how much time is spent in active negotiations;[27]
- whether to establish a maximum time frame for an LFA to act on an application for a competitive franchise;[28]
- whether "level-playing-field" mandates, which impose on new entrants terms and conditions identical to those in the incumbent cable operator's franchise, constitute unreasonable barriers to entry;[29]
- whether build-out requirements (*i.e.*, requirements that a franchisee deploy cable service to parts or all of the franchise area within a specified period of time) are creating unreasonable barriers to competitive entry;[30]
- specific examples of any monetary or in-kind LFA demands unrelated to cable services that could be adversely affecting new entrants' ability to obtain franchises;[31] and
- whether current procedures or requirements are appropriate for any cable operator, including incumbent cable operators.[32]

12. In the *Local Franchising NPRM,* we tentatively concluded that Section 621(a)(1) empowers the Commission to adopt rules to ensure that the franchising process does not unduly interfere with the ability of potential competitors to provide video programming to consumers.[33] Accordingly, the Commission sought comment on how it could best remedy any problems with the current franchising process.[34]

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[25] *Local Franchising NPRM*, 20 FCC Rcd at 18588.

[26] *Id*.

[27] *Id.*

[28] *Id.* at 18591.

[29] *Id.* at 18588.

[30] *Id.* at 18592.

[31] *Id. See also* 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"). *See* Appendix A for a list of all commenters and reply commenters.

[32] *Local Franchising NPRM*, 20 FCC Rcd at 18592.

[33] *Id.* at 18590.

[34] *Id.* at 18581.

13. The Commission also asked whether Section 706 provides a basis for the Commission to address barriers faced by would-be entrants to the video market.[35] Section 706 directs the Commission to encourage broadband deployment by utilizing "measures that promote competition … or other regulating methods that remove barriers to infrastructure investment."[36] Competitive entrants in the video market are, in large part, deploying new fiber-based facilities that allow companies to offer the "triple play" of voice, data, and video services. New entrants' video offerings thus directly affect their roll-out of new broadband services. Revenues from cable services are, in fact, a driver for broadband deployment. In light of that relationship, the Commission sought comment on whether it could take remedial action pursuant to Section 706.[37]

14. ***The Franchising Process.*** The record in this proceeding demonstrates that the franchising process differs significantly from locality to locality. In most states, franchising is conducted at the local level, affording counties and municipalities broad discretion in deciding whether to grant a franchise.[38] Some counties and municipalities have cable ordinances that govern the structure of negotiations, while others may proceed on an applicant-by-applicant basis.[39] Where franchising negotiations are focused at the local level, some LFAs create formal or informal consortia to pool their resources and expedite competitive entry.[40]

15. To provide video services over a geographic area that encompasses more than one LFA, a prospective entrant must become familiar with all applicable regulations. This is a time-consuming and expensive process that has a chilling effect on competitors.[41] Verizon estimates, for example, that it will need 2,500-3,000 franchises in order to provide video services throughout its service area.[42] AT&T states

[35] *Id.* at 18590.

[36] Section 706 of the Telecommunications Act of 1996, 47 U.S.C. § 157 nt.

[37] *See USTA v. FCC*, 359 F.3d 554, 580, 583 (D.C. Cir. 2004). *See also* USTelecom Comments at 15; TIA Comments at 16-17.

[38] *See, e.g.*, MD. ANN. CODE art. 23A § 2(b)(13); OR. CONST. ART. I, § 21 (2005); COLO. REV. STAT. ANN. § 30-35-201 (West 2005). We also note that several states have adopted statutes governing the franchising process. For example, some states require public hearings or special elections. *See* League of Minnesota Cities ("LMC") Comments at 6-8, South Slope Comments at 6. Other states have laws limiting the range of issues that can be negotiated in a franchise. *See* Cablevision Comments at 12, LMC Comments at 15. As we discuss below, certain states have adopted new franchising laws that allow providers to apply for franchises through state franchising authorities ("SFAs"), and we note that lawmakers in those states adopted these new franchising laws to address the needs of the current marketplace. Furthermore, certain states have traditionally considered franchise applications at the state level. *See, e.g.*, HAW. REV. STAT. § 440G-4 (2006), CONN. GEN. STAT. ANN. § 16-331 (West 2006), VT. STAT. ANN. tit. 30, § 502 (2006). The record indicates that state level franchising may provide a practical solution to the problems that facilities-based entrants face when seeking to provide competitive services on a broader basis than county or municipal boundaries and seek to provide service in a significant number of franchise areas. *See, e.g.*, AT&T Reply at 21, 37, NTCA Comments at 10.

[39] *See, e.g.*, Mobile, Ala. Comments at 2 (discussing its Master Cable Services Regulatory Ordinance that was created to ensure all potential entrants were treated in a uniform manner); Ontario, Cal. Comments at 5-6 (discussing draft master ordinance that will ensure a "fair and equitable application process" for all new entrants).

[40] *See, e.g.*, MO-NATOA Comments at 8 ("some localities work together to franchise and manage rights-of-way"); MHRC Comments at 1 (MHRC is a consolidated regulatory authority for six Oregon localities).

[41] *See, e.g.*, Verizon Comments at 27, Att. A, para. 10, 59-75; BellSouth Comments at 2, 11; Letter from Jeffrey S. Lanning, Associate General Counsel, USTelecom, to Marlene H. Dortch, Secretary, Federal Communications Commission at 17-18 (July 28, 2006) ("USTelecom *Ex Parte*").

[42] Verizon Comments at 27, Att. A, para. 10.

that its Project Lightspeed deployment is projected to cover a geographic area that would encompass as many as 2,000 local franchise areas.[43] BellSouth estimates that there are approximately 1,500 LFAs within its service area.[44] Qwest's in-region territory covers a potential 5,389 LFAs.[45] While other companies are also considering competitive entry,[46] these estimates amply demonstrate the regulatory burden faced by competitors that seek to enter the market on a wide scale, a burden that is amplified when individual LFAs unreasonably refuse to grant competitive franchises.

16. A few states and municipalities recently have recognized the need for reform and have established expedited franchising processes for new entrants. Although these processes also vary greatly and thus are of limited help to new cable providers seeking to quickly enter the marketplace on a regional basis, they do provide more uniformity in the franchising process on an intrastate basis. These state level reforms appear to offer promise in assisting new entrants to more quickly begin offering consumers a competitive choice among cable providers. In 2005, the Texas legislature designated the Texas Public Utility Commission ("PUC") as the franchising authority for state-issued franchises, and required the PUC to issue a franchise within 17 business days after receipt of a completed application from an eligible applicant.[47] In 2006, Indiana, Kansas, South Carolina, New Jersey, North Carolina, and California also passed legislation to streamline the franchising process by providing for expedited, state level grants of franchises.[48] Virginia, by contrast, did not establish statewide franchises but mandated uniform time frames for negotiations, public hearings, and ultimate franchise approval at the local level. In particular, a "certificated provider of telecommunications service" with existing authority to use public rights-of-way is authorized to provide video service within 75 days of filing a request to negotiate with each individual LFA.[49] Similarly, Michigan recently enacted legislation that streamlines the franchise application process, establishes a 30-day timeframe within which an LFA must make a decision, and eliminates build-out requirements.[50]

17. In some states, however, franchise reform efforts launched in recent months have failed. For example, in Florida, bills that would have allowed competitive providers to enter the market with a permit from the Office of the Secretary of State, and contained no build-out or service delivery schedules, died in committee.[51] In Louisiana, the Governor vetoed a bill that would have created a state franchise

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[43] AT&T Comments at 17.

[44] BellSouth Comments at 11.

[45] Qwest Comments at 14.

[46] *See* BSPA Comments at 1-2; Cavalier Telephone Comments at 2; South Slope Comments at 2; Cincinnati Bell Comments at 1; Hawaiian Telcom Comments at 1; Minnesota Telecom Alliance Comments at 2. In addition to video services, many of these new entrants also intend to provide broadband services. *See, e.g.*, Verizon Comments at i; BSPA Comments at 1; Cavalier Telephone Comments at 2.

[47] TEX. UTIL. CODE ANN. §§ 66.001, 66.003. Holders of these franchises are required to pay franchise fees, comply with customer service standards, and provide the capacity for PEG access channels that a municipality has activated under the incumbent cable operator's franchise agreement. *Id.* at §§ 66.005, 66.006, 66.008, 66.009, 66.014. Franchisees are not required to comply with any build-out requirements, but they are prohibited from denying service to any area based on the income level of that area. *Id.* at § 66.007.

[48] IND. CODE § 8-1-34-16 (2006); 2006 Kan. Sess. Laws 93 (codified at KAN. STAT. ANN. § 17-1902); S.C. CODE ANN. § 58-12-310 et seq. (2006); Assemb., No. 804, 212th Leg. (N.J. 2006); 2006 N.C. Sessions Laws 151 (to be codified 1/1/2007 at N.C. GEN STAT. ANN. § 66-351 (West 2006); CAL. PUB. UTIL. CODE § 401, et seq.;.

[49] VA. CODE ANN. § 15.2-2108.1:1 et seq.

[50] 2006 Mich. Pub. Acts 480.

[51] S 1984, 2006 Sess. (Fla. 2006), HB 1199, 2006 Sess. (Fla. 2006).

structure, provided for automatic grant of an application 45 days after filing, and contained no build-out requirements.[52] In Maine, a bill that would have replaced municipal franchises with state franchises was withdrawn.[53] Finally, a Missouri bill that would have given the Public Service Commission the authority to grant franchises and would have prohibited local franchising died in committee.[54]

III. DISCUSSION

18. Based on the voluminous record in this proceeding, which includes comments filed by new entrants, incumbent cable operators, LFAs, consumer groups, and others, we conclude that the current operation of the franchising process can constitute an unreasonable barrier to entry for potential cable competitors, and thus justifies Commission action. We find that we have authority under Section 621(a)(1) to address this problem by establishing limits on LFAs' ability to delay, condition, or otherwise "unreasonably refuse to award" competitive franchises. We find that we also have the authority to consider the goals of Section 706 in addressing this problem under Section 621(a)(1). We believe that, absent Commission action, deployment of competitive video services by new cable entrants will continue to be unreasonably delayed or, at worst, derailed. Accordingly, we adopt incremental measures directed to LFA-controlled franchising processes, as described in detail below. We anticipate that the rules and guidance we adopt today will facilitate and expedite entry of new cable competitors into the market for the delivery of multichannel video programming and thus encourage broadband deployment.

A. The Current Operation of the Franchising Process Unreasonably Interferes With Competitive Entry

19. Most communities in the United States lack cable competition, which would reduce cable rates and increase innovation and quality of service.[55] Although LFAs adduced evidence that they have granted some competitive franchises,[56] and competitors acknowledge that they have obtained some franchises,[57] the record includes only a few hundred examples of competitive franchises, many of which were obtained after months of unnecessary delay. In the vast majority of communities, cable competition simply does not exist.

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[52] HB 699, 2006 Reg. Sess. (La. 2006).

[53] LR 2800, 2006 Leg., 2d. Reg. Sess. (Me. 2005).

[54] SB 816, 2006 Sess. (Mo. 2006).

[55] *See Local Franchising NPRM*, 20 FCC Rcd at 18588.

[56] For example, in Michigan, a number of LFAs have granted competitive franchises to local telecommunications companies. *See* Ada Township, *et al.*, Comments at 18-26. Vermont has granted franchises to competitive operators in Burlington, Newport, Berlin, Duxbury, Stowe, and Moretown. VPSB Comments at 5. Mt. Hood Cable Regulatory Commission ("MHRC"), a consolidated regulatory authority for six Oregon localities, has negotiated franchises with cable overbuilders, although those companies ultimately were unable to deploy service. MHRC Comments at 20-21. Similarly, the City of Los Angeles has granted two competitive franchises, but each of the competitors went out of business shortly after negotiating the franchise. City of Los Angeles Comments at 15; *see also* San Diego County, Cal. Comments at 4. Miami-Dade has granted 11 franchises to six providers, and currently is considering the application of another potential entrant. Miami-Dade Comments at 1-2. New Jersey has granted five competitive franchises, but only two ultimately provided service to customers. NJBPU Comments at 3. *See also, e.g.*, AT&T Reply Comments at 11-13; Chicago, Ill. Comments at 2-3; City of Charlotte and Mecklenburg County, N.C. Comments at 12-13; Henderson, Nev. Comments at 5.

[57] For example, Verizon has obtained franchises covering approximately 200 franchise areas. *See* http://newscenter.verizon.com/press-releases/verizon/2006/verizon-to-bring-western.html.

20. The dearth of competition is due, at least in part, to the franchising process.[58] The record demonstrates that the current operation of the franchising process unreasonably prevents or, at a minimum, unduly delays potential cable competitors from entering the MVPD market.[59] Numerous commenters have adduced evidence that the current operation of the franchising process constitutes an unreasonable barrier to entry. Regulatory restrictions and conditions on entry shield incumbents from competition and are associated with various economic inefficiencies, such as reduced innovation and distorted consumer choices.[60] We recognize that some LFAs have made reasonable efforts to facilitate competitive entry into the video programming market. We also recognize that recent state level reforms have the potential to streamline the process to a noteworthy degree. We find, though, that the current operation of the local franchising process often is a roadblock to achievement of the statutory goals of enhancing cable competition and broadband deployment.

21. Commenters have identified six factors that stand in the way of competitive entry. They are: (1) unreasonable delays by LFAs in acting on franchise applications; (2) unreasonable build-out requirements imposed by LFAs; (3) LFA demands unrelated to the franchising process; (4) confusion concerning the meaning and scope of franchise fee obligations; (5) unreasonable LFA demands for PEG channel capacity and construction of I-Nets; and (6) level-playing-field requirements set by LFAs. We address each factor below.

22. ***LFA Delays in Acting on Franchise Applications.*** The record demonstrates that unreasonable delays in the franchising process have obstructed and, in some cases, completely derailed attempts to deploy competitive video services. Many new entrants have been subjected to lengthy, costly, drawn-out negotiations that, in many cases, are still ongoing. The FTTH Council cited a report by an investment firm that, on average, the franchising process, as it currently operates, delays entry by 8-16 months.[61] The record generally supports that estimate. For example, Verizon had 113 franchise negotiations underway as of the end of March 2005. By the end of March 2006, LFAs had granted only 10 of those franchises. In other words, more than 90% of the negotiations were not completed within one year.[62] Verizon noted that delays are often caused by mandatory waiting periods.[63] BellSouth explained that negotiations took an average of 10 months for each of its 20 cable franchise agreements,[64] and that in one case, the negotiations took nearly three years.[65] AT&T claims that anti-competitive conditions, such as level-playing-field constraints and LFA demands regarding build-out, not only delay entry but can prevent it altogether.[66] BellSouth notes that absent such demands (in Georgia, for example), the

[58] Qwest Reply at 13-14; USTelecom *Ex Parte* at 17-18.

[59] Verizon Comments at 31-34; AT&T Reply at 22-23; BellSouth Comments at 10; Cavalier Telephone Comments at 1. *See also* Mercatus Center Comments at 39-43.

[60] *See, e.g.*, DOJ *Ex Parte* at 3

[61] FTTH Council Comments at 26.

[62] Verizon Reply Comments at 35. These figures do not include Verizon's franchise applications in Texas, which now authorizes statewide franchises. *See supra* para. 16.

[63] Verizon Comments at 31-32.

[64] BellSouth Comments at 2.

[65] BellSouth Comments at 11. BellSouth's franchise in Cobb County, Ga. took approximately 32 months to obtain; its franchises in Davie, Fla. and Orange County, Fla. took 29 and 28 months, respectively. BellSouth Comments Decl. of Thompson T. Rawls, II, Exh. A.

[66] AT&T Reply at 6.

company's applications were granted quickly.[67] Most of Ameritech's franchise negotiations likewise took a number of years.[68] New entrants other than the large incumbent local exchange carriers ("LECs")[69] also have experienced delays in the franchising process. NTCA provided an example of a small, competitive IPTV provider that is in ongoing negotiations that began more than one year ago.[70]

23. These delays are particularly unreasonable when, as is often the case, the applicant already has access to rights-of-way. One of the primary justifications for cable franchising is the LFA's need to regulate and receive compensation for the use of public rights-of-way.[71] However, when considering a franchise application from an entity that already has rights-of-way access, such as an incumbent LEC, an LFA need not and should not devote substantial attention to issues of rights-of-way management.[72] Moreover, in obtaining a certificate for public convenience and necessity from a state, a facilities-based provider generally has demonstrated its legal, technical, and financial fitness to be a provider of telecommunications services. Thus, an LFA need not spend a significant amount of time considering the fitness of such applicants to access public rights-of-way.

24. Delays in acting on franchise applications are especially onerous because franchise applications are rarely denied outright,[73] which would enable applicants to seek judicial review under Section 635.[74] Rather, negotiations are often drawn out over an extended period of time.[75] As a result,

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[67] BellSouth Reply at 7.

[68] AT&T Reply at 24.

[69] The term "local exchange carrier" means any person that is engaged in the provision of telephone exchange service or exchange access. 47 U.S.C. § 153(26). For the purposes of Section 251 of the Communications Act, "the term 'incumbent local exchange carrier' means, with respect to an area, the local exchange carrier that (A) on the date of enactment of the Telecommunications Act of 1996, provided telephone exchange service in such area; and (B)(i) on such date of enactment, was deemed to be a member of the exchange carrier association …; or (B)(ii) is a person or entity that, on or after such date of enactment, became a successor or assign of a member [of the exchange carrier association]." 47 U.S.C. § 251(h)(1). A competitive LEC is any LEC other than an incumbent LEC. A LEC will be treated as an ILEC if "(A) such carrier occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by a carrier described in paragraph [251(h)](1); (B) such carrier has substantially replaced an incumbent local exchange carrier described in paragraph [251(h)](1); and (C) such treatment is consistent with the public interest, convenience, and necessity and the purposes of this section." 47 U.S.C. § 251(h)(2).

[70] NTCA Comments at 4, 10.

[71] We note that certain franchising authorities may have existing authority to regulate LECs through state and local rights-of-way statutes and ordinances.

[72] Recognizing this distinction, some states have enacted or proposed streamlined franchising procedures specifically tailored to entities with existing access to public rights-of-way. *See, e.g.*, VIRGINIA CODE ANN. § 15.2-2108.1:1 et seq.); HF-2647, 2006 Sess. (Iowa 2006) (this proposed legislation would grant franchises to all telephone providers authorized to use the right-of-way without any application or negotiation requirement). *See also* South Slope Comments at 11 (duplicative local franchising requirements imposed on a competitor with existing authority to occupy the rights-of-way are unjustified and constitute an unreasonable barrier to competitive video entry).

[73] *See* Northwest Suburbs Cable Communications Commission Comments at 5-6 (rare instance of competitive franchise denial).

[74] *See* 47 U.S.C. §§ 541(a)(1), 555(a).

[75] *See* Verizon Comments at 30-34; Verizon Reply Comments at 2, 34-37; AT&T Reply Comments at 24; NTCA Comments at 4, 10.

the record shows that numerous new entrants have accepted franchise terms they considered unreasonable in order to avoid further delay.[76] Others have filed lawsuits seeking a court order compelling the LFA to act, which entails additional delay, legal uncertainty, and great expense.[77] Alternatively, some prospective entrants have walked away from unduly prolonged negotiations.[78] Moreover, delays provide the incumbent cable operator the opportunity to launch targeted marketing campaigns before the competitor's rollout, thus undermining a competitor's prospects for success.[79]

25. Despite this evidence, incumbent cable operators and LFAs nevertheless assert that new entrants can obtain and are obtaining franchises in a timely fashion,[80] and that delays are largely due to unreasonable behavior on the part of franchise applicants, not LFAs.[81] For example, Minnesota LFAs claim that they can grant a franchise in as little as eight weeks.[82] The record, however, shows that expeditious grants of competitive franchises are atypical. Most LFAs lack any temporal limits for

[76] *See, e.g.*, USTelecom *Ex Parte* at 20 (Grand Rapids, Minnesota insisted that Paul Bunyan Telephone Cooperative provide fiber connections to every municipal building in the City, including a water treatment plant); Qwest *Ex Parte* at 7 (initially agreed to mandatory build-out provisions in certain situations); BellSouth Comments at 15-16 (in Dekalb County, Georgia, BellSouth makes PEG payments and I-Net support payments that drive total fees significantly above 5 percent of gross revenue).

[77] For example, in Maryland, Verizon filed suit against Montgomery County, seeking to invalidate some of the County's franchise rules, and requesting that the County be required to negotiate a franchise agreement, after the parties unsuccessfully attempted to negotiate a franchise beginning in May 2005. *See* Complaint, *Verizon Maryland, Inc. v. Montgomery County, Md*., No. 06-01663-MJG (N.D. Md. June 29, 2006). The court denied Verizon's Motion for Preliminary Injunction in August, and ordered the parties to mediation. *See Verizon Maryland, Inc. v. Montgomery County, Md*., Order, No. 06-01663-MJG (N.D. Md. August 8, 2006). Since then, the parties have negotiated a franchise agreement and the County held a public hearing on the draft franchise agreement. *See* Press Release, Montgomery County, Md., County Negotiates Cable Franchise Agreement with Verizon; Agreement Resolves Litigation, Provides Increased Competition for Cable Service (Sept. 13, 2006) *available at* http://www.montgomerycountymd.gov/apps/News/press/PR_details.asp?PrID=2582. The County Council granted the negotiated franchise on November 28, 2006. Neil Adler, *Montgomery officials approve Verizon cable franchise*, WASHINGTON BUSINESS JOURNAL, Nov. 28, 2006, *available at* http://washington.bizjournals.com/washington/stories/2006/11/27/daily23.html. Qwest's experience with the City of Colorado Springs, Colorado is a particularly onerous example. *See* Letter from Melissa E. Newman, Vice President, Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, Federal Communications Commission (June 13, 2006), Letter from Kenneth L. Fellman, Counsel to Colorado Springs, Colorado, to Marlene H. Dortch, Secretary, Federal Communications Commission (July 26, 2006). The city charter in Colorado Springs requires that a franchise agreement be approved by voters rather than a franchising authority. Despite the fact that the Communications Act and federal case law deem this approach unlawful, the Colorado Springs City Counsel would not grant a franchise absent a vote, and invited Qwest to file a "friendly lawsuit" (presumably at Qwest's expense) to invalidate that provision of the city charter. 47 U.S.C. §§ 522(10), 541, *Qwest Broadband Services, Inc. v. City of Boulder*, 151 F.Supp.2d 1236 (D. Colo. 2001), Letter from Melissa E. Newman, Vice President, Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, Federal Communications Commission at 2 (June 13, 2006).

[78] *See* Qwest Comments at 9.

[79] *See, e.g.*, South Slope Comments at 7.

[80] Cablevision Reply at 5; Orange County Comments at 5; Palm Beach County Comments at 3. *See* Comcast Comments at 8-9.

[81] Comcast Comments at 16; Cablevision Reply at 2. The incumbent cable operators accuse Verizon of making unreasonable demands through its model franchise. Verizon asserts that it submits a model franchise to begin negotiations because uniformity is necessary for its nationwide service deployment. Verizon Reply at 40. Verizon states that it is willing to negotiate and tailor the model franchise to each locality's needs. *Id.*

[82] LMC Comments at 18.

consideration of franchise applications, and of those that have such limits, many set forth lengthy time frames. In localities without a time limit or with an unreasonable time limit, the delays caused by the current operation of the franchising process present a significant barrier to entry.[83] For example, the cities of Chicago and Indianapolis acknowledged that, as currently operated, their franchising processes take one to three years, respectively.[84] Miami-Dade's cable ordinance permits the county to make a final decision on a cable franchise up to eight months after receiving a completed application, and the process may take longer if an applicant submits an incomplete application or amends its application. [85]

26. Incumbent cable operators and LFAs state that new entrants could gain rapid entry if the new entrants simply agreed to the same terms applied to incumbent cable franchisees.[86] However, this is not a reasonable expectation generally, given that the circumstances surrounding competitive entry are considerably different than those in existence at the time incumbent cable operators obtained their franchises. Incumbent cable operators originally negotiated franchise agreements as a means of acquiring or maintaining a monopoly position.[87] In most instances, imposing the incumbent cable operator's terms and conditions on a new entrant would make entry prohibitively costly because the entrant cannot assume that it will quickly – or ever – amass the same number or percentage of subscribers that the incumbent cable operator captured.[88] The record demonstrates that requiring entry on the same terms as incumbent cable operators may thwart entry entirely or may threaten new entrants' chances of success once in the market.

27. Incumbent cable operators also suggest that delay is attributable to competitors that are not really serious about entering the market, as demonstrated by their failure to file the thousands of franchise applications required for broad competitive entry.[89] We reject this explanation as inconsistent with both the record as well as common sense. Given the complexity and time-consuming nature of the current franchising process, it is patently unreasonable to expect any competitive entrant to file several thousand applications and negotiate several thousand franchising processes at once. Moreover, the incumbent LECs have made their plans to enter the video services market abundantly clear, and the evidence in the record demonstates their seriousness about doing so. For instance, they are investing billions of dollars to upgrade their networks to enable the provision of video services, expenditures that

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[83] We recognize that some franchising authorities move quickly, as a matter of law or policy. The record indicates that some LFAs have stated that they welcome competition to the incumbent cable operator, and actively facilitate such competition. *See, e.g.*, Manatee County, Fla. Comments at 4, Ada Township, *et al*. Comments at 16-27. For example, a consolidated franchising authority in Oregon negotiated and approved competitive franchises within 90 days. *See* Mt. Hood Cable Regulatory Commission Comments at 20. An advisory committee in Minnesota granted two competitive franchises in six months, after a statutorily imposed eight-week notice and hearing period. *See* Southwest Suburban Cable Commission Comments at 5, 7. While we laud the prompt disposition of franchise applications in these particular areas, the record shows that these examples are atypical.

[84] *See* Chicago Comments at 4; Indianapolis Comments at 8.

[85] Miami-Dade Comments at 3.

[86] *See, e.g.*, ANC Reply at 5-6. Commenters assert that Verizon's model agreement prevents LFAs from exercising control over rights-of-way, does not require Verizon to repair damage to municipal property due to construction, does not require service to all residents, and contains an "opt-out" provision that allows Verizon to abandon an area it does not find profitable. ANC Reply at 8-10.

[87] Verizon Reply at 38-40.

[88] Verizon Comments at 53.

[89] Cablevision Comments at 3.

would make little sense if they were not planning to enter the video market.[90] Finally, the record also demonstrates that the obstacles posed by the current operation of the franchising process are so great that some prospective entrants have shied away from the franchise process altogether.[91]

28. We also reject the argument by incumbent cable operators that delays in the franchising process are immaterial because competitive applicants are not ready to enter the market and frequently delay initiating service once they secure a franchise.[92] We find that lack of competition in the video market is not attributable to inertia on the part of competitors. Given the financial risk, uncertainty, and delay new entrants face when they apply for a competitive franchise, it is not surprising that they wait until they get franchise approval before taking all steps necessary to provide service.[93] The sooner a franchise is granted, the sooner an applicant can begin completing those steps. Consequently, shortening the franchising process will accelerate market entry. Moreover, the record shows that streamlining the franchising process can expedite market entry. For example, less than 30 days after Texas authorized statewide franchises, Verizon filed an application for a franchise with respect to 21 Texas communities and was able to launch services in most of those communities within 45 days.[94]

29. Incumbent cable operators offer evidence from their experience in the renewal and transfer processes as support for their contention that the vast majority of LFAs operate in a reasonable and timely manner.[95] We find that incumbent cable operators' purported success in the franchising process is not a useful comparison in this case. Today's large MSOs obtained their current franchises by either renewing their preexisting agreements or by merging with and purchasing other incumbent cable franchisees with preexisting agreements. For two key reasons, their experiences in franchise transfers and renewals are not equivalent to those of new entrants seeking to obtain new franchises.[96] First, in the transfer or renewal context, delays in LFA consideration do not result in a bar to market entry. Second, in the transfer or renewal context, the LFA has a vested interest in preserving continuity of service for subscribers, and will act accordingly.

30. We also reject the claims by incumbent cable operators that the experiences of Ameritech, RCN, and other overbuilders[97] demonstrate that new entrants can and do obtain competitive

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[90] *See* AT&T Comments at 14; Verizon Comments at 27. In addition to negotiating with LFAs, competitors also have lobbied for broad franchising reform. To be sure, when prospective entrants anticipate franchise reform may occur at the state level, there is evidence in the record they often have not sought franchises at the local level. *See* Fairfax County, Va. Comments at 4. Such tactics, however, do not indicate that prospective entrants are not serious about entering the market but rather represent a strategic judgment as to the best method of accomplishing that goal.

[91] Qwest Comments at 9.

[92] NCTA Comments at 11; Comcast Reply at 16; Cablevision Reply at 9; City of Murrieta, Ca. Comments at 2.

[93] *See* Verizon Reply Comments at 37.

[94] Verizon Reply Comments at 37-38. *See also* NTCA Comments at 10-11 (citing Texas PUC testimony at February Commission Meeting held in Keller, Texas, which revealed that 15 companies have filed applications to serve 153 discrete communities in Texas since adoption of the new statewide franchising scheme).

[95] Comcast Comments at 17. For example, Comcast reports that when it acquired AT&T Broadband, it received timely approval from more than 1,800 LFAs within eight months. The company also states that it was well along in the process of receiving approvals from more than 1,500 LFAs for the Adelphia transaction.

[96] AT&T Reply at 22.

[97] The term "overbuild" describes the situation in which a second cable operator enters a local market in direct competition with an incumbent cable operator. In these markets, the second operator, or "overbuilder," lays wires in the same area as the incumbent, "overbuilding" the incumbent's plant, thereby giving consumers a choice between cable service providers. *See Implementation of Section 3 of the Cable Television Consumer Protection and*

(continued…)

franchises in a timely manner.[98] Charter claims that it secured franchises and upgraded its systems in a highly competitive market and that the incumbent LECs possess sufficient resources to do the same.[99] BellSouth notes, however, that Charter does not indicate a single instance in which it obtained a franchise through an initial negotiation, rather than a transfer.[100] Comcast argues that it faces competition from cable overbuilders in several markets.[101] The record is scant and inconsistent, however, with respect to overbuilder experiences in obtaining franchises, and thus does not provide reliable evidence. BellSouth also claims that, despite RCN's claims that the franchising process has worked in other proceedings, RCN previously has painted a less positive picture of the process and has called it a high barrier to entry.[102] Given these facts, we do not believe that the experiences cited by incumbent cable operators shed any significant light on the current operation of the franchising process with respect to competitive entrants.

31. ***Impact of Build-Out Requirements.*** The record shows that build-out issues are one of the most contentious between LFAs and prospective new entrants, and that build-out requirements can greatly hinder the deployment of new video and broadband services. New and potential entrants commented extensively on the adverse impact of build-out requirements on their deployment plans.[103] Large incumbent LECs,[104] small and mid-sized incumbent LECs,[105] competitive LECs[106] and others view build-out requirements as the most significant obstacle to their plans to deploy competitive video and broadband services. Similarly, consumer groups and the U.S. Department of Justice, Antitrust Division,

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Competition Act of 1992, Statistical Report on Average Prices for Basic Service, Cable Programming Services, and Equipment, 20 FCC Rcd 2718, 2719 n.6 (2005).

[98] Cablevision Reply at 6. Comcast states that the overbuilder industry as a whole has more than 16 million households under active franchise and two million households under franchise in anticipation of future network build-outs. Comcast Comments at 5-6 (citing Broadband Service Providers Association Comments, MB Docket No. 05-255, at 7 (filed Sept. 19, 2005)).

[99] Charter Comments at 4. Specifically, Charter states that it entered the cable market in earnest in the late 1990s and has spent the last five years investing billions of dollars to upgrade its cable systems and deploy advanced broadband services in more than 4,000 communities. Charter Comments at 2. During Charter's peak period of growth, it secured over 2,000 franchise transfers with LFAs and invested several billion dollars to upgrade systems, all while subject to significant competition from DBS. Charter Comments at 5.

[100] BellSouth Reply at 11.

[101] Comcast Comments at 4-5.

[102] BellSouth Reply at 13 (citing RCN's petition to deny the AT&T/Comcast merger application).

[103] *See, e.g.*, Qwest Comments at 2; Cincinnati Bell Comments at 10-11; South Slope Comments at 7-9; NTCA Comments at 6-7; Cavalier Telephone Comments at 5; BSPA Comments at 6. *See also* Letter from Lawrence Spiwak, President, Phoenix Ctr. for Advanced Legal and Econ. Pub. Policy Studies, to Marlene Dortch, Secretary, Federal Communications Commission, at Att., *Phoenix Center Policy Paper Number 22: The Consumer Welfare Cost of Cable "Build-out" Rules*, at 3 ("build-out requirements are, on average, counterproductive and serve to *slow down* deployment of communications networks") (March 13, 2006) ("*Phoenix Center Build-Out Paper*").

[104] Qwest Comments at 2.

[105] Cincinnati Bell Comments at 10-11; South Slope Comments at 7-9; NTCA Comments at 6-7 (because the risk is great, the service provided by the new entrants must be guided by sound business principles; forcing a new entrant to build out an entire area before such action is financially justified is tantamount to forcing that entrant out of the video business); USTelecom *Ex Parte* at 8-11.

[106] Cavalier Telephone Comments at 5; BSPA Comments at 6 (a number of competitive franchises have been renegotiated or converted to OVS because the operator could not comply with unreasonable and uneconomic build-out requirements).

urge the Commission to address this aspect of the current franchising process in order to speed competitive entry.[107]

32. The record demonstrates that build-out requirements can substantially reduce competitive entry.[108] Numerous commenters urge the Commission to prohibit LFAs from imposing any build-out requirements, and particularly universal build-out requirements.[109] They argue that imposition of such mandates, rather than resulting in the increased service throughout the franchise area that LFAs desire, will cause potential new entrants to simply refrain from entering the market at all.[110] They argue that even build-out provisions that do not require deployment throughout an entire franchise area may prevent a prospective new entrant from offering service.[111]

33. The record contains numerous examples of build-out requirements at the local level that resulted in delayed entry, no entry, or failed entry. A consortium of California communities demanded that Verizon build out to every household in each community before Verizon would be allowed to offer service to any community, even though large parts of the communities fell outside of Verizon's telephone service area.[112] Furthermore, Qwest has withdrawn franchise applications in eight communities due to build-out requirements.[113] In each case, Qwest determined that entering into a franchise agreement that mandates universal build-out would not be economically feasible.[114]

[107] *See* MMTC Comments at 13-24; Consumers for Cable Choice Comments at 8; DOJ *Ex Parte* at 12-13, 15 (stating that build-out requirements lead to abandonment of entry, less efficient competition, or higher prices).

[108] *See, e.g.*, USTelecom Comments at 24 (citing example of Shenandoah Telecommunications, which cannot provide service to an entire county, and thus cannot provide service at all). *See also Phoenix Center Build-Out Paper* at 1, 3; DOJ *Ex Parte* at 12-13, 15.

[109] *See, e.g.*, Alcatel Comments at 10-11; AT&T Comments at 44; BellSouth Reply at 6; NTCA Comments at 6.

[110] *See, e.g.*, AT&T Comments at 44; Qwest Comments at 2; Ad Hoc Telecom Manufacturer Coalition Comments at 5; DOJ *Ex Parte* at 12-13, 15.

[111] Not all new entrants to the video market with existing telecommunications facilities are engaging in the upgrades to which Verizon and AT&T have committed. Cavalier Telephone, for example, is delivering IPTV over copper lines. Such delivery is limited, however, by ADSL-2 technology. Cavalier Telephone argues that it is unreasonable to require that it become capable of providing service to all households in a franchise area, which would require Cavalier Telephone to dig up rights-of-way and install duplicative facilities, which it has specifically sought to avoid doing by virtue of relying on the unbundled local loop. Cavalier Telephone Comments at 5. Similarly, Guadalupe Valley Telephone Cooperative (GVTC) could not deploy service in the face of differing build-out requirements across jurisdictions. *See* AT&T Reply at 37. Once Texas's new statewide franchising law went into effect, however, deployment became economically feasible for GVTC. *See id. See also Phoenix Center Build-out Paper at* 1, 3, 4 (build-out rules can significantly increase the costs of a new video entrant, and are actually counter-productive, serving primarily to deter new video entry and slow down deployment of communications networks); *Phoenix Center Redlining Paper* at 3 (even when build-out requirements are applied to new entrants altruistically, the requirements can be self-defeating and often erect insurmountable barriers to entry for new firms); BSPA at 4 (When a new network operator is forced to comply with a build-out that is equal to the existing incumbent cable footprint, it is forced to a build on a timeframe and in geographic areas where the cost to build and customer density will likely produce an economic loss for both network operators.), DOJ *Ex Parte* at 12-13, 15.

[112] Verizon Comments at 41-42. Before the new statewide legislation, a Texas community had made the same request.

[113] *See* Qwest Comments at 9.

[114] *Id*. at 10.

34. In many instances, level-playing-field provisions in local laws or franchise agreements compel LFAs to impose on competitors the same build-out requirements that apply to the incumbent cable operator.[115] Cable operators use threatened or actual litigation against LFAs to enforce level-playing-field requirements and have successfully delayed entry or driven would-be competitors out of town.[116] Even in the absence of level-playing-field requirements, incumbent cable operators demand that LFAs impose comparable build-out requirements on competitors to increase the financial burden and risk for the new entrant.[117]

35. Build-out requirements can deter market entry because a new entrant generally must take customers from the incumbent cable operator, and thus must focus its efforts in areas where the take-rate will be sufficiently high to make economic sense. Because the second provider realistically cannot count on acquiring a share of the market similar to the incumbent's share, the second entrant cannot justify a large initial deployment.[118] Rather, a new entrant must begin offering service within a smaller area to determine whether it can reasonably ensure a return on its investment before expanding.[119] For example, Verizon has expressed significant concerns about deploying service in areas heavily populated with MDUs already under exclusive contract with another MVPD.[120] Due to the risk associated with entering the video market, forcing new entrants to agree up front to build out an entire franchise area too quickly may be tantamount to forcing them out of – or precluding their entry into – the business.[121]

36. In many cases, build-out requirements also adversely affect consumer welfare. DOJ noted that imposing uneconomical build-out requirements results in less efficient competition and the potential for higher prices.[122] Non-profit research organizations the Mercatus Center and the Phoenix Center argue that build-out requirements reduce consumer welfare.[123] Each conclude that build-out

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[115] *See, e.g.*, GMTC Comments at 15; Philadelphia Reply at 2; FTTH Council at 33-34; US Telecom at 30-31; TCCFUI Comments at 11, 15.

[116] BSPA Comments at 5-6; BellSouth Comments at 44; Verizon Comments at 33-34 (noting that some LFAs are requesting indemnification from competitive applicants). For example, Insight Communications filed suit against the City of Louisville and Knology. Although the LFA and Knology ultimately won, the delay resulted in Knology declining to enter that market. BSPA Comments at 5-6.

[117] *See* AT&T Comments at 51.

[118] Qwest Comments at 8.

[119] FTTH Council Comments at 33-34.

[120] Verizon Reply at 70-71.

[121] NTCA Comments at 7. *See also* DOJ *Ex Parte* at 12-13, 15; FTTH Council Comments at 29 (competitive entrants face a riskier investment than incumbents faced when they entered; moreover, incumbent firms have market power in the video market, their customers have little choice, and their costs can be spread over a large base, whereas new entrants do not have this same advantage). Although it is sometimes possible to renegotiate a build-out requirement if the new entrant cannot meet it, in many cases the LFA imposes substantial penalties for failure to meet a build-out requirement. *See* Anne Arundel County *et al*. Comments at 4, FTTH Council Comments at 34 (citing Grande Communications franchise agreement establishing penalty of $2,000 per day); Letter from Melissa E. Newman, Vice President-Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, Federal Communications Commission, (Apr. 26, 2006), Attachment at 7 ("Qwest *Ex Parte*").

[122] *Id.* at 13.

[123] Mercatus Center Comments at 39-41; *Phoenix Center Build-Out Paper* at 1; Letter from Stephen Pociask, President, American Consumer Institute, to Marlene Dortch, Secretary, Federal Communications Commission (March 3, 2006).

requirements imposed on competitive cable entrants only benefit an incumbent cable operator.[124] The Mercatus Center, citing data from the FCC and GAO indicating that customers with a choice of cable providers enjoy lower rates, argues that, to the extent that build-out requirements deter entry, they result in fewer customers having a choice of providers and a resulting reduction in rates.[125] The Phoenix Center study contends that build-out requirements deter entry and conflict with federal, state, and local government goals of rapid broadband deployment.[126] Another research organization, the American Consumer Institute (ACI), concluded that build-out requirements are inefficient: if a cable competitor initially serves only one neighborhood in a community, and a few consumers in this neighborhood benefit from the competition, total welfare in the community improves because no consumer was made worse and some consumers (those who can subscribe to the competitive service) were made better.[127] In comparison, requirements that deter competitive entry may make some consumers (those who would have been able to subscribe to the competitive service) worse off.[128] In many instances, placing build-out conditions on competitive entrants harms consumers and competition because it increases the cost of cable service.[129] Qwest commented that, in those communities it has not entered due to build-out requirements, consumers have been deprived of the likely benefit of lower prices as the result of competition from a second cable provider.[130] This claim is supported by the Commission's 2005 annual cable price survey, in which the Commission observed that average monthly cable rates varied markedly depending on the presence – and type – of MVPD competition in the local market. The greatest difference occurred where there was wireline overbuild competition, where average monthly cable rates were 20.6 percent lower than the average for markets deemed noncompetitive.[131]

37. For these reasons, we disagree with LFAs and incumbent cable operators who argue that unlimited local flexibility to impose build-out requirements, including universal build-out of a franchise area, is essential to promote competition in the delivery of video programming and ensure a choice in

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[124] *See id*.

[125] Mercatus Center Comments at 41. The Mercatus Center bases this assertion on the evidence that cable rate regulation does not affect cable rates significantly, which suggests that cable providers are not subsidizing less-profitable areas with the returns from more-profitable areas. *Id.*

[126] *Phoenix Center Build-Out Paper* at 1.

[127] ACI Comments at 7.

[128] AT&T Comments at 48 (citing Thomas Hazlett & George Ford, *The Fallacy of Regulatory Symmetry: An Economic Analysis of the "Level Playing Field" in Cable TV Franchising Statutes*, 3 BUSINESS AND POLITICS issue 1, at 25-26 (2001)).

[129] AT&T Comments at 48 (citing Thomas Hazlett & George Ford, *The Fallacy of Regulatory Symmetry: An Economic Analysis of the "Level Playing Field" in Cable TV Franchising Statutes*, 3 BUSINESS AND POLITICS issue 1, at 25-26 (2001)).

[130] Qwest Comments at 10.

[131] *Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992: Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment*, MM Docket. No. 92-266, FCC 06-179, para. 12 (rel. Dec. 27, 2006) ("2005 Cable Price Survey"). *See also Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 20 FCC Rcd 2755, 2772-73 (2005) ("*2005 Video Competition Report*").

providers for every household.[132] In many cases, build-out requirements may have precisely the opposite effects – they deter competition and deny consumers a choice.

38. Although incumbent LECs already have telecommunications facilities deployed over large areas, build-out requirements may nonetheless be a formidable barrier to entry for them for two reasons. First, incumbent LECs must upgrade their existing plant to enable the provision of video service, which often costs billions of dollars. Second, as the Commission stated in the *Local Franchising NPRM*, the boundaries of the areas served by facilities-based providers of telephone and/or broadband services frequently do not coincide with the boundaries of the areas under the jurisdiction of the relevant LFAs.[133] In some cases, a potential new entrant's service area comprises only a portion of the area under the LFA's jurisdiction.[134] When LECs are required to build out where they have no existing plant, the business case for market entry is significantly weakened because their deployment costs are substantially increased.[135] In other cases, a potential new entrant's facilities may already cover most or all of the franchise area, but certain economic realities prevent or deter the provider from upgrading certain "wire center service areas" within its overall service area.[136] For example, some wire center service areas may encompass a disproportionate level of business locations or multi-dwelling units ("MDUs") with MVPD exclusive contracts.[137] New entrants argue that the imposition of build-out requirements in either circumstance creates a disincentive for them to enter the marketplace.[138]

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[132] State of Hawaii Reply Comments at 4-5; Ada Township, *et al* Comments at 8-9; Manatee County, Fla. Comments at 19; Burnsville/Eagan Reply Comments at 19-20; New Jersey Board of Public Utilities Comments at 11-12.

[133] *Local Franchising NPRM*, 20 FCC Rcd at para. 618595.

[134] *See* NTCA Comments at 15; South Slope Comments at 8-9 (mandatory build-out of entire franchise areas unreasonably impedes competitive entry where entrants' proposed service area is not located entirely within an LFA-defined local franchise area).

[135] *See, e.g.*, FTTH Council Comments at 33-34; South Slope Comments at 8-9; NTCA Comments at 15; BellSouth Reply at 25. BellSouth has a franchise to serve unincorporated Cherokee County, Ga., but the geographic area of this franchise is much larger than the boundaries of BellSouth's wire center. *Id.* BellSouth faces a similar issue in Orange County, Fla. *Id. See also* Linda Haugsted, *Franchise War in Texas*, MULTICHANNEL NEWS, May 2, 2005 (noting that, although Verizon had 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."). NTCA states that theoretically the incumbent LEC could extend its facilities, but to do so within another provider's incumbent LEC territory would require an incumbent LEC to make a financially significant business decision, solely for purposes of providing video programming. *See* NTCA Comments at 15.

[136] *See* Letter from Leora Hochstein, Executive Director, Federal Regulatory, Verizon, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 05-311 at 3 (filed May 3, 2006). In this *Order* we use "wire center service area" to mean the geographic area served by a wire center as defined in Part 51 of the Commission's rules, except wire centers that have no line-side functionality, such as switching units that exclusively interconnect trunks. See 47 C.F.R. § 51.5. *See also Unbundled Access to Network Elements: Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 FCC Rcd 2533, 2586 (2005), para. 87 n.251 ("*Triennial Review Remand Order*") ("By 'wire center,' we mean any incumbent LEC switching office that terminates and aggregates loop facilities"). The Commission's rules define "wire center" to mean "the location of an incumbent LEC local switching facility containing one or more central offices as defined in Part 36 [of the Commission's rules]. The wire center boundaries define the area in which all customers served by a given wire center are located." 47 C.F.R. § 51.5. The term "wire center" is often used interchangeably with the term "central office." Technically, the wire center is the location where a LEC terminates subscriber local loops, along with the facilities necessary to maintain them.

[137] New entrants also point out that some wire center service areas are low in population density (measured by homes per cable plant mile). The record suggests, however, that LFAs generally have not required franchisees to

(continued…)

39. Incumbent cable operators assert that new entrants' claims are exaggerated, and that, in most cases, LEC facilities are coterminous with municipal boundaries.[139] The evidence submitted by new entrants, however, convincingly shows that inconsistencies between the geographic boundaries of municipalities and the network footprints of telephone companies are commonplace.[140] The cable industry has adduced no contrary evidence. The fact that few LFAs argued that non-coterminous boundaries are a problem[141] is not sufficient to contradict the incumbent LECs' evidence.[142]

40. Based on the record as a whole, we find that build-out requirements imposed by LFAs can constitute unreasonable barriers to entry for competitive applicants. Indeed, the record indicates that because potential competitive entrants to the cable market may not be able to economically justify build-out of an entire local franchising area immediately,[143] these requirements can have the effect of granting *de facto* exclusive franchises, in direct contravention of Section 621(a)(1)'s prohibition of exclusive cable franchises.[144]

41. Besides thwarting potential new entrants' deployment of video services and depriving consumers of reduced prices and increased choice,[145] build-out mandates imposed by LFAs also may directly contravene the goals of Section 706 of the Telecommunications Act of 1996, which requires the Commission to "remov[e] barriers to infrastructure investment" to encourage the deployment of broadband services "on a reasonable and timely basis."[146] We agree with AT&T that Section 706, in

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provide service in low-density areas. *See, e.g.,* Madison, WI Comments at 4 (limiting build-out to areas with 40 dwelling units per cable mile); Renton, WA Comments at 3 (limiting build-out to 35 dwelling units per mile); West Palm Beach, Fla. Comments at 11 (limiting build-out to areas with 20 homes per mile). Nevertheless, density is likely to be of greater concern to a new entrant than to an incumbent cable operator, because the new entrant has to lure customers from the incumbent cable operator, and therefore cannot count on serving as many of the customers in a cable plant mile.

[138] BSPA Comments at 5 (when the footprint of an existing system does not match the territory of an LFA, build-out requirements restrict the growth of competition that could be created by incremental expansion of existing networks into adjacent territories because the operator must have the financial means to build out the entire adjacent franchise area before commencing any build-out); NTCA Comments at 15 (requiring small, rural incumbent LECs to deploy service beyond their existing telephone service areas would prohibit some carriers from offering video services to any community, thereby preventing competition). *See also* DOJ *Ex Parte* at 12-13, 15.

[139] *See* Cablevision Reply at 16-17; Charter Reply at 8.

[140] *See* BSPA Comments at 5; South Slope Comments at 8-9; NTCA Comments at 15.

[141] Comcast Reply at 21 (citing comments of NATOA and Torrance, Cal.).

[142] *Compare* Tele Atlas Wire Center Premium v10.1 (April 2006) Maps for Bergen County, NJ and Los Angeles, Ca. and surrounding areas *with* The BRIDGE Data Group CableBounds Maps for Bergen County, NJ and Los Angeles, Ca. and surrounding areas (filed by the Media Bureau), *available at* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6518618170, http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6518618171.

[143] *See* FTTH Council Comments at 32; NTCA Comments at 7; Qwest Comments at 2, 8; Verizon Comments at 39-40.

[144] 47 U.S.C. § 544(a)(1).

[145] *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 05-255, Twelfth Annual Report, FCC 06-11, at ¶ 41 (rel. Mar. 3, 2006) (noting that overbuild competition, when present, often leads to lower cable rates and higher quality service).

[146] Section 706 of the Telecommunications Act of 1996, 47 U.S.C. § 157 nt.

conjunction with Section 621(a)(1), requires us to prevent LFAs from adversely affecting the deployment of broadband services through cable regulation.[147]

42. We do not find persuasive incumbent cable operators' claims that build-out should necessarily be required for new entrants into the video market because of certain obligations faced by cable operators in their deployment of voice services. To the extent cable operators believe they face undue regulatory obstacles to providing voice services, they should make that point in other proceedings, not here. In any event, commenters generally agree that the record indicates that the investment that a competitive cable provider must make to deploy video in a particular geographic area far outweighs the cost of the additional facilities that a cable operator must install to deploy voice service.[148]

43. ***LFA Demands Unrelated to the Provision of Video Services.*** Many commenters recounted franchise negotiation experiences in which LFAs made unreasonable demands unrelated to the provision of video services. Verizon, for example, described several communities that made unreasonable requests, such as the purchase of street lights, wiring for all houses of worship, the installation of cell phone towers, cell phone subsidies for town employees, library parking at Verizon's facilities, connection of 220 traffic signals with fiber optics, and provision of free wireless broadband service in an area in which Verizon's subsidiary does not offer such service.[149] In Maryland, some localities conditioned a franchise upon Verizon's agreement to make its data services subject to local customer service regulation.[150] AT&T provided examples of impediments that Ameritech New Media faced when it entered the market, including a request for a new recreation center and pool.[151] FTTH

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[147] AT&T Comments at 45. *See also infra* para. 63.

[148] *See* NTCA Comments at 7; Verizon Reply at 54-55; American Consumer Institute Comments at 7; *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978, 17142-17143 (2003) ("*Triennial Review Order*"); *See also* High Tech Broadband Coalition Comments at 4-5 (fiber-to-the-home deployment increased 5300 percent since the *Triennial Review Order*, due in large part to the elimination of barriers to entry in that Order).

[149] Verizon Comments at 57 & Attachment A at 16-17. The *Wall Street Journal* reported "[Tampa, Florida] City officials presented [Verizon] with a $13 million wish list, including money for an emergency communications network, digital editing equipment and video cameras to film a math-tutoring program for kids." Another community presented Verizon with "requests for seed money for wildflowers and a video hookup for Christmas celebrations." Dionne Searcey, *As Verizon Enters Cable Business, it Faces Local Static*, WALL ST. J., Oct. 28, 2005, at A1. *But see* Verizon Comments at 65, filed February 13, 2006 (stating that "one franchising authority in Florida demanded that Verizon meet the incumbent cable operator's cumulative payments for PEG, which would exceed $6 million over 15 years of Verizon's proposed franchise term. When Verizon rejected this demand, the LFA doubled its request, asking for a fee in excess of $13 million that it said would be used for both PEG support and the construction of a redundant institutional network."); Verizon Revised Comments, filed March 6, 2006 at 65 (amending the second sentence of their comments above, in response to a request from the City of Tampa, to state that "[w]hen Verizon rejected this demand and asked for an explanation, the LFA provided a summary 'needs assessment' in excess of $13 million for both PEG support."); Tampa Reply at 3-4 (noting that Verizon's errata "clarified that the City of Tampa has not demanded Verizon provide $13.5 million dollars as a condition of granting a cable television franchise," and calling the *Wall Street Journal* article assertions an "urban legend"); John Dunbar, *FCC's Cable TV Ruling Criticized*, ASSOCIATED PRESS, Jan. 29, 2007 (stating that "[The Tampa City Attorney] said Tampa gave Verizon a $13 million 'needs assessment' that was required by law in order to obtain contributions for equipment for public access and government channels" and also quoting the City Attorney saying that "it is possible the 'needs assessment' included video cameras to film shows such as the math class, but that there was never 'a specific quid pro quo.' Nor was anything like that mentioned in the franchise agreement.").

[150] Verizon Comments at 75.

[151] AT&T Comments at 24.

Council highlighted Grande Communications' experience in San Antonio, which required that Grande Communications make an up-front, $1 million franchise fee payment and fund a $50,000 scholarship with additional annual contributions of $7,200.[152] The record demonstrates that LFA demands unrelated to cable service typically are not counted toward the statutory 5 percent cap on franchise fees, but rather imposed on franchisees in addition to assessed franchise fees.[153] Based on this record evidence, we are convinced that LFA requests for unreasonable concessions are not isolated, and that these requests impose undue burdens upon potential cable providers.

44. ***Assessment of Franchise Fees.*** The record establishes that unreasonable demands over franchise fee issues also contribute to delay in franchise negotiations at the local level and hinder competitive entry.[154] Fee issues include not only which franchise-related costs imposed on providers should be included within the 5 percent statutory franchise fee cap established in Section 622(b),[155] but also the proper calculation of franchise fees (*i.e.*, the revenue base from which the 5 percent is calculated). In Virginia, municipalities have requested large "acceptance fees" upon grant of a franchise, in addition to franchise fees.[156] Other LFAs have requested consultant and attorneys' fees.[157] Several Pennsylvania localities have requested franchise fees based on cable and non-cable revenues.[158] Some commenters assert that an obligation to provide anything of value, including PEG costs, should apply toward the franchise fee obligation.[159]

45. The parties indicate that the lack of clarity with respect to assessment of franchise fees impedes deployment of new video programming facilities and services for three reasons. First, some LFAs make unreasonable demands regarding franchise fees as a condition of awarding a competitive franchise. Second, new entrants cannot reasonably determine the costs of entry in any particular community. Accordingly, they may delay or refrain from entering a market because the cost of entry is unclear and market viability cannot be projected.[160] Third, a new entrant must negotiate these terms prior to obtaining a franchise, which can take a considerable amount of time. Thus, unreasonable demands by some LFAs effectively creates an unreasonable barrier to entry.

46. ***PEG and I-Net Requirements.*** Negotiations over PEG and I-Nets also contribute to delays in the franchising process. In response to the *Local Franchising NPRM*, we received numerous comments asking for clarification of what requirements LFAs reasonably may impose on franchisees to

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[152] FTTH Council Comments at 38.

[153] BSPA Comments at 8. BSPA argues that under the current franchising process, LFAs are able to bargain for capital payments to use on infrastructure needs when LFAs should use the capital to benefit consumers. BSPA claims that LFAs use the capital to build and maintain I-Nets, city broadcasting facilities, and traffic light control systems. *Id.*

[154] *See, e.g.*, AT&T Comments at 64-67; BellSouth Comments at 38-40; Cavalier Telephone Comments at 7; FTTH Council Comments at 38-40. *But see* NATOA Reply at 27-35.

[155] 47 U.S.C. § 542(b).

[156] Verizon Comments at 59.

[157] *Id*. at 59-60.

[158] *Id*. at 63.

[159] AT&T Comments at 65-67; BellSouth Comments at 39.

[160] AT&T Reply at 31-32.

support PEG and I-Nets.[161] We also received comments suggesting that some LFAs are making unreasonable demands regarding PEG and I-Net support as a condition of awarding competitive franchises.[162] LFAs have demanded funding for PEG programming and facilities that exceeds their needs, and will not provide an accounting of where the money goes.[163] For example, one municipality in Florida requested $6 million for PEG facilities, and a Massachusetts community requested 10 PEG channels, when the incumbent cable operator only provides two.[164] Several commenters argued that it is unreasonable for an LFA to request a number of PEG channels from a new entrant that is greater than the number of channels that the community is using at the time the new entrant submits its franchise application.[165] The record indicates that LFAs also have made what commenters view as unreasonable institutional network requests, such as free cell phones for employees, fiber optic service for traffic signals, and redundant fiber networks for public buildings.[166]

47. ***Level-Playing-Field Provisions.*** The record demonstrates that, in considering franchise applications, some LFAs are constrained by so-called "level-playing-field" provisions in local laws or incumbent cable operator franchise agreements.[167] Such provisions typically impose upon new entrants terms and conditions that are neither "more favorable" nor "less burdensome" than those to which existing franchisees are subject.[168] Some LFAs impose level-playing-field requirements on new entrants even without a statutory, regulatory, or contractual obligation to do so.[169] Minnesota's process allows incumbent cable operators to be active in a competitor's negotiation, and incumbent cable operators have challenged franchise grants when those incumbent cable operators believed that the LFA did not follow correct procedure.[170] According to BellSouth, the length of time for approval of its franchises was tied directly to level-playing-field constraints; absent such demands (in Georgia, for example), the company's applications were granted quickly.[171] NATOA contends, however, that although level-playing-field

[161] *See, e.g.*, AT&T Comments at 67-70; BellSouth Comments at 39; Consumers for Cable Choice Comments at 8; FTTH Council Comments at 36-37, 66-67; Verizon Comments at 65-75. *But see* NATOA Reply at 30-42.

[162] FTTH Council Comments at 36; Verizon Comments at 65-66.

[163] Verizon Comments at 65.

[164] *Id*. at 65-66.

[165] Consumers for Cable Choice Comments at 8; Verizon Comments at 71.

[166] Verizon Comments at 73.

[167] *See, e.g.*, Orange County, Fla. Comments at 3; Northwest Suburbs Cable Communications Commission Comments at 3; Winston-Salem, N.C. Comments at 5; Albuquerque, N.M. Comments at 3; Tulsa, Okla. Comments at 2-4; Enumclaw, Wash. Comments at 2; Madison, Wis. Comments at 5-6.

[168] *See Local Franchising NPRM*, 20 FCC Rcd at 18588. At least 10 states impose level-playing-field requirements upon LFAs, and those laws vary significantly in the subject matters they encompass. For example, compare Minnesota's requirement that a competitive entrant face similar build-out, franchise fee, and PEG requirements to Illinois's requirement that the competitive franchise be no more favorable with respect to the territorial extent of the franchise, system design, technical performance standards, construction schedules, bonds, standards for construction and installation of facilities, service to subscribers, PEG channels and programming, production assistance, liability and indemnification and franchise fees. MINN. STAT. ANN. § 238.08 (West 2006), 55 ILL. COMP. STAT. ANN. 5/5-1095(e)(4) (West 2006), *see also* ALA. CODE § 11-27-2 (2005), CONN. GEN. STAT. § 16-331(g) (2006), FLA. STAT. § 166.046(3) (2006), N.H. REV. STAT. ANN. § 53-C:3-b (2005), OKLA. STAT. ANN. tit. 11, § 22-107.1(B) (West 2006). S.D. CODIFIED LAWS § 9-35-27 (2005), TENN. CODE. ANN. § 7-59-203 (2005).

[169] *See* GMTC *et al.* Comments at 15; Pasadena, Ca. Comments at 10-11; Philadelphia, Pa. Comments at 7. *See also* AT&T Reply at 14.

[170] LMC Comments at 12-15.

provisions sometimes can complicate the franchising process, they do not present unreasonable barriers to entry.[172] NATOA and LFAs argue that level-playing-field provisions serve important policy goals, such as ensuring a competitive environment and providing for an equitable distribution of services and obligations among all operators.[173]

48. The record demonstrates that local level-playing-field mandates can impose unreasonable and unnecessary requirements on competitive applicants.[174] As noted above, level-playing-field provisions enable incumbent cable operators to delay or prevent new entry by threatening to challenge any franchise that an LFA grants.[175] Comcast asserts that MSOs are well within their rights to insist that their legal and contractual rights are honored in the grant of a subsequent franchise.[176] The record demonstrates, however, that local level-playing-field requirements may require LFAs to impose obligations on new entrants that directly contravene Section 621(a)(1)'s prohibition on unreasonable refusals to award a competitive franchise.[177] In most cases, incumbent cable operators entered into their franchise agreements in exchange for a monopoly over the provision of cable service.[178] Build-out requirements and other terms and conditions that may have been sensible under those circumstances can be unreasonable when applied to competitive entrants. NATOA's argument that level-playing-field requirements always serve to ensure a competitive environment and provide for an equitable distribution of services and obligations ignores that incumbent and competitive operators are not on the same footing. LFAs do not afford competitive providers the monopoly power and privileges that incumbents received when they agreed to their franchises, something that investors recognize.[179]

49. Moreover, competitive operators should not bear the consequences of an incumbent cable operator's choice to agree to any unreasonable franchise terms that an LFA may demand. And while the record is mixed as to whether level-playing-field mandates "assure that cable systems are responsive to the needs and interests of the local community,"[180] the more compelling evidence indicates that they do not because they prevent competition. Local level-playing-field provisions impose costs and risks

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[171] BellSouth Reply at 7.

[172] NATOA Reply at 43.

[173] *See, e.g.*, NATOA Reply at 44; Burnsville/Eagan Comments at 44; City of Philadelphia Reply at 2.

[174] *See, e.g.*, South Slope Comments at 7-8 (build-out); Verizon Comments at 60-61, 71 (PEG requirements); AT&T Comments at 67 (redundant facilities). *See also* FTTH Council Comments at 29-30 (quoting Hazlett & Ford study concluding that the result of level-playing-field laws "is that incumbents and [LFAs] can force entrants to incur sunk costs considerably in excess of what free market conditions would imply"). We note that, as described below, we do not address – and therefore do not preempt – state laws governing the franchising process including state level-playing-field mandates.

[175] *See supra* para. 34; *see also* DOJ *Ex Parte* at 15-16.

[176] Comcast Reply at 17-18 (citing Comcast's involvement in Verizon's Howard County, Maryland, franchise approval process).

[177] Mercatus Center at 39-40; *Phoenix Center Competition Paper* at 7.

[178] *Id.*

[179] *See* BSPA Comments 4; USTelecom Comments at 51-53; Mercatus Comments at 39-40.

[180] 47 U.S.C. § 521(2); *Id.*

sufficient to undermine the business plan for profitable entry in a given community, thereby undercutting the possibility of competition.[181]

50. ***Benefits of Cable Competition.*** We further agree with new entrants that reform of the operation of the franchise process is necessary and appropriate to achieve increased video competition and broadband deployment.[182] The record demonstrates that new cable competition reduces rates far more than competition from DBS. Specifically, the presence of a second cable operator in a market results in rates approximately 15 percent lower than in areas without competition – about $5 per month.[183] The magnitude of the rate decreases caused by wireline cable competition is corroborated by the rates charged in Keller, Texas, where the price for Verizon's "Everything" package is 13 percent below that of the incumbent cable operator, and in Pinellas County, Florida, where Knology is the overbuilder and the incumbent cable operator's rates are $10-15 lower than in neighboring areas where it faces no competition.[184]

51. We also conclude that broadband deployment and video entry are "inextricably linked"[185] and that, because the current operation of the franchising process often presents an unreasonable barrier to entry for the provision of video services, it necessarily hampers deployment of broadband services.[186] The record demonstrates that broadband deployment is not profitable without the ability to compete with the bundled services that cable companies provide.[187] As the Phoenix Center explains, "the more potential revenues that the network can generate in a household, the more likely it is the network will be

[181] Mercatus Comments at 46.

[182] Verizon Reply at 5-8. *See also* DOJ *Ex Parte* at 1, 3.

[183] FTTH Council Comments at 13. *See also* U.S. General Accountability Office, *Subscriber Rates and Competition in the Cable Television Industry*, GAO-04-262T (Mar. 2004) ("[S]ubscribers in areas with a wire-based competitor had monthly cable rates about $5 lower, on average, than subscribers in similar areas without a wire-based competitor. Our interviews with cable operators also revealed that these companies generally lower rates and/or improve customer service where a wire-based competitor is present."); U.S. General Accounting Office, GAO-04-8, *Issues Related to Competition and Subscriber Rates in the Cable Television Industry*, Report to the Chairman, Committee on Commerce, Science and Transportation, U.S. Senate (2003) ("*2003 GAO Report*") at 3 (noting that cable rates are about 15 percent lower in markets where wireline competition is present), and at 10 (estimating that with an average monthly cable rate of approximately $34 that year, subscribers in areas with a wire-based competitor had monthly cable rates about $5 lower, on average, than subscribers in areas without such a competitor); U.S. General Accounting Office, GAO-03-130, *Issues in Providing Cable and Satellite Television Services*, Report to the Subcommittee on Antitrust, Competition, and Business and Consumer Rights, Committee on the Judiciary, U.S. Senate (2002) ("*2002 GAO Report*") at 9 (noting that in franchise areas with a second cable provider, cable prices are approximately 17 percent lower than in comparable areas without a second cable provider). *See also Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 05-255, Twelfth Annual Report, FCC 06-11, at para. 41 (rel. Mar. 3, 2006) and 2005 Cable Price Survey at paras. 2, 14 (noting that cable prices are 17 percent lower and decrease substantially when wireline cable competition is present).

[184] FTTH Council Comments at 15-16, including chart and declaration.

[185] AT&T Comments at 12. *See also* BSPA Comments at 7; Freedomworks Comments at 15; Mercatus Center Comments at 34-35.

[186] Technology and Democracy Project Comments at 4.

[187] AT&T Comments at 12. The Government Accountability Office reached this same conclusion in its review of the video service market. *See Issues in Providing Cable and Satellite Television Services*, GAO 03-130 at 2 (2002).

built to that household."[188] DOJ's comments underscore that additional video competition will likely speed deployment of advanced broadband services to consumers.[189] Thus, although LFAs only oversee the provision of wireline-based video services, their regulatory actions can directly affect the provision of voice and data services, not just cable.[190] We find reasonable AT&T's assertion that carriers will not invest billions of dollars in network upgrades unless they are confident that LFAs will grant permission to offer video services quickly and without unreasonable difficulty.[191]

52. In sum, the current operation of the franchising process deters entry and thereby denies consumers choices.[192] Delays in the franchising process also hamper accelerated broadband deployment and investment in broadband facilities in direct contravention of the goals of Section 706,[193] the President's competitive broadband objectives,[194] and our established broadband goals.[195] In addition, the economic effects of franchising delays can trickle down to manufacturing companies, which in some cases have lost business because potential new entrants would not purchase equipment without certainties that they could deploy their services.[196] We discuss below our authority to address these problems.

B. The Commission Has Authority to Adopt Rules to Implement Section 621(a)(1)

53. In the *Local Franchising NPRM*, the Commission tentatively concluded that it has the authority to adopt rules implementing Title VI of the Act,[197] including Section 621(a)(1).[198] The Commission sought comment on whether it has the authority to adopt rules or whether it is limited to providing guidance.[199] Based on the record and governing legal principles, we affirm this tentative conclusion and find that the Commission has the authority to adopt rules to implement Title VI and, more specifically, Section 621(a)(1).

54. Congress delegated to the Commission the task of administering the Communications Act. As the Supreme Court has explained, the Commission serves "as the 'single Government agency' with 'unified jurisdiction' and 'regulatory power over all forms of electrical communication, whether by

[188] Letter from Lawrence Spiwak, President, Phoenix Ctr. for Advanced Legal and Econ. Pub. Policy Studies, to Marlene Dortch, Secretary, Federal Communications Commission, at Att., *Phoenix Center Policy Paper Number 23: The Impact of Video Service Regulation on the Construction of Broadband Networks to Low-Income Households*, pg 23 (March 13, 2006) ("*Phoenix Center Redlining Paper*").

[189] DOJ *Ex Parte* at 3-4.

[190] FTTH Council Comments at 4.

[191] AT&T Comments at 15.

[192] DOJ *Ex Parte* at 7-8.

[193] Section 706 of the Telecommunications Act of 1996, 47 U.S.C. § 157 nt.

[194] *See* The White House, *A New Generation of American Innovation*, 11-12 (April 2004), *available at* http://www.whitehouse.gov/infocus/technology/economic_policy200404/innovation.pdf.

[195] *See* Federal Communications Commission, *Strategic Plan 2006-2011* at 3 (2005).

[196] AT&T Reply at 9; Alcatel Comments at 1; Letter from Danielle Jafari, Director and Legal Counsel of Government Affairs, Telecommunications Industry Association, to Marlene Dortch, Secretary, Federal Communications Commission (March 9, 2006).

[197] *Local Franchising NPRM*, 20 FCC Rcd at 18589.

[198] 47 U.S.C. § 541(a)(1).

[199] *Local Franchising NPRM*, 20 FCC Rcd at 18589.

telephone, telegraph, cable, or radio.'"[200] To that end, "[t]he Act grants the Commission broad responsibility to forge a rapid and efficient communications system, and broad authority to implement that responsibility."[201] Section 201(b) authorizes the Commission to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act."[202] "[T]he grant in § 201(b) means what it says: The FCC has rulemaking authority to carry out the 'provisions of this Act.'"[203] This grant of authority therefore necessarily includes Title VI of the Communications Act in general, and Section 621(a)(1) in particular. Other provisions in the Act reinforce the Commission's general rulemaking authority. Section 303(r), for example, states that "the Commission from time to time, as public convenience, interest, or necessity requires shall … make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act…."[204] Section 4(i) states that the Commission "may 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."[205]

55. Section 2 of the Communications Act grants the Commission explicit jurisdiction over "cable services."[206] Moreover, as we explained in the *Local Franchising NPRM*, Congress specifically charged the Commission with the administration of the Cable Act, including Section 621.[207] In addition, federal courts have consistently upheld the Commission's authority in this area.[208]

56. Although several commenters disagreed with our tentative conclusion, none has persuaded us that the Commission lacks the authority to adopt rules to implement Section 621(a)(1). Incumbent cable operators and franchise authorities argue that the judicial review provisions in Sections 621(a)(1) and 635[209] indicate that Congress gave the courts exclusive jurisdiction to interpret and enforce

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[200] *United States v. Southwestern Cable Co.*, 392 U.S. 157, 167-68 (1968) (quotation omitted).

[201] *United Telegraph Workers, AFL-CIO v. FCC*, 436 F.2d 920, 923 (D.C. Cir. 1970) (citations and quotations omitted).

[202] 47 U.S.C. § 201(b) ("The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act.").

[203] *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 378 (1999).

[204] *See also* 47 U.S.C. § 151 (the Commission "shall execute and enforce the provisions of this Act").

[205] 47 U.S.C. § 154(i).

[206] 47 U.S.C. § 152 ("The provisions of this Act shall apply with respect to cable service, to all persons engaged within the United States in providing such service, and to the facilities of cable operators which relate to such service, as provided in title VI.").

[207] *Local Franchising NPRM*, 20 FCC Rcd at 18589.

[208] *See City of Chicago v. FCC*, 199 F.3d 424 (7th Cir. 1999) (finding that the FCC is charged by Congress with the administration of the Cable Act, including Section 621). *See also City of New York v. FCC*, 486 U.S. 57, 70 n.6 (1988) (explaining that Section 303 gives the FCC rulemaking power with respect to the Cable Act); *Nat'l Cable Television Ass'n v. FCC*, 33 F.3d 66, 70 (D.C. Cir. 1994) (upholding Commission finding that certain services are not subject to the franchise requirement in Section 621(b)(1)); *United Video v. FCC*, 890 F.2d 1173, 1183 (D.C. Cir. 1989) (denying petitions to review the Commission's syndicated exclusivity rules); *ACLU v. FCC*, 823 F.2d 1554 (D.C. Cir. 1987) (upholding the Commission's interpretive rules regarding Section 621(a)(3)).

[209] 47 U.S.C. § 541(a)(1) ("[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 sets forth the specific procedures for such judicial proceedings. 47 U.S.C. § 555.

Section 621(a)(1), including authority to decide what constitutes an unreasonable refusal to award a competitive cable franchise.[210] We find, however, that this argument reads far too much into the judicial review provisions. The mere existence of a judicial review provision in the Communications Act does not, by itself, strip the Commission of its otherwise undeniable rulemaking authority.[211] As a general matter, the fact that Congress provides a mechanism for judicial review to remedy a violation of a statutory provision does not deprive an agency of the authority to issue rules interpreting that statutory provision. Here, nothing in the statutory language or the legislative history suggests that by providing a judicial remedy, Congress intended to divest the Commission of the authority to adopt and enforce rules implementing Section 621.[212] In light of the Commission's broad rulemaking authority under Section 201 and other provisions in the Act, the absence of a specific grant of rulemaking authority in Section 621 is "not peculiar."[213] Other provisions in the Act demonstrate that when Congress intended to grant exclusive jurisdiction, it said so in the legislation.[214] Here, however, neither Section 621(a)(1) nor Section 635 includes an exclusivity provision, and we decline to read one into either provision.

57. In addition, we note that the judicial review provisions at issue here on their face apply only to a final decision by the franchising authority.[215] They do not provide for review of unreasonable refusals to award an additional franchise by withholding a final decision or insisting on unreasonable terms that an applicant properly refuses to accept. Nor do the judicial review provisions say anything about the broader range of practices governed by Section 621.[216]

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[210] *See* NCTA Reply, at 11-13 (given the courts have concurrent jurisdiction to review many provisions of Title VI, Section 635(a) only has meaning if it is read to grant exclusive jurisdiction to the courts); Comcast Comments at 27-28 (Congress provided no role for the Commission in the franchising process); Comcast Reply at 27-28 (621(a)(1)'s "unreasonably refuse" language and court review are inextricably linked and thus enforcement authority over the franchising approval process lies with the courts); NATOA Comments at 7-8 (same).

[211] *See ACLU v. Texas*, 823 F.2d 1554, 1574 (D.C. Cir 1987) (recognizing that despite a reference to "court action" in Section 622(d), in the absence of more explicit guidance from Congress, the Commission has concurrent jurisdiction to take enforcement action with respect to franchise fee disputes).

[212] *See* BellSouth Reply at 35; USTelecom Reply at 14-16.

[213] *AT&T v. Iowa Utilities Board*, 525 U.S. 366, 385 (1999). In *Iowa Utilities Board*, the Supreme Court reviewed Commission rules implementing provisions of the Telecommunications Act of 1996. In particular, states challenged Commission rules implementing Section 252(c)(2), which provides, "a State commission shall … establish any rates for interconnection, services, or network elements." 47 U.S.C. § 252(c)(2). Although this and other provisions in the 1996 Act entrusted the states with certain tasks, the Supreme Court held that "these assignments … do not logically preclude the Commission's issuance of rules to guide the state-commission judgments." *Iowa Utilities Board*, 525 U.S. at 385. The same reasoning applies to the judicial review provisions in Sections 621(a)(1) and 635.

[214] *See, e.g.,* 47 U.S.C. § 255(f) ("The Commission shall have exclusive jurisdiction with respect to any complaint under this section."). We do not find persuasive commenters' argument that the only way to give Section 635(a) any meaning is to construe it as giving courts exclusive jurisdiction with regard to the three Title VI provisions enumerated in Section 635(a), *i.e.*, Sections 621(a)(1), 625, and 626. *See* NATOA Comments at 9. None of the cases cited by commenters support this proposition. Rather, they suggest that in the absence of an exclusivity provision in the statute, the Commission and courts share jurisdiction. *See, e.g.,* NATOA Comments at 9 (citing *ACLU v. FCC*, 823 F.2d 1554, 1573-75 (D.C. Cir. 1987)).

[215] 47 U.S.C. § 541(a)(1) ("Any applicant whose application for a second franchise has been *denied by a final decision* of the franchising authority may appeal such *final decision* pursuant to the provisions of section 635 for failure to comply with this subsection") (emphasis added); 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 in federal district court or State court) (emphasis added).

[216] *See* USTelecom Reply at 14.

58. We also reject the argument by some incumbent cable operators and franchise authorities that Section 621(a)(1) is unambiguous and contains no gaps in the statutory language that would give the Commission authority to regulate the franchising process.[217] We strongly disagree. Congress did not define the term "unreasonably refuse," and it is far from self-explanatory. The United States Court of Appeals for the District of Columbia Circuit has held that the term "unreasonable" is among the "ambiguous statutory terms" in the Communications Act, and that the "court owes substantial deference to the interpretation the Commission accords them."[218] We therefore find that Section 621(a)(1)'s requirement that an LFA "may not unreasonably refuse to award an additional competitive franchise" creates ambiguity that the Commission has the authority to resolve.[219] The possibility that a court, in reviewing a particular matter, may determine whether an LFA "unreasonably" denied a second franchise does not displace the Commission's authority to adopt rules generally interpreting what constitutes an "unreasonable refusal" under Section 621(a)(1).[220]

59. Some incumbent cable operators and franchise authorities argue that Section 621(a)(1) imposes no general duty of reasonableness on the LFA in connection with procedures for *awarding* a competitive franchise.[221] According to these commenters, the "unreasonably refuse to award" language in the first sentence in Section 621(a)(1) must be read in conjunction with the second sentence, which relates to the *denial* of a competitive franchise application.[222] Based on this, commenters claim that "unreasonably refuse to award" means "unreasonably *deny*" and, thus, Section 621(a)(1) is not applicable before a final decision is rendered.[223] We disagree. By concluding that the language "unreasonably refuse to award" means the same thing as "unreasonably deny," commenters violate the long-settled principle of statutory construction that each word in a statutory scheme must be given meaning.[224] We find that the better reading of the phrase "unreasonably refuse to award" is that Congress intended to cover LFA conduct beyond ultimate denials by final decision, such as situations where an LFA has unreasonably refused to award an additional franchise by withholding a final decision or by insisting on unreasonable terms that an applicant refuses to accept.[225] While the judicial review provisions in Sections

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[217] *See* Comcast Reply at 27.

[218] *Capital Network System, Inc. v. FCC*, 28 F.3d 201, 204 (D.C. Cir. 1994) ("Because 'just,' 'unjust,' 'reasonable,' and 'unreasonable' are ambiguous statutory terms, this court owes substantial deference to the interpretation the Commission accords them.").

[219] 47 U.S.C. § 541(a)(1) (emphasis added).

[220] *See NCTA v. Brand X Internet Services,* 545 U.S. 967, --, 125 S. Ct. 2688, 2700-02 (2005) (where statute is ambiguous, and implementing agency's construction is reasonable, *Chevron* requires federal court to accept agency's construction of statute, even if agency's reading differs from prior judicial construction).

[221] *See* NCTA Comments at 28-29; Comcast Reply at 31.

[222] *See* NCTA Comments at 29; Comcast Reply at 32.

[223] *See* NATOA Comments at 30-31; NCTA Comments at 28-29; Burnsville/Eagan Comments at 31-32; Comcast Reply at 32-33.

[224] *See Bailey v. United States,* 516 U.S. 137, 143-45 (1995) ("We assume that Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning.").

[225] *See, e.g., Tribune Co. v. FCC,* 133 F.3d 61, 66 (D.C. Cir. 1998) (imposing an "intolerable" condition on the grant of a license application may be deemed a *de facto* denial of that license for purposes of the appeal provisions under § 402(b) of the Act, citing *Mobile Communications Corp. of America v. FCC,* 77 F.3d 1399 (D.C. Cir. 1996)). *See also* DOJ *Ex Parte* at 7 (stating that unnecessary delays, demands for goods and services unrelated to the provision of cable services, and imposition of build-out requirements are tantamount to a "refusal" to award an additional competitive franchise).

621(a)(1) and 635 refer to a "final decision" or "final determination,"[226] the Commission's rulemaking authority under Section 621 is not constrained in the same manner. Instead, the Commission has the authority to address what constitutes an unreasonable refusal to award a franchise, and as stated above, a local franchising authority may unreasonably refuse to award a franchise through other routes than issuing a final decision or determination denying a franchise application. For all of these reasons, we conclude that the Commission may exercise its statutory authority to establish federal standards identifying those LFA-imposed terms and conditions that would violate Section 621(a)(1) of the Communications Act.[227]

60. Incumbent cable operators and local franchise authorities also maintain that the legislative history of Section 621(a)(1) demonstrates that Congress reserved to LFAs the authority to determine what constitutes "reasonable" grounds for franchise denials, with oversight by the courts, and left no authority under Section 621(a)(1) for the Commission to issue rules or guidelines governing the franchise approval process.[228] Commenters point to the Conference Committee Report on the 1992 Amendments,[229] which adopted the Senate version of Section 621,[230] rather than the House version, which "contained five examples of circumstances under which it is reasonable for a franchising authority to deny a franchise."[231] We find commenters' reliance on the legislative history to be misplaced. While the House may have initially considered adopting a categorical approach for determining what would constitute a "reasonable *denial*," Congress ultimately decided to forgo that approach and prohibit franchising authorities from unreasonably refusing to *award* an additional competitive franchise.[232] To be sure, commenters are correct to point out that Congress chose not to define in the Act the meaning of the phrase "unreasonably refuse to award." However, commenters' assertion that Congress therefore intended for this gap in the statute to be filled in by only LFAs and courts lacks any basis in law or logic. Rather, we believe that it is far more reasonable to assume, consistent with settled principles of administrative law, that Congress intended that the Commission, which is charged by Congress with the administration of Title VI,[233] to have the authority to do so. There is nothing in the statute or the

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[226] 47 U.S.C. §§ 541(a), 555. *See also Puget Sound Energy, Inc. v. U.S.*, 310 F.3d 613, 624-25 (9th Cir. 2002) (for purposes of determining when power administration's rate determination becomes a "final action" under statutory judicial review provision, court will turn for guidance to general doctrine of finality in administrative law, which "is concerned with whether the initial decision-maker has arrived at a definitive position on the issue that inflicts an actual, concrete injury").

[227] *See* Qwest Reply at 10-11.

[228] *See* NCTA Comments at 22-23; Florida Municipalities Comments at 9-10.

[229] H.R. REP. NO. 102-862, at 77-78 (1992) (Conf. Rep.), *as reprinted in* 1992 U.S.C.C.A.N. 1231, 1259-1260.

[230] S. REP. NO. 102-92, at 185 (1991) (explaining that "[i]t shall not be considered unreasonable for purposes of this provision for local franchising authorities to deny the application of a potential competitor if it is technically infeasible. However, the Committee does not intend technical infeasibility to be the only justification for denying an additional franchise").

[231] H.R. REP. NO. 102-862, at 77-78 (1992) (Conf. Rep.), *as reprinted in* 1992 U.S.C.C.A.N. 1231, 1259-1260 (listing five examples of reasonable denials identified in the House amendment to include: (1) technical infeasibility; (2) failure of the applicant to assure that it will provide adequate public, educational, and governmental access channel capacity, facilities, or financial support; (3) failure of the applicant to assure that it will provide service throughout the entire franchise area within a reasonable period of time; (4) the award would interfere with the ability of the franchising authority to deny renewal of a franchise; and (5) failure to demonstrate financial, technical, or legal qualifications to provide cable service."); H.R. REP. NO. 102-628, at 90 (1992). *See* NCTA Comments at 22; Florida Municipalities Comments at 9-10.

[232] H.R. REP. NO. 102-862, at 77-78 (1992) (Conf. Rep.), *as reprinted in* 1992 U.S.C.C.A.N. 1231, 1259-1260.

[233] *See City of Chicago v. FCC*, 199 F.3d at 428. *See also AT&T Corp. v. Iowa Utilities Board*, 525 U.S. at 377-380.

legislative history to suggest that Congress intended to displace the Commission's explicit authority to interpret and enforce provisions in Title VI, including Section 621(a)(1).

61. The pro-competitive rules and guidance we adopt in this *Order* are consistent with Congressional intent. Section 601 states that Title VI is designed to "promote competition in cable communications."[234] In a report to Congress prepared pursuant to the 1984 Cable Act, 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."[235] In response, Congress revised Section 621(a)(1) to prohibit a franchising authority from unreasonably refusing to award an additional competitive franchise.[236] The regulations set forth herein give force to that restriction and vindicate the national policy goal of promoting competition in the video marketplace.

62. Our authority to adopt rules implementing Section 621(a)(1) is further supported by Section 706 of the Telecommunications Act of 1996, which directs the Commission to encourage broadband deployment by utilizing "measures that promote competition … or other regulating methods that remove barriers to infrastructure investment."[237] The D.C. Circuit has found that the Commission has the authority to consider the goals of Section 706 when formulating regulations under the Act.[238] The record here indicates that a provider's ability to offer video service and to deploy broadband networks are linked intrinsically, and the federal goals of enhanced cable competition and rapid broadband deployment are interrelated.[239] Thus, if the franchising process were allowed to slow competition in the video service market, that would decrease broadband infrastructure investment, which would not only affect video but other broadband services as well.[240] As the DOJ points out, potential gains from competition, such as

[234] 47 U.S.C. § 521(6).

[235] *See Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service*, 5 FCC Rcd 4962, 4974 (1990).

[236] 47 U.S.C. § 541(a)(1). *See also* H.R. REP. NO. 102-628, at 47 (1992) (noting the Commission's recommendation that, in order to encourage competition, Congress should prevent LFAs from unreasonably denying a franchise to potential competitors); *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) (recognizing that "Congress incorporated the Commission's recommendation in the 1992 Cable Act by amending § 621(a)(1) of the Communications Act…"). The legislative history explained that the purpose of this abridgement of local government authority was to promote greater cable competition. S. REP. NO. 102-92, at 47 (1991) (the prohibition on local franchising authorities from unreasonably refusing to grant second franchises is based on evidence in the record that there are benefits from competition between two cable systems and the Committee's belief that LFAs should be encouraged to award second franchises).

[237] Section 706 of the Telecommunications Act of 1996, 47 U.S.C. § 157 nt.

[238] *See USTA v. FCC*, 359 F.3d 554, 580, 583 (D.C. Cir. 2004); *see also* USTelecom Comments at 15; TIA Comments at 16.

[239] *See* Alcatel Comments at 5-6; USTelecom Comments at 6 (broadband growth is tied to bundled services; firm's perceived need to compete for "triple play" customers is the driving force for broadband investment); AT&T Comments at 39-40 (the local franchising process discourages broadband infrastructure investment that supports video along with other broadband services).

[240] *See* Ad Hoc Telcom Manufacturer Coalition Comments at 1-3 (the franchising process threatens to slow down incumbent LECs' capital expenditures, thereby slowing competition in the video service market and reducing output throughout the high-tech manufacturing industry); AT&T Reply at 31-32 (the lack of clear regulatory guidance is chilling investment because new entrants cannot gauge the cost of entry); BellSouth Comments at 20-22 (the current franchising process impedes the deployment of BellSouth's broadband network).

expedited broadband deployment, are more likely to be realized without imposed restrictions or conditions on entry in the franchising process.[241]

63. We reject the argument by incumbent cable operators and LFAs that any rules adopted under Section 621(a)(1) could adversely affect the franchising process.[242] In particular, LFAs contend that cable service requirements must vary from jurisdiction to jurisdiction because cable franchises need to be "tailored to the needs and interests of the local community."[243] The Communications Act preserves a role for local jurisdictions in the franchise process. We do not believe that the rules we adopt today will hamper the franchising process. While local franchising authorities and potential new entrants have opposing viewpoints about the reasonableness of certain terms,[244] we received comments from both groups that agree that Commission guidance concerning factors that are "reasonable" will help to expedite the franchising process.[245] Therefore, we anticipate that our implementation of Section 621(a)(1) will aid new entrants, incumbent cable operators, and LFAs in understanding the bounds of local authority in considering competitive franchise applications.

64. In sum, we conclude that we have clear authority to interpret and implement the Cable Act, including the ambiguous phrase "unreasonably refuse to award" in Section 621(a)(1), to further the congressional imperatives to promote competition and broadband deployment. As discussed above, this authority is reinforced by Section 4(i) of the Communications Act, which gives us broad power to perform acts necessary to execute our functions, and the mandate in Section 706 of the Telecommunications Act of 1996 that we encourage broadband deployment through measures that promote competition.[246] We adopt the rules and regulations in this *Order* pursuant to that authority. We find that Section 621(a)(1) prohibits not only an LFA's ultimate unreasonable denial of a competitive franchise application, but also LFA procedures and conduct that have the effect of unreasonably interfering with the ability of a would-be competitor to obtain a competitive franchise, whether by (1) creating unreasonable delays in the process, or (2) imposing unreasonable regulatory roadblocks, such that they effectively constitute an "unreasonable refusal to award an additional competitive franchise" within the meaning of Section 621(a)(1).[247]

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

65. Commenters in this proceeding identified several specific issues regarding problems with the current operation of the franchising process. These include: (1) failure by LFAs to grant or deny franchises within reasonable time frames; (2) LFA requirements that a facilities-based new entrant build out its cable facilities beyond a reasonable service area; (3) certain LFA-mandated costs, fees, and other compensation and whether they must be counted toward the statutory 5 percent cap on franchise fees; (4)

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[241] DOJ *Ex Parte* at 4.

[242] *See, e.g.,* Anne Arundel County *et al.* Comments at 15 (federal regulation would not allow each locality to tailor franchise terms to its specific needs); NCTA Comments at 23 (universal rules and standards cannot be tailored well enough to define what is reasonable; reasonableness must be reviewed on a case-by-case basis).

[243] NATOA Comments at 27 (quoting Section 601(2) of the Communications Act, 47 U.S.C. § 521(2)).

[244] *See, e.g.,* NATOA Reply at 43; Verizon Comments at 76-77 (disagreeing about the reasonableness of level playing fields).

[245] *See* Manatee County Comments at 15; Verizon Reply at 35.

[246] 47 U.S.C. § 154(i), Section 706 of the Telecommunications Act of 1996, 47 U.S.C. § 157 nt.

[247] *Id.*

new entrants' obligations to provide support mandated by LFAs for PEG and I-Nets; and (5) facilities-based new entrants' obligations to comply with local consumer protection and customer service standards when the same facilities are used to provide other regulated services, such as telephony. We discuss each measure below.

1. Maximum Time Frame for Franchise Negotiations

66. As explained above,[248] the record demonstrates that, although the average time that elapses between application and grant of a franchise varies from locality to locality, unreasonable delays in the franchising process are commonplace and have hindered, and in some cases thwarted entirely, attempts to deploy competitive video services. The record is replete with examples of unreasonable delays in the franchising process,[249] which can indefinitely delay competitive entry and leave an applicant without recourse in violation of Section 621(a)(1)'s prohibition on unreasonable refusals to award a competitive franchise.[250]

67. We find that unreasonable delays in the franchising process deprive consumers of competitive video services, hamper accelerated broadband deployment, and can result in unreasonable refusals to award competitive franchises. Thus, it is necessary to establish reasonable time limits for LFAs to render a decision on a competitive applicant's franchise application.[251] We define below the boundaries of a reasonable time period in which an LFA must render a decision, and we establish a remedy for applicants that do not receive a decision within the applicable time frame. We establish a maximum time frame of 90 days for entities with existing authority to access public rights-of-way, and six months for entities that do not have authority to access public rights-of-way. The deadline will be calculated from the date that the applicant files an application or other writing that includes the information described below. Failure of an LFA to act within the allotted time constitutes an unreasonable refusal to award the franchise under Section 621(a)(1), and the LFA at that time is deemed to have granted the entity's application on an interim basis, pursuant to which the applicant may begin providing service. Thereafter, the LFA and applicant may continue to negotiate the terms of the franchise, consistent with the guidance and rulings in this *Order*.

a. Time Limit

68. The record shows that the franchising process in some localities can drag on for years. We are concerned that without a defined time limit, the extended delays will continue, depriving consumers of cable competition and applicants of franchises. We thus consider the appropriate length of time that should be afforded LFAs in reaching a final decision on a competitive franchise application. Commenters suggest a wide range of time frames that may be reasonable for an LFA's consideration of a competitive franchise application. TIA proposes that we adopt the time limit used in the Texas franchising legislation, which would allow a new entrant to obtain a franchise within 17 days of submitting an application.[252] Other commenters propose time limits ranging from 30 days to six

[248] *See supra* paras. 14-17, 22.

[249] *See Local Franchising NPRM,* 20 FCC Rcd at 18590 (quoting 47 U.S.C. § 541(a)(1)), FTTH Council Comments at 27, South Slope Comments at 13, Verizon Reply at 34-35.

[250] *See supra* paras. 22-30.

[251] 47 U.S.C. §§ 541(a)(1), 555.

[252] *See* TIA Comments at 8, 18.

months.[253] While NATOA in its comments opposes any time limit,[254] in February 2006 a NATOA representative told the Commission that the six-month time limit that California law imposes is reasonable.[255] Some commenters have suggested that a franchise applicant that holds an existing authorization to access rights-of-way (*e.g.*, a LEC) should be subject to a shorter time frame than other applicants. These commenters reason that deployment of video services requires an upgrade to existing facilities in the rights-of-way rather than construction of new facilities, and such applicants generally have demonstrated their fitness as a provider of communications services.[256]

69. In certain states, an SFA is responsible for all franchising decisions (*e.g.*, Hawaii, Connecticut, Vermont, Texas, Indiana, Kansas, South Carolina, and beginning January 1, 2007, California and North Carolina), and the majority of these states have established time frames within which those SFAs must make franchising decisions.[257] We are mindful, however, that states in which an LFA is the franchising authority, the LFA may be a small municipal entity with extremely limited resources. [258] Thus, it may not always be feasible for an LFA to carry out legitimate local policy objectives permitted by the Act and appropriate state or local law within an extremely short time frame. We therefore seek to establish a time limit that balances the reasonable needs of the LFA with the needs of the public for greater video service competition and broadband deployment. As set out in detail below, we believe that it is appropriate to provide rules to guide LFAs that retain ultimate decision-making power over franchise decisions.

70. As a preliminary matter, we find that a franchise applicant that holds an existing authorization to access rights-of-way should be subject to a shorter time frame for review than other applicants. First, one of the primary justifications for cable franchising is the locality's need to regulate and receive compensation for the use of public rights-of-way.[259] In considering an application for a cable franchise by an entity that already has rights-of-way access, however, an LFA need not devote substantial attention to issues of rights-of-way management.[260] Second, in obtaining a certificate for public

[253] *See* AT&T Comments at 77, Cavalier Telephone Comments at 4 (suggesting a 30-day time limit); BellSouth Comments at 36, NTCA Comments at 9, OPASTCO Reply at 4 (suggesting a 90-day time limit); Consumers for Cable Choice Comments at 9, Verizon Comments at 38, FTTH Council Comments at 60, State of Hawaii Reply at 3 (suggesting a 120-day time limit); Alliance for Public Technology Comments at 3 (suggesting a 180-day time limit); Qwest Comments at 26-27.

[254] NATOA Comments at 36-37, NATOA Reply at 21-23.

[255] Transcript of FCC Agenda Meeting and Panel Discussion at 38 (Feb. 10, 2006).

[256] *See Local Franchising NPRM*, 20 FCC Rcd at 18591.

[257] *See* HAW. REV. STAT. § 440G-4 (2006); CONN. GEN. STAT. ANN. § 16-331 (West 2006); VT. STAT. ANN. tit. 30, § 502 (2006); TEX. UTIL. CODE ANN. § 66.003 (West 2006); IND. CODE § 8-1-34-16 (2006); 2006 KAN. SESS. LAWS Ch. 93 (West 2006); S.C. CODE ANN. § 58-12-05 (2006); N.C. GEN STAT. ANN. § 66-351; CAL. PUB. UTIL. CODE § 401, et seq. We note that our *Order* does not affect these franchising decisions.

[258] We note that a number of other states in addition to Texas have adopted or are considering statewide franchising in order to speed competitive entry. *See, e.g.*, IND. CODE § 8-1-34-16 (2006); VA. CODE ANN. § 15.2-2108.1:1 et seq. (2006); SB-816, 2006 Sess. (Mo. 2006). Nothing in our discussion here is intended to preempt the actions of any states. The time limit we adopt herein is a ceiling beyond which LFA delay in processing a franchise application becomes unreasonable. To the extent that states and/or municipalities wish to adopt shorter time limits, they remain free to do so.

[259] NATOA Comments at 38-39; Ada Township Comments at 11-14; TCCFUI Reply Comments at 18.

[260] Recognizing this distinction, some states have created streamlined franchising procedures specifically tailored to entities with existing access to public rights-of-way. *See, e.g.*, VIRGINIA CODE ANN. § 15.2-2108.1:1 et seq.); HF-2647, 2006 Sess. (Iowa 2006) (this proposed legislation would grant franchises to all telephone providers authorized

(continued…)

convenience and necessity from a state, a facilities-based provider generally has demonstrated its legal, technical, and financial fitness to be a provider of telecommunications services. Thus, an LFA need not spend a significant amount of time considering the fitness of such applicants to access public rights-of-way. NATOA and its members concede that the authority to occupy the right-of-way has an effect on the review of the financial, technical, and legal merits of the application, and eases right-of-way management burdens.[261] We thus find that a time limit is particularly appropriate for an applicant that already possesses authority to deploy telecommunications infrastructure in the public rights-of-way.[262] We further agree with AT&T that entities with existing authority to access rights-of-way should be entitled to an expedited process, and that lengthy consideration of franchise applications made by such entities would be unreasonable.[263] Specifically, we find that 90 days provides LFAs ample time to review and negotiate a franchise agreement with applicants that have access to rights-of-way.[264]

71. Based on our examination of the record, we believe that a time limit of 90 days for those applicants that have access to rights-of-way strikes the appropriate balance between the goals of facilitating competitive entry into the video marketplace and ensuring that franchising authorities have sufficient time to fulfill their responsibilities. In this vein, we note that 90 days is a considerably longer time frame than that suggested by some commenters, such as TIA.[265] Additionally, we recognize that the Communications Act gives an LFA 120 days to make a final decision on a cable operator's request to modify a franchise.[266] We believe that the record supports an even shorter time here because the costs associated with delay are much greater with respect to entry. When an incumbent cable franchisee requests a modification, consumers are not deprived of service while an LFA deliberates. Here, delay by an individual LFA deprives consumers of the benefits of cable competition.[267] An LFA should be able to

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to use the right-of-way without any application or negotiation requirement). *See also* South Slope Comments at 11 (duplicative local franchising requirements imposed on a competitor with existing authority to occupy the rights-of-way are unjustified and constitute an unreasonable barrier to competitive video entry).

[261] *See* NATOA Comments at 38-39. Although NATOA contends that an applicant's authority to occupy the rights-of-way would not affect the length of the negotiations regarding PEG requirements, franchise fees, or build-out, we clarify the law concerning those issues below to minimize further disputes and delays.

[262] Ad Hoc Telecom Manufacturers Comments at 6.

[263] AT&T argues that an entity authorized to occupy a right-of-way should simply complete a short-form application and agree to general cable franchise requirements such as franchise fees and PEG capacity, and that the right-of-way holder should receive a franchise within one month of filing the short-form application. *See* AT&T Comments at 74.

[264] *See* BellSouth Comments at 36; Ada Township, *et al*. Comments at 23; LMC Comments at 18; Hawaiian Telecom Comments at 7-8 (recommending a time frame of 90 days from the filing of the application). Several state legislators agree that an applicant's existing authority to occupy the right-of-way lightens the administrative load, and enacted or proposed similar measures to streamline the franchising process for entities that hold the authority. *See* VIRGINIA CODE ANN. § 15.2-2108.21; HF-2647, 2006 Sess. (Iowa 2006) (this proposed legislation would grant franchises to all telephone providers authorized to use the right-of-way without any application or negotiation requirement). We assume generally that state and local regulators are sufficiently empowered to deal with any public safety or aesthetic issues that may arise by virtue of deployment of new video-related equipment by applicants already authorized to use the rights-of way.

[265] *See* TIA Comments at 8-9 (a time frame of 17 business days, as set forth in the Texas statute, "provides ample time to negotiate an agreement reflecting the requirements of Section 621"); AT&T Comments at 75, 78-79. *See also supra* paras. 17, 27.

[266] *See* 47 U.S.C. § 545.

[267] Verizon Comments at 36-37.

negotiate a franchise with a familiar applicant that is already authorized to occupy the right-of-way in less than 120 days. The list of legitimate issues to be negotiated is short,[268] and we narrow those issues considerably in this *Order*. We therefore impose a deadline of 90 days for an LFA to reach a final decision on a competitive franchise application submitted by those applicants authorized to occupy rights-of-way within the franchise area.

72. For other applicants, we believe that six months affords a reasonable amount of time to negotiate with an entity that is not already authorized to occupy the right-of-way, as an LFA will need to evaluate the entity's legal, financial, and technical capabilities in addition to generally considering the applicant's fitness to be a communications provider over the rights-of-way. Commenters have presented substantial evidence that six months provides LFAs sufficient time to review an applicant's proposal, negotiate acceptable terms, and award or deny a competitive franchise.[269] We are persuaded by the record that a six-month period will allow sufficient time for review. Given that LFAs must act on modification applications within the 120-day limit set by the Communications Act, we believe affording an additional two months – *i.e.*, a six-month review period – will provide LFAs ample time to conduct negotiations with an entity new to the franchise area.

73. Failure of an LFA to act within these time frames is unreasonable and constitutes a refusal to award a competitive franchise. Consistent with other time limits that the Communications Act and our rules impose,[270] a franchising authority and a competitive applicant may extend these limits if both parties agree to an extension of time. We further note that an LFA may engage in franchise review activities that are not prohibited by the Communications Act or our rules, such as multiple levels of review or holding a public hearing,[271] provided that a final decision is made within the time period established under this *Order*.

b. Commencement of the Time Period for Negotiations

74. The record demonstrates that there is no universally accepted event that "starts the clock" for purposes of calculating the length of franchise negotiations between LFAs and new entrants.[272] Accordingly, we find it necessary to delineate the point at which such calculation should begin. Few commenters offer specific suggestions on what event should open the time period for franchise negotiations. Qwest contends that the period for negotiations should commence once an applicant files an application.[273] On the other hand, Verizon argues that the clock must start before an applicant files a formal application because significant negotiations often take place before a formal filing.[274] Specifically,

[268] Verizon Reply Comments at 43 n.69.

[269] *See* Cablevision Comments at 10-12; GMTC Comments at 3, 6-8; State of Hawaii Reply at 3; Mt. Hood Cable Regulatory Commission Comments at 20; NJBPU Comments at 5; Southwest Suburban Cable Commission Comments at 7. *See also* Fairfax County, Va. Comments at 4-7 (formal negotiations began April 1, 2005, franchise granted Oct. 1, 2005).

[270] *See, e.g.*, 47 U.S.C. § 537, 47 C.F.R. § 76.502(c).

[271] *See* Southwest Suburban Cable Commission Comments at 7.

[272] *See supra* paras. 14-17.

[273] *See* Qwest Reply at 2 (establish a requirement that an LFA "must act on a franchise application within six months of filing").

[274] *See* Verizon Reply at 37; Letter from Leora Hochstein, Executive Director, Federal Regulatory, Verizon, to Marlene Dortch, Secretary, Federal Communications Commission at 1 (April 21, 2006).

the company advocates starting the clock when the applicant initiates negotiations with the LFA,[275] which could be documented informally between the applicant and the LFA or with a formal Commission filing for evidentiary purposes.

75. We will calculate the deadline from the date that the applicant first files certain requisite information in writing with the LFA. This filing must meet any applicable state or local requirements, including any state or local laws that specify the contents of a franchise application and payment of a reasonable application fee in jurisdictions where such fee is required.[276] This application, whether formal or informal, must at a minimum contain: (1) the applicant's name; (2) the names of the applicant's officers and directors; (3) the applicant's business address; (4) the name and contact information of the applicant's contact; (5) a description of the geographic area that the applicant proposes to serve; (6) the applicant's proposed PEG channel capacity and capital support; (7) the requested term of the agreement; (8) whether the applicant holds an existing authorization to access the community's public rights-of-way; and (9) the amount of the franchise fee the applicant agrees to pay (consistent with the Communications Act and the standards set forth herein). Any requirement the LFA imposes on the applicant to negotiate or engage in any regulatory or administrative processes before the applicant files the requisite information is *per se* unreasonable and preempted by this *Order*. Such a requirement would delay competitive entry by undermining the efficacy of the time limits adopted in this *Order* and would not serve any legitimate purpose. At their discretion, applicants may choose to engage in informal negotiations before filing an application. These informal negotiations do not apply to the deadline, however; we will calculate the deadline from the date that the applicant first files its application with an LFA. For purposes of any disputes that may arise, the applicant will have the burden of proving that it filed the requisite information or, where required, the application with the LFA, by producing either a receipt-stamped copy of the filing or a certified mail return receipt indicating receipt of the required documentation. We believe that adoption of a time limit with a specific starting point will ensure that the franchising process will not be unduly delayed by pre-filing requirements, will increase applicants' incentive to begin negotiating in earnest at an earlier stage of the process, and will encourage both LFAs and applicants to reach agreement within the specified time frame. We note that an LFA may toll the running of the 90-day or six-month time period if it has requested information from the franchise applicant and is waiting for such information. Once the information is received by the LFA, the time period would automatically begin to run again.

c. Remedy for Failure to Negotiate a Franchise Within the Time Limit

76. Finally, we consider what remedy or remedies may be appropriate in the event that an LFA and franchise applicant are unable to reach agreement within the 90-day or six-month time frame. Section 635 of the Communications Act provides a specific remedy for an applicant who believes that an LFA unreasonably denied its application containing the requisite information within the applicable time frame. Here, we establish a remedy in the event an LFA does not grant or deny a franchise application by the deadline. In selecting this remedy, we seek to provide a meaningful incentive for local franchising authorities to abide by the deadlines contained in this *Order* while at the same time maintaining LFAs' authority to manage rights-of-way, collect franchise fees, and address other legitimate franchise concerns.

77. In the event that an LFA fails to grant or deny an application by the deadline set by the Commission, Verizon urges the Commission to temporarily authorize the applicant to provide video

[275] *Id.*

[276] *See infra* paras. 99-104.

service.[277] In general, we agree with this proposed remedy. In order to encourage franchising authorities to reach a final decision on a competitive application within the applicable time frame set forth in this *Order*, a failure to abide by the Commission's deadline must bring with it meaningful consequences. Additionally, we do not believe that a sufficient remedy for an LFA's inaction on an application is the creation of a remedial process, such as arbitration, that will result in even further delay. We also decline to agree to NATOA's suggestion that an applicant should be awarded a franchise identical to that held by the incumbent cable operator. This suggestion is impractical for the same reasons that we find local level-playing-field requirements are preempted.[278] Therefore, if an LFA has not made a final decision within the time limits we adopt in this *Order*, the LFA will be deemed to have granted the applicant an interim franchise based on the terms proposed in the application. This interim franchise will remain in effect only until the LFA takes final action on the application. We believe this approach is preferable to having the Commission itself provide interim franchises to applicants because a "deemed grant" will begin the process of developing a working relationship between the competitive applicant and the franchising authority, which will be helpful in the event that a negotiated franchise is ultimately approved.

78. The Commission has authority to deem a franchise application "granted" on an interim basis. As noted above, the Commission has broad authority to adopt rules to implement Title VI and, specifically, Section 621(a)(1) of the Communications Act.[279] As the Supreme Court has explained, the Commission serves "as the 'single Government agency' with 'unified jurisdiction' and 'regulatory power over all forms of electrical communication, whether by telephone, telegraph, cable, or radio.'"[280] Section 201(b) authorizes the Commission to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act."[281] "[T]he grant in § 201(b) means what it says: The FCC has rulemaking authority to carry out the 'provisions of this Act.'"[282] Section 2 of the Communications Act grants the Commission explicit jurisdiction over "cable services."[283] Moreover, Congress specifically charged the Commission with the administration of the Cable Act, including Section 621, and federal courts have consistently upheld the Commission's authority in this area.[284]

79. The Commission has previously granted franchise applicants temporary authority to operate in local areas. In the early 1970s, the Commission required every cable operator to obtain a federal certificate of compliance from the Commission before it could "commence operations."[285] In effect, the Commission acted as a co-franchising authority – requiring both an FCC certificate and a local franchise (granted pursuant to detailed Commission guidance and oversight) prior to the provision of

[277] *See* Letter from Leora Hochstein, Executive Director, Federal Regulatory, Verizon, to Marlene Dortch, Secretary, Federal Communications Commission at 1 (May 3, 2006).

[278] *See infra* para. 138. If new entrants were required to adopt the same franchises as incumbents, the new entrants would be forced to accept terms that violate Section 621(a)(1)'s prohibition on unreasonable refusals to grant franchises. *See* Mercatus Center at 39-40; Phoenix Center Competition Paper at 7.

[279] *See supra* Section III.B.

[280] *United States v. Southwestern Cable Co.*, 392 U.S. 157, 167-68 (1968) (citations omitted).

[281] 47 U.S.C. § 201(b). *See also* 47 U.S.C. §§ 151, 154(i), 303(r).

[282] *AT&T Corp. v. Iowa Utilites Board*, 525 U.S. 366, 378 (1999).

[283] 47 U.S.C. § 152.

[284] *See supra* note 208.

[285] *Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to Community Antenna Television Systems*, 36 F.C.C.2d 143, ¶ 178 (1972).

services.[286] As the Commission noted, "[a]lthough we have determined that local authorities ought to have the widest scope in franchising cable operators, *the final responsibility is ours*."[287] And the Commission granted interim franchises for cable services in areas where there was no other franchising authority.[288]

80. We note that the deemed grant approach is consistent with other federal regulations designed to address inaction on the part of a State decision maker.[289] In addition, this approach does not raise any special legal concerns about impinging on state or local authority. The Act plainly gives federal courts authority to review decisions made pursuant to Section 621(a)(1).[290] As the Supreme Court observed in *Iowa Utilities Board*, "This is, at bottom, a debate not about whether the States will be allowed to do their own thing, but about whether it will be the FCC or the federal courts that draw the lines to which they must hew. To be sure, the FCC's lines can be even more restrictive than those drawn by the courts – but it is hard to spark a passionate 'States' rights' debate over that detail."[291]

81. We anticipate that a deemed grant will be the exception rather than the rule because LFAs will generally comply with the Commission's rules and either accept or reject applications within the applicable time frame. However, in the rare instance that a local franchising authority unreasonably delays acting on an application and a deemed grant therefore occurs, we encourage the parties to continue to negotiate and attempt to reach a franchise agreement following expiration of the formal time limit. Each party will have a strong incentive to negotiate sincerely: LFAs will want to ensure that their constituents continue to receive the benefits of competition and cable providers will want to protect the investments they have made in deploying their systems. If the LFA ultimately acts to deny the franchise after the deadline, the applicant may appeal such denial pursuant to Section 635(a) of the Communications Act. If, on the other hand, the LFA ultimately grants the franchise, the applicant's operations will continue pursuant to the negotiated franchise, rather than the interim franchise.

2. Build-Out

82. As discussed above, build-out requirements in many cases may constitute unreasonable barriers to entry into the MVPD market for facilities-based competitors.[292] Accordingly, we limit LFAs' ability to impose certain build-out requirements pursuant to Section 621(a)(1).

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[286] The Commission ended the certificate requirement and ceded additional authority to state and local governments in the late 1970s, but only for pragmatic reasons. *See, e.g.*, Report and Order, 66 F.C.C.2d 380, ¶¶ 33, 37 (1977); Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 71 F.C.C.2d 569, ¶ 7 (1979) (withdrawing aspects of Commission franchising participation, but only "as long as the actions taken at the local level will not undermine important and overriding federal interests").

[287] *Teleprompter Cable Sys.*, 52 F.C.C.2d 1263, ¶ 9 (1975) (emphasis added).

[288] *See, e.g., Cable Television Reconsideration Order*, 36 F.C.C.2d 326, ¶ 116 (1972); *Sun Valley Cable Communications (Sun City, Arizona)*, 39 F.C.C.2d 105 (1973); *Mahoning Valley Cablevision, Inc. (Liberty Township, Ohio)*, 39 F.C.C.2d 939 (1973).

[289] *See, e.g.*, 40 C.F.R. 141.716(a) (watershed control plans that are submitted to a state and not acted upon by the regulatory deadline are "considered approved" until the state subsequently withdraws such approval.); 42 C.F.R. 438.56(e)(2) (an application to disenroll from a Medicaid managed care plan shall be "considered approved" if not acted on by a state agency within the regulatory deadline). *See also* 47 U.S.C. § 160(c) (petition for forbearance "deemed granted" if Commission fails to deny within the regulatory deadline).

[290] *See* 47 U.S.C. § 555.

[291] *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378 n.6 (1999).

[292] *See* Section III.A., *supra*, at paras. 31-42.

a. Authority

83. Proponents of build-out requirements do not offer any persuasive legal argument that the Commission lacks authority to address this significant problem and conclude that certain build-out requirements for competitive entrants are unreasonable. Nothing in the Communications Act requires competitive franchise applicants to agree to build-out their networks in any particular fashion. Nevertheless, incumbent cable operators and LFAs contend that it is both lawful and appropriate, in all circumstances, to impose the same build-out requirements on competitive applicants that apply to incumbents.[293] We reject these arguments and find that Section 621(a)(1) prohibits LFAs from refusing to award a new franchise on the ground that the applicant will not agree to unreasonable build-out requirements.

84. The only provision in the Communications Act that even alludes to build-out is Section 621(a)(4)(A), which provides that "a franchising authority . . . shall allow the applicant's cable system a reasonable period of time to become capable of providing cable service to all households in the franchise area."[294] Far from a grant of authority, however, Section 621(a)(4)(A) is actually a limitation on LFAs' authority. In circumstances when it is reasonable for LFAs to require cable operators to build out their networks in accordance with a specific plan, LFAs must give franchisees a reasonable period of time to comply with those requirements. However, Section 621(a)(4)(A) does not address the central question here: whether it may be unreasonable for LFAs to impose certain build-out requirements on competitive cable applicants. To answer that question, Section 621(a)(4)(A) must be read in conjunction with Section 621(a)(1)'s prohibition on unreasonable refusals to award competitive franchises, and in light of the Act's twin goals of promoting competition and broadband deployment.[295]

85. Our interpretation of Section 621(a)(4)(A) is consistent with relevant jurisprudence and the legislative history. The D.C. Circuit has squarely rejected the notion that Section 621(a)(4)(A) authorizes LFAs to impose universal build-out requirements on all cable providers. The court has held that Section 621(a)(4)(A) does not require that cable operators extend service "throughout the franchise area," but instead is a limit on franchising authorities that seek to impose such obligations.[296] That decision comports with the legislative history, which indicates that Congress explicitly rejected an approach that would have imposed affirmative build-out obligations on all cable providers. The House version of the bill provided that an LFA's "refusal to award a franchise shall not be unreasonable if, for example, such refusal is on the ground . . . of inadequate assurance that the cable operator will, within a reasonable period of time, provide universal service throughout the entire franchise area under the

[293] *See, e.g.*, Comcast Reply Comments at 34; NCTA Reply Comments at 25-26; NATOA Reply Comments at 24; Southeast Michigan Municipalities Reply Comments at 44-45.

[294] 47 U.S.C. § 541(a)(4)(A).

[295] *Americable Intern., Inc. v. Dep't of Navy*, 129 F.3d 1271, 1274-75 (D.C. Cir. 1997).

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

jurisdiction of the franchising authority."[297] By declining to adopt this language, Congress made clear that it did not intend to impose uniform build-out requirements on all franchise applicants.[298]

86. LFAs and incumbent cable operators also rely on Section 621(a)(3) to support compulsory build-out. That Section provides: "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."[299] We therefore address below some commenters' concerns that limitations on build-out requirements will contravene or render ineffective the statutory prohibition against discrimination on the basis of income ("redlining.")[300] But for present purposes, it has already been established that Section 621(a)(3) does not mandate universal build-out. As the Commission previously has stated, "the intent of [Section 621(a)(3)] was to prevent the exclusion of cable service based on income" and "this section does not mandate that the franchising authority require the complete wiring of the franchise area in those circumstances where such an exclusion is not based on the income status of the residents of the unwired area."[301] The U.S. Court of Appeals for the District of Columbia Circuit (the "D.C. Circuit") has upheld this interpretation in the face of an argument that universal build-out was required by Section 621(a)(3):

> The statute on its face prohibits discrimination on the basis of income; it manifestly does not require universal [build-out]. . . . [The provision requires] "wiring of all areas of the franchise" *to prevent redlining.* However, if no redlining is in evidence, it is likewise clear that wiring within the franchise area can be limited.[302]

b. Discussion

87. Given the current state of the MVPD marketplace, we find that an LFA's refusal to award a competitive franchise because the applicant will not agree to specified build-out requirements can be unreasonable. Market conditions today are far different from when incumbent cable operators obtained their franchises. Incumbent cable providers were frequently awarded community-wide monopolies.[303] In that context, a requirement that the provider build out facilities to the entire community was eminently sensible. The essential bargain was that the cable operator would provide service to an entire community in exchange for its status as the only franchisee from whom customers in the community could purchase

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[297] H.R. REP. NO. 102-628, at 9 (1992).

[298] *See Doe v. Chao*, 540 U.S. 614, 622-23 (2004) (finding relevance in the fact that Congress had cut out the very language in the bill that would have achieved the result claimant urged).

[299] 47 U.S.C. § 541(a)(3).

[300] *See, e.g.*, Comcast Reply at 2 (arguing that incumbent LECs are seeking Commission action on build-out requirements in order to pursue their "high-value" customers while bypassing "low-value" ones).

[301] *Implementing the Provisions of the Cable Communications Policy Act of 1984*, Report and Order, MM Docket No. 84-1296, 58 Rad. Reg. 2d (P & F) 1, 62-63 (1985). BSPA Comments at 6 ("The most significant factors affecting where a wireline network will be built relate to cost of construction and the density of the population that will be served. These factors have a much more significant impact on the network expansion plans than the specific customer profile in a geographic area").

[302] *ACLU v. FCC*, 823 F.2d 1554, 1580 (D.C. Cir. 1987) (emphasis in original). *See also* Consumers for Cable Choice Comments at 8; DOJ *Ex Parte* at 4.

[303] *See* H.R. REP. NO. 102-862, at 77-78 (1992) (Conf. Rep.), *as reprinted in* 1992 U.S.C.C.A.N. 1231, 1259-1260; Mercatus Center Comments at 39-40; *Phoenix Center Competition Paper* at 7.

service. Thus, a financial burden was placed upon the monopoly provider in exchange for the undeniable benefit of being able to operate without competition.[304]

88. By contrast, new cable entrants must compete with entrenched cable operators and other video service providers. A competing cable provider that seeks to offer service in a particular community cannot reasonably expect to capture more than a fraction of the total market.[305] Build-out requirements thus impose significant financial risks on competitive applicants, who must incur substantial construction costs to deploy facilities within the franchise area in exchange for the opportunity to capture a relatively small percentage of the market.[306] In many instances, build-out requirements make entry so expensive that the prospective competitive provider withdraws its application and simply declines to serve any portion of the community.[307] Given the entry-deterring effect of build-out conditions, our construction of Section 621(a)(1) best serves the Act's purposes of promoting competition and broadband deployment.[308]

89. Accordingly, we find that it is unlawful for LFAs to refuse to grant a competitive franchise on the basis of unreasonable build-out mandates. For example, absent other factors, it would seem unreasonable to require a new competitive entrant to serve everyone in a franchise area before it has begun providing service to anyone. It also would seem unreasonable to require facilities-based entrants, such as incumbent LECs, to build out beyond the footprint of their existing facilities before they have even begun providing cable service.[309] It also would seem unreasonable, absent other factors, to require more of a new entrant than an incumbent cable operator by, for instance, requiring the new entrant to build out its facilities in a shorter period of time than that originally afforded to the incumbent cable operator; or requiring the new entrant to build out and provide service to areas of lower density than those that the incumbent cable operator is required to build out to and serve.[310] We note, however, it would seem reasonable for an LFA in establishing build-out requirements to consider the new entrant's market penetration. It would also seem reasonable for an LFA to consider benchmarks requiring the new entrant to increase its build-out after a reasonable period of time had passed after initiating service and taking into account its market success.

90. Some other practices that seem unreasonable include: requiring the new entrant to build out and provide service to buildings or developments to which the new entrant cannot obtain access on reasonable terms; requiring the new entrant to build out to certain areas or customers that the entrant cannot reach using standard technical solutions; and requiring the new entrant to build out and provide service to areas where it cannot obtain reasonable access to and use of the public rights of way. Subjecting a competitive applicant to more stringent build-out requirements than the LFA placed on the incumbent cable operator is unreasonable in light of the greater economic challenges facing competitive applicants explained above. Moreover, build-out requirements may significantly deter entry and thus

[304] *See* FTTH Council Comments at 32-33; BellSouth Comments at 34.

[305] *See, e.g.*, AT&T Comments at 50; FTTH Council Comments at 29-30.

[306] *See* FTTH Council Comments at 32-35; DOJ *Ex Parte* at 12-15 (May 10, 2006); AT&T Reply Comments at 34-36; BellSouth Comments at 34-35; Verizon Comments at 39-40.

[307] *See* FTTH Council Comments at 35; BellSouth Comments at 17-19, 35; USTA Comments at 22-25; Verizon Comments at 40-42.

[308] AT&T Comments at 62-64; BellSouth Comments at 32-33; Qwest Comments at 21-22; USTA Comments at 27; Verizon Comments at 44-46.

[309] *See supra* paras. 38-40.

[310] As we understand these franchising agreements are public documents, we find it reasonable to require the new entrant to produce the incumbent's current agreement.

forestall competition by placing substantial demands on competitive entrants.

91. In sum, we find, based on the record as a whole, that build-out requirements imposed by LFAs can operate as unreasonable barriers to competitive entry. The Commission has broad authority under Section 621(a)(1) to determine whether particular LFA conditions on entry are unreasonable. Exercising that authority, we find that Section 621(a)(1) prohibits LFAs from refusing to award a competitive franchise because the applicant will not agree to unreasonable build-out requirements.

c. Redlining

92. The Communications Act forbids access to cable service from being denied to any group of potential residential cable subscribers because of neighborhood income. The statute is thus clear that no provider of cable services may deploy services with the intent to redline and "that access to cable service [may not be] 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."[311] Nothing in our action today is intended to limit LFAs' authority to appropriately enforce Section 621(a)(3) and to ensure that their constituents are protected against discrimination. This includes an LFA's authority to deny a franchise that would run afoul of Section 621(a)(3).

93. MMTC suggests that the Commission develop anti-redlining "best practices," specifically defining who is responsible for overseeing redlining issues, what constitutes redlining, and developing substantial relief for those affected by redlining.[312] MMTC suggests that an LFA could afford a new entrant means of obtaining pre-clearance of its build-out plans, establishing a rebuttable presumption that the new entrant will not redline (for example, proposing to replicate a successful anti-redlining program employed in another franchise area).[313] Alternatively, an LFA could allow a new entrant to choose among regulatory options, any of which would be sufficient to allow for build-out to commence while the granular details of anti-redlining reporting are finalized.[314] We note these suggestions but do not require them.

3. Franchise Fees

94. In response to questions in the *Local Franchising NPRM* concerning existing practices that may impede cable entry,[315] various parties discussed unreasonable demands relating to franchise fees. Commenters have also indicated that unreasonable demands concerning fees or other consideration by some LFAs have created an unreasonable barrier to entry.[316] Such matters include not only the universe

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[311] 47 U.S.C. § 541.

[312] MMTC Comments at 22, MMTC Reply at 15. MMTC urges that The State Regulators Council of the Advisory Committee on Diversity for Communication in the Digital Age should be the oversight committee for redlining issues. MMTC Comments at 24.

[313] MMTC Reply at 11.

[314] MMTC Reply at 11 (providing examples of "rapid buildout plan," "equal service verification plan," and "combined plan").

[315] *Local Franchising NPRM*, 20 FCC Rcd at 18588.

[316] *See, e.g.*, AT&T Reply at Attachment C at 5 ("Lynbrook, N.Y. has asked Verizon to provide cameras to film a holiday visit from Santa Claus. Deputy Mayor Thomas Miccio said, 'They know if they don't get this process done they're going to be in big, big trouble, so we feel we're in a very good position.'") (citing Dionne Searcey, *As Verizon Enters Cable Business, it Faces Local Static*, WALL ST. J., Oct. 28, 2005, at A1), Verizon Comments at Attachment A at 14 ("Two LFAs in California required application fees of $25,000 and $20,000, respectively.

(continued…)

of franchise-related costs imposed on providers that should or should not be included within the 5 percent statutory franchise fee cap established in Section 622(b),[317] but also the calculation of franchise fees (*i.e.*, the revenue base from which the 5 percent is calculated). Accordingly, we will exercise our authority under Section 621(a)(1) to address the unreasonable demands made by some LFAs. In particular, any refusal to award an additional competitive franchise because of an applicant's refusal to accede to demands that are deemed impermissible below shall be considered to be unreasonable. The Commission's jurisdiction over franchise fee policy is well established.[318] The general law with respect to franchise fees should be relatively well known, but we believe it may be helpful to restate the basic propositions here in effort to avoid misunderstandings that can lead to delay in the franchising process as well as unreasonable refusals to award competitive franchises. To the extent that our determinations are relevant to incumbent cable operators as well, we would expect that discrepancies would be addressed at the next franchise renewal negotiation period, as noted in the FNPRM *infra*, which tentatively concludes that the findings in this *Order* should apply to cable operators that have existing franchise agreements as they negotiate renewal of those agreements with LFAs.[319]

95. We address below four significant issues relating to franchise fee payments. First, we consider the franchise fee revenue base. Second, we examine the limitations on charges incidental to the awarding or enforcing of a franchise. Third, we discuss the proper classification of in-kind payments unrelated to the provision of cable service. Finally, we consider whether contributions in support of PEG services and equipment should be considered within the franchise fee calculation.

96. The fundamental franchise fee limitation is set forth in Section 622(b), which states that "franchise fees paid by a cable operator with respect to any cable system shall not exceed 5 percent of such cable operator's gross revenues derived in such period from the operation of the cable system to provide cable services."[320] Section 622(g)(1) broadly defines the term "franchise fee" to include "any tax, fee, or assessment of any kind imposed by a franchising authority or other governmental entity on a cable operator or cable subscriber, or both, solely because of their status as such."[321] Section 622(g)(2)(c), however, excludes from the term "franchise fee" any "capital costs which are required by the franchise to be incurred by the cable operator for public, educational, or governmental access facilities."[322] And Section 622(g)(2)(D) excludes from the term (and therefore from the 5 percent cap) "requirements or charges incidental to the awarding or enforcing of the franchise, including payments for bonds, security funds, letters of credit, insurance, indemnification, penalties, or liquidated damages."[323] It has been established that certain types of "in-kind" obligations, in addition to monetary payments, may be subject

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Another community in that state has requested an upfront application fee of $30,000 plus an agreement to pay additional expenses (*i.e.*, attorneys fees) of up to an additional $20,000.").

[317] 47 U.S.C. § 542(b).

[318] *See ACLU v. FCC*, 823 F.2d 1554, 1574 (D.C. Cir. 1987) ("[I]t is clear . . . that the *ultimate* responsibility for ensuring a 'national policy' with respect to franchise fees lies with the federal agency responsible for administering the Communications Act.") (emphasis in original).

[319] *See infra* para. 140.

[320] 47 U.S.C. § 542(b) (emphasis added). FTTH Council supports an alternative cap based on the actual costs of managing the use of public rights-of-way, but we need not address that argument because we do not have the discretion to adopt a different limit than that set by Congress.

[321] 47 U.S.C. § 542(g)(1).

[322] 47 U.S.C. § 542(g)(2)(C).

[323] 47 U.S.C. § 542(g)(2)(D).

to the cap. The legislative history of the 1984 Cable Act, which adopted the franchise fee limit, specifically provides that "lump sum grants not related to PEG access for municipal programs such as libraries, recreation departments, detention centers or other payments not related to PEG access would be subject to the 5 percent limitation."[324]

97. **Definition of the 5 percent fee cap revenue base.** As a preliminary matter, we address the request of several parties to clarify which revenue-generating services should be included in the gross fee figure from which the 5 percent calculation is drawn.[325] The record indicates that in the franchise application process, disputes that arise as to the propriety of particular fees can be a significant cause of delay in the process and that some franchising authorities are making unreasonable demands in this area.[326] This issue is of particular concern where a prospective new entrant for the provision of cable services is a facilities-based incumbent or competitive provider of telecommunications and/or broadband services. A number of controversies regarding which revenues are properly subject to application of the franchise fee were resolved before the Supreme Court's decision in *NCTA v. Brand X*,[327] which settled issues concerning the proper regulatory classification of cable modem-based Internet access service. Nevertheless, in some quarters, there has been considerable uncertainty over the application of franchise fees to Internet access service revenues and other non-cable revenues. Thus, we believe it may assist the franchise process and prevent unreasonable refusals to award competitive franchises to reiterate certain conclusions that have been reached with respect to the franchise fee base.

98. We clarify that a cable operator is not required to pay franchise fees on revenues from non-cable services.[328] Section 622(b) provides that the "franchise fees paid by a cable operator with respect to any cable system shall not exceed 5 percent of such cable operator's gross revenues derived in such period from the operation of the cable system to provide *cable services*."[329] The term "cable service" is explicitly defined in Section 602(6) to mean (i) "the one-way transmission to subscribers of video programming or other programming service," and (ii) "subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service."[330] The Commission determined in the *Cable Modem Declaratory Ruling* that a franchise authority may not assess franchise fees on non-cable services, such as cable modem service, stating that "revenue from cable modem service would not be included in the calculation of gross revenues from which the franchise fee ceiling is determined."[331] Although this decision related specifically to Internet access service revenues, the same

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[324] H.R. REP. NO. 98-934, at 65 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 4655, 4702.

[325] Verizon Comments at 63-64; BellSouth Comments at 41-43.

[326] *See supra* paras. 43-45.

[327] 125 S. Ct. 2688 (2005). *See infra* note 331.

[328] Advertising revenue and home shopping commissions have been included in an operator's gross revenues for franchise fee calculation purposes. *See Texas Coalition of Cities for Utility Issues v. FCC*, 354 F.3d 802, 806 (5th Cir. 2003) ("A cable operator's gross revenue includes revenue from subscriptions and revenue from other sources-e.g., advertising and commissions from home shopping networks."); *City of Pasadena, California The City of Nashville, Tennessee and The City of Virginia Beach, Virginia*, 16 FCC Rcd. 18192, 2001 WL 1167612, par. 15 (2001) ("There is no dispute among the parties to this proceeding, or in relevant precedent, that advertising revenue and home shopping commissions can be considered part of an operator's gross revenues for franchise fee calculation purposes.").

[329] 47 U.S.C. § 542(b) (emphasis added).

[330] 47 U.S.C. § 522(6).

[331] *In re Inquiry Concerning High Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd 4798, 4851 (2002) ("*Cable Modem Declaratory Ruling*"), *rev'd, Brand X Internet Services v. FCC*, 345 F.3d 1120 (9th Cir.

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would be true for other "non-cable" service revenues.[332] Thus, Internet access services, including broadband data services, and any other non-cable services are not subject to "cable services" fees.

99. **Charges incidental to the awarding or enforcing of a franchise.** Section 622(g)(2)(D) excludes from the term "franchise fee" "requirements or charges incidental to the awarding or enforcing of the franchise, including payments for bonds, security funds, letters of credit, insurance, indemnification, penalties, or liquidated damages."[333] Such "incidental" requirements or charges may be assessed by a franchising authority without counting toward the 5 percent cap. A number of parties assert, and seek Commission clarification, that certain types of payments being requested in the franchise process are not incidental fees under Section 622(g)(2)(D) but instead must either be prohibited or counted toward the cap.[334] Furthermore, a number of parties report that disputes over such issues as well as unreasonable demands being made by some franchising authorities in this regard may be leading to delays in the franchising process as well as unreasonable refusals to award competitive franchises. We therefore determine that non-incidental franchise-related costs required by LFAs must count toward the 5 percent franchise fee cap and provide guidance as to what constitutes such non-incidental franchise-related costs. Under the Act, these costs combined with other franchise fees cannot exceed 5 percent of gross revenues for cable service.

100. BellSouth urges us to prohibit franchising authorities from assessing fees that the authorities claim are "incidental" if those fees are not specifically allowed under Section 622 of the Cable Act.[335] BellSouth asserts that LFAs often seek fees beyond the 5 percent franchise fee allowed by the statutory provision. The company therefore asks us to clarify that any costs that an LFA requires a cable provider to pay beyond the exceptions listed in Section 622 – including generally applicable taxes, PEG capital costs, and "incidental charges" – count toward the 5 percent cap.[336] OPASTCO asserts that higher fees discourage investment and often will need to be passed on to consumers.[337] Verizon also requests that we clarify that fees that exceed the cap are unreasonable.[338]

101. AT&T argues that we should find unreasonable any fees or contribution requirements that are not credited toward the franchise fee obligation.[339] AT&T also asserts that any financial obligation to the franchising authority that a provider undertakes, such as application or acceptance fees

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2003), *rev'd*, *NCTA v. Brand X*, 545 U.S. 967 (2005). The Commission issued a notice of proposed rulemaking ("*Cable Modem NPRM*") concurrently with the *Cable Modem Declaratory Ruling*. Certain questions from the *Cable Modem NPRM* that are relevant, but not directly related, to this discussion remain pending before the Commission. *Cable Modem Declaratory Ruling* at 4839-4854.

[332] *See* NATOA Reply at 29 (agreeing that non-cable services are not subject to franchise fees).

[333] 47 U.S.C. § 542(g)(2)(D).

[334] AT&T Comments at 65-67; BellSouth Comments at 7, 38-39.

[335] BellSouth Comments at 7.

[336] BellSouth Comments at 38-39.

[337] OPASTCO Reply at 5.

[338] Verizon Reply at 59.

[339] AT&T Comments at 64.

that exceed the reasonable cost of processing an application, free or discounted service to an LFA, and LFA attorney or consultant fees, should apply toward the franchise fee obligation.[340]

102. Conversely, NATOA asserts that costs such as those enumerated above by AT&T fall within Section 622(g)(2)(D)'s definition of charges "incidental" to granting the franchise.[341] NATOA contends that the word "incidental" does not refer to the *amount* of the charge, but rather the fact that a charge is "naturally appertaining" to the grant of a franchise. Thus, NATOA argues, these costs are not part of the franchise fee and therefore do not count toward the cap.[342]

103. There is nothing in the text of the statute or the legislative history to suggest that Congress intended the list of exceptions in Section 622(g)(2)(D) to include the myriad additional expenses that some LFAs argue are "incidental."[343] Given that the lack of clarity on this issue may hinder competitive deployment and lead to unreasonable refusals to award competitive franchises under Section 621, we seek to provide guidance as to what is "incidental" for a new competitive application.[344] We find that the term "incidental" in Section 622(g)(2)(D) should be limited to the list of incidentals in the statutory provision, as well as other minor expenses, as described below. We find instructive a series of federal court decisions relating to this subsection of Section 622. These courts have indicated that (i) there are significant limits on what payments qualify as "incidental" and may be requested outside of the 5 percent fee limitation; and (ii) processing fees, consultant fees, and attorney fees are not necessarily to be regarded as "incidental" to the awarding of a franchise.[345] In *Robin Cable Systems v. City of Sierra Vista*, for example, the United States District Court for the District of Arizona held that "processing costs" of up to $30,000 required as part of the award of a franchise were not excluded under subsection (g)(2)(D) because they were not "incidental," but rather "substantial" and therefore "inconsistent with the Cable Act."[346] Additionally, in *Time Warner Entertainment v. Briggs*, the United States District Court for the District of Massachusetts decided that attorney fees and consultant fees fall within the definition of franchise fees, as defined in Section 622. Because the municipality in that case was already collecting 5 percent of the operator's gross revenues, the Court determined that a franchise provision requiring the cable operator to pay such fees above and beyond its 5 percent gross revenues was preempted and therefore unenforceable.[347] Finally, in *Birmingham Cable Comm. v. City of Birmingham,* the United States District for the Northern District of Alabama stated that "it would be an aberrant construction of

[340] AT&T Comments at 65-67.

[341] NATOA Reply at 34-35.

[342] NATOA Reply at 35 (citing Random House Dictionary of the English Language at 720).

[343] *See infra* paras. 105-108.

[344] NATOA argues that the Commission is powerless to rewrite the meaning of the statute. NATOA Reply at 35. Yet, Section 622(i) states "[a]ny Federal agency may not regulate the amount of the franchise fees paid by a cable operator, or regulate the use of funds derived from such fees, *except as provided in this section*." Therefore, we are within our Congressionally mandated authority to provide clarifying guidance regarding the meaning of this provision.

[345] *See Robin Cable Systems v. City of Sierra Vista,* 842 F. Supp. 380 (D. Ariz. 1993); *Time Warner Entertainment Co. v. Briggs,* 1993 WL 23710 (D. Mass. Jan. 14, 1993); *Birmingham Cable Comm. v. City of Birmingham,* 1989 WL 253850 (N.D. Ala. 1989).

[346] *Robin Cable* at 381.

[347] *Time Warner* at 23710 * 6.

the phrase 'incidental to the awarding … of the franchise,' in this context, to conclude that the phrase embraces consultant fees incurred solely by the City."[348]

104. We find these decisions instructive and emphasize that LFAs must count such non-incidental franchise-related costs toward the cap. We agree with these judicial decisions that non-incidental costs include the items discussed above, such as attorney fees and consultant fees, but may include other items, as well. Examples of other items include application or processing fees that exceed the reasonable cost of processing the application, acceptance fees, free or discounted services provided to an LFA, any requirement to lease or purchase equipment from an LFA at prices higher than market value, and in-kind payments as discussed below. Accordingly, if LFAs continue to request the provision of such in-kind services and the reimbursement of franchise-related costs, the value of such costs and services should count towards the provider's franchise fee payments.[349] For future guidance, LFAs and video service providers may look to judicial cases to determine other costs that should be considered "incidental."

105. **In-kind payments unrelated to provision of cable service.** The record indicates that in the context of some franchise negotiations, LFAs have demanded from new entrants payments or in-kind contributions that are unrelated to the provision of cable services. While many parties argue that franchising authority requirements unrelated to the provision of cable services are unreasonable,[350] few parties provided specific details surrounding the in-kind payment demands of LFAs.[351] As discussed further below, most parties generally discussed examples of concessions, but were unwilling to provide details of specific instances, including the identity of the LFA requesting the unrelated services.[352] Even without specific details concerning the LFAs involved, however, the record adequately supports a finding that LFA requests unrelated to the provision of cable services have a negative impact on the entry of new cable competitors in terms of timing and costs and may lead to unreasonable refusals to award competitive franchises. Accordingly, we clarify that any requests made by LFAs that are unrelated to the provision of cable services by a new competitive entrant are subject to the statutory 5 percent franchise fee cap.

106. The Broadband Service Providers Association states that an example of a municipal capital requirement can include traffic light control systems.[353] FTTH Council states that non-video requirements raise the cost of entry for new entrants and should be prohibited.[354] As an example, FTTH

[348] *Birmingham* at 253850.

[349] To the extent that an LFA requires franchise fee payments of less than 5 percent an offset may not be necessary. Such LFAs are able to request the reimbursement or provision of such costs up to the 5 percent statutory threshold.

[350] Alcatel Comments at 10; FTTH Council Comments at 36; OPASTCO Reply at 4; USTelecom Comments at 48; BPSA Comments at 8; NTCA Comments at 13; South Slope Comments at 15. *See also* DOJ *Ex Parte* at 11.

[351] Some LFAs argue that commenters' allegations about inappropriate fees fail to identify the LFAs in question. As a consequence, they contend, we should not rely on such unsubstantiated claims unless the particular LFAs in question are given a chance to respond. Communications Support Group Reply at 7; Anne Arundel County Reply at 5. We need not resolve particular disputes between parties, however, in order to address this issue. Our clarification that all LFA requests not related to cable services must be counted toward the 5 percent cap is a matter of statutory construction, and all commenters have had ample opportunity to address this issue.

[352] Broadband Service Providers Association Comments at 8; AT&T Comments at 26; Verizon Comments at 57-58. Parties have indicated that they were unwilling to identify specific instances of unreasonable requests, since in many cases these parties are still trying to negotiate franchise agreements with the communities at issue.

[353] Broadband Service Providers Association Comments at 8.

[354] FTTH Council Comments at 66.

Council asserts that in San Antonio, Grande Communications was required to prepay $1 million in franchise fees (which took the company five years to draw down) and to fund a $50,000 scholarship, with an additional $7,200 to be contributed each year. They assert that new entrants agree to these requirements because they have no alternative.[355] The National Telecommunications Cooperative Association ("NTCA") also asserts that its members have complained that LFAs require them to accept franchise terms unrelated to the provision of video service.[356] NTCA states that any incumbent cable operator that already abides by such a requirement has made the concession in exchange for an exclusive franchise, but that new entrants, in contrast, must fight for every subscriber and will not survive if forced into expensive non-video related projects.[357]

107. AT&T refers to a press article stating that Verizon has faced myriad requests unrelated to the provision of cable service. These include: a $13 million "wish list" in Tampa, Florida; a request for video hookup for a Christmas celebration and money for wildflower seeds in New York; and a request for fiber on traffic lights to monitor traffic in Virginia.[358] Verizon provides little additional information about these examples, but argues that any requests must be considered franchise-related costs subject to the 5 percent franchise fee cap, as discussed above.[359]

108. We clarify that any requests made by LFAs unrelated to the provision of cable services by a new competitive entrant are subject to the statutory 5 percent franchise fee cap, as discussed above. Municipal projects unrelated to the provision of cable service do not fall within any of the exempted categories in Section 622(g)(2) of the Act and thus should be considered a "franchise fee" under Section 622(g)(1). The legislative history of the 1984 Cable Act supports this finding, providing that "lump sum grants not related to PEG access for municipal programs such as libraries, recreation departments, detention centers or other payments not related to PEG access would be subject to the 5 percent limitation."[360] Accordingly, any such requests for municipal projects will count towards the 5 percent cap.

109. **Contributions in support of PEG services and equipment.** As further discussed in the Section below, we also consider the question of the proper treatment of LFA-mandated contributions in support of PEG services and equipment. The record reflects that disputes regarding such contributions are impeding video deployment and may be leading to unreasonable refusals to award competitive franchises.[361] Section 622(g)(2)(C) excludes from the term "franchise fee" any "capital costs which are required by the franchise to be incurred by the cable operator for public, educational, or governmental access facilities."[362] Accordingly, payments of this type, if collected only for the cost of building PEG facilities, are not subject to the 5 percent limit. Capital costs refer to those costs incurred in or associated

[355] *Id.* at 38.

[356] NTCA Comments at 4.

[357] NTCA Comments at 13.

[358] AT&T Comments at 26 (citing Dionne Searcey, *As Verizon Enters Cable Business, it Faces Local Static*, WALL ST. J., Oct. 28, 2005, at A1). *See also* City of Tampa Reply Comments at 5.

[359] Verizon Comments at 54. *See also* USTelecom Comments at 48.

[360] H.R. REP. NO. 98-934, at 65 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 4655, 4702.

[361] *See, e.g.*, FTTH Council Comments at 36 (noting how Knology declined to enter the Louisville market after the Louisville LFA requested a PEG grant of $266,000 at the time of franchise grant, with $1.9 million total due over the 15-year term).

[362] 47 U.S.C. § 542(g)(2)(C).

with the construction of PEG access facilities.[363] These costs are distinct from payments in support of the use of PEG access facilities. PEG support payments may include, but are not limited to, salaries and training. Payments made in support of PEG access facilities are considered franchise fees and are subject to the 5 percent cap.[364] While Section 622(g)(2)(B) excluded from the term franchise fee any such payments made in support of PEG facilities, it only applies to any franchise in effect on the date of enactment.[365] Thus, for any franchise granted after 1984, this exemption from franchise fees no longer applies.

4. PEG/Institutional Networks

110. In the *Local Franchising NPRM*, we tentatively concluded that it is not unreasonable for an LFA, in awarding a franchise, to "require adequate assurance that the cable operator will provide adequate public, educational and governmental access channel capacity, facilities, or financial support"[366] because this promotes important statutory and public policy goals.[367] However, pursuant to Section 621(a)(1), we conclude that LFAs may not make unreasonable demands of competitive applicants for PEG and I-Net[368] and that conditioning the award of a competitive franchise on applicants agreeing to such unreasonable demands constitutes an unreasonable refusal to award a franchise. This finding is limited to competitive applicants under Section 621(a)(1). Yet, as this issue is also germane to existing franchisees, we ask for further comment on the applicability of this and other findings in the *Further Notice of Proposed Rulemaking* attached hereto. The FNPRM tentatively concludes that the findings in this *Order* should apply to cable operators that have existing franchise agreements as they negotiate renewal of those agreements with LFAs.

111. As an initial matter, we conclude that we have the authority to address issues relating to PEG and I-Net support.[369] Some commenters argue that Congress explicitly granted the responsibility for PEG and I-Net regulation to state and local governments.[370] For example, NATOA contends that we cannot limit the in-kind or monetary support that LFAs may request for PEG access, because Sections 624(a) and (b) allow an LFA to establish requirements "related to the establishment and operation of a cable system," including facilities and equipment.[371] In response, Verizon claims that PEG requirements should extend only to channel capacity, and that LFAs can obtain other contributions only to the extent

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[363] *See* H.R. REP. NO. 98-934, at 19 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 4655, 4656.

[364] *See Cable TV Fund 14-A v. City of Naperville*, 1997 WL 433628 (N.D. Ill. 1997) at 13; *City of Bowie, Maryland*, 14 FCC Rcd. 7675 (Cable Service Bureau, 1999); *as clarified* 14 FCC Rcd 9596 (Cable Services Bureau, 1999).

[365] 47 U.S.C. § 542(g)(2)(B).

[366] 47 U.S.C. § 541(a)(4)(B).

[367] *Local Franchising NPRM*, 20 FCC Rcd at 18590.

[368] An I-Net is defined as "a communication network which is constructed or operated by the cable operator and which is generally available only to subscribers who are not residential customers." 47 U.S.C. § 531(f).

[369] *See infra* Section III.B.2.

[370] NATOA Comments at 35; NATOA Reply at 30-31; Hawaii Reply at 2-3; Mercatus Comments at 35; Certain Florida Municipalities Comments at 17-18; Anne Arundel *et al* Comments at 35; City of New York Comments at 3-4.

[371] NATOA Reply at 30 (quoting 47 U.S.C. § 544(b)).

that they are agreed to voluntarily by the cable operator.[372] Verizon also asserts that the record confirms that LFAs often demand PEG support that exceeds statutory limits.[373]

112. Section 611(a) of the Communications Act operates as a restriction on the authority of the franchising authority to establish channel capacity requirements for PEG. This Section provides that "[a] franchising authority may establish requirements in a franchise with respect to the designation or use of channel capacity for public, educational, or governmental use only to the extent provided in this section."[374] Section 611(b) allows a franchising authority to require that "channel capacity be designated for public, educational or governmental use," but the extent of such channel capacity is not defined.[375] Section 621(a)(4)(b) provides that a franchising authority may require "adequate assurance" that the cable operator will provide "adequate" PEG access channel capacity, facilities, or financial support."[376] Because the statute does not define the term "adequate," we have the authority to interpret what Congress meant by "adequate PEG access channel capacity, facilities, and financial support," and to prohibit excessive LFA demands in this area, if necessary. We note that the legislative history does not define "adequate," nor does it provide any guidance as to what Congress meant by the term.[377] We therefore conclude that "adequate" should be given its plain meaning: the term does not mean significant but rather "satisfactory or sufficient."[378] As discussed above, we have also accepted the tentative conclusion of the *Local Franchising NPRM* 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. Given this conclusion and our authority to interpret the term "adequate" in Section 621(a)(4), we will provide guidance as to what constitutes "adequate" PEG support under that provision as subject to the constraints of the "reasonableness" requirement in Section 621(a)(1).

113. AT&T asserts that we should shorten the period for franchise negotiations by adopting standard terms for PEG channels.[379] We reject this suggestion and clarify that LFAs are free to establish their own requirements for PEG to the extent discussed herein, provided that the non-capital costs of such requirements are offset from the cable operator's franchise fee payments. This is consistent with the Act and the historic management of PEG requirements by LFAs.[380]

114. Consumers for Cable Choice and Verizon argue that it is unreasonable for an LFA to request a number of PEG channels from a new entrant that is greater than the number of channels that the community is using at the time the new entrant submits its franchise application.[381] We find that it is

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[372] Verizon Reply at 60-61.

[373] Verizon Reply at 60 (citing NATOA Comments).

[374] 47 U.S.C. § 531(a).

[375] 47 U.S.C. § 531(b).

[376] 47 U.S.C. § 541(a)(4)(B).

[377] *See See* H.R. REP. NO. 102-862, at 78 (1992) (Conf. Rep.), *as reprinted in* 1992 U.S.C.C.A.N. 1231, 1260.

[378] American Heritage Dictionary, Second College Edition (1991).

[379] AT&T Reply at 15.

[380] *See* 47 U.S.C. § 541(a)(4)(B); *Time Warner Cable of New York City v. City of New York*, 943 F.Supp. 1357, 1367 (S.D.N.Y 1996), *aff'd sub nom. Time Warner Cable of New York City v. Bloomberg, L.P.*, 118 F.3d 917 (2nd Cir. 1997).

[381] Consumers for Cable Choice Comments at 8; Verizon Comments at 71.

unreasonable for an LFA to impose on a new entrant more burdensome PEG carriage obligations than it has imposed upon the incumbent cable operator.

115. Some commenters also asked whether certain requirements regarding construction or financial support of PEG facilities and I-Nets are unreasonable under Section 621(a)(1). Several parties indicate that, as a general matter, PEG contributions should be limited to what is "reasonable" to support "adequate" facilities.[382] We agree that PEG support required by an LFA in exchange for granting a new entrant a franchise should be both adequate and reasonable, as discussed above. In addressing each of these concerns below, we seek to strike the necessary balance between the two statutory terms.

116. Ad Hoc Telecom Manufacturers argue that it is unreasonable to require the payment of ongoing costs to operate PEG channels, because a requirement is unrelated to right-of-way management, the fundamental policy rationale for an LFA's franchising authority.[383] In response, Cablevision asserts that exempting incumbent LECs from PEG support requirements would undermine the key localism features of franchise requirements, and could undermine the ability of incumbent cable operators to provide robust community access.[384] We disagree with Ad Hoc Telecom Manufacturers that it is *per se* unreasonable for LFAs to require the payment of ongoing costs to support PEG. Such a ruling would be contrary to Section 621(a)(4)(B) and public policy. We note, however, that any ongoing LFA-required PEG support costs are subject to the franchise fee cap, as discussed above.

117. FTTH Council, Verizon, and AT&T ask us to affirm that PEG or I-Net requirements imposed on a new entrant that are wholly duplicative of existing requirements imposed on the incumbent cable operator are *per se* unreasonable.[385] AT&T and Verizon argue that Section 621(a)(4)(B) requires adequate facilities, not duplicative facilities.[386] FTTH Council contends that if LFAs can require duplicative facilities, they can burden new entrants with inefficient obligations without increasing the benefit to the public.[387] FTTH Council thus suggests that LFAs be precluded from imposing completely duplicative requirements, and that we require new entrants to contribute a *pro rata* share of the incumbent cable operator's PEG obligations. For example, if an incumbent cable operator funds a PEG studio, the new entrant should be required to contribute a *pro rata* share of the ongoing financial obligation for such studio, based on the new entrant's number of subscribers.[388]

118. In addition to advocating a *pro rata* contribution rule, FTTH Council requests that we require incumbents to permit new entrants to connect with the incumbent's pre-existing PEG channel feeds.[389] FTTH Council proposes that the incumbent cable operator and new entrant decide how to accomplish this connection, with LFA involvement if necessary, and that the costs of the connection should be deducted from the new entrant's PEG-related financial obligations to the LFA.[390] Others agree that PEG interconnection is necessary to maximize the value of local access channels when more than one

382 BellSouth Comments at 8; Verizon Comments at 71.

383 Ad Hoc Telecom Manufacturer Coalition Comments at 4.

384 Cablevision Reply at 29-30.

385 FTTH Council Comments at 66; Verizon Comments at 71; AT&T Comments at 67.

386 AT&T Comments at 67-68; Verizon Reply at 61.

387 FTTH Council Comments at 67.

388 *Id.*

389 *Id.*

390 *Id.*

video provider operates in a community.[391] New entrants seek a *pro rata* contribution rule based on practical constraints as well. AT&T asserts that, although incumbent cable operators can provide space for PEG in local headend buildings, LEC new entrants' facilities are not designed to accommodate those needs. Thus, if duplicative facilities are demanded, new entrants would have to build or rent facilities solely for this purpose, which AT&T contends would be unreasonable under the statute.[392] NATOA counters that AT&T's complaint regarding space mischaracterizes PEG studio requirements that exist in some franchises.[393] Specifically, NATOA claims that LFAs generally are not concerned with a PEG studio's location, and that PEG studios are usually located near cable headends simply because those locations reduce the cable operators' costs.[394]

119. We agree with AT&T, FTTH Council, Verizon, and others that completely duplicative PEG and I-Net requirements imposed by LFAs would be unreasonable.[395] Such duplication generally would be inefficient and would provide minimal additional benefits to the public, unless it was required to address an LFA's particular concern regarding redundancy needed for, for example, public safety. We clarify that an I-Net requirement is not duplicative if it would provide additional capability or functionality, beyond that provided by existing I-Net facilities. We note, however, that we would expect an LFA to consider whether a competitive franchisee can provide such additional functionality by providing financial support or actual equipment to supplement existing I-Net facilities, rather than by constructing new I-Net facilities. Finally, we find that it is unreasonable for an LFA to refuse to award a competitive franchise unless the applicant agrees to pay the face value of an I-Net that will not be constructed. Payment for I-Nets that ultimately are not constructed are unreasonable as they do not serve their intended purpose.

120. While we prefer that LFAs and new entrants negotiate reasonable PEG obligations, we find that under Section 621 it is unreasonable for an LFA to require a new entrant to provide PEG support that is in excess of the incumbent cable operator's obligations. We also agree that a *pro rata* cost sharing approach is one reasonable means of meeting the statutory requirement of the provision of adequate PEG facilities. To the extent that a new entrant agrees to share *pro rata* costs with the incumbent cable operator, such an arrangement is *per se* reasonable.[396]

[391] Communications Support Group, Inc. Reply at 12.

[392] AT&T Comments at 70.

[393] NATOA Reply at 41-42.

[394] NATOA Reply at 42.

[395] If a new entrant, for technical, financial, or other reasons, is unable to interconnect with the incumbent cable operator's facilities, it would not be unreasonable for an LFA to require the new entrant to assume the responsibility of providing comparable facilities, subject to the limitations discussed herein.

[396] To determine a new entrant's *per se* reasonable PEG support payment, the new entrant should determine the incumbent cable operator's per subscriber payment at the time the competitive applicant applies for a franchise or submits its informational filing, and then calculate the proportionate fee based on its subscriber base. A new entrant may agree to provide PEG support over and above the incumbent cable operator's existing obligations, but such support is at the entrant's discretion. If the new entrant agrees to share the *pro rata* costs with the incumbent cable operator, the PEG programming provider, be it the incumbent cable operator, the LFA, or a third-party programmer, must allow the new entrant to interconnect with the existing PEG feeds. The costs of such interconnection should be borne by the new entrant. We note that we previously have required cost-sharing and interconnection for PEG channels and facilities in another context. Section 75.1505(d) of the Commission's rules requires that if an LFA and OVS operator cannot reach an agreement on the OVS operator's PEG obligations, the operator is required to match the incumbent cable operator's PEG obligations and the incumbent cable operator is required to permit the OVS

(continued…)

5. Regulation of Mixed-Use Networks

121. We clarify that LFAs' jurisdiction applies only to the provision of cable services over cable systems. To the extent a cable operator provides non-cable services and/or operates facilities that do not qualify as a cable system, it is unreasonable for an LFA to refuse to award a franchise based on issues related to such services or facilities. For example, we find it unreasonable for an LFA to refuse to grant a cable franchise to an applicant for resisting an LFA's demands for regulatory control over non-cable services or facilities.[397] Similarly, an LFA has no authority to insist on an entity obtaining a separate cable franchise in order to upgrade non-cable facilities. For example, assuming an entity (*e.g.*, a LEC) already possesses authority to access the public rights-of-way, an LFA may not require the LEC to obtain a franchise solely for the purpose of upgrading its network.[398] So long as there is a non-cable purpose associated with the network upgrade, the LEC is not required to obtain a franchise until and unless it proposes to offer cable services. For example, if a LEC deploys fiber optic cable that can be used for cable and non-cable services, this deployment alone does not trigger the obligation to obtain a cable franchise. The same is true for boxes housing infrastructure to be used for cable and non-cable services.

122. We further clarify that an LFA may not use its video franchising authority to attempt to regulate a LEC's entire network beyond the provision of cable services. We agree with Verizon that the "entirety of a telecommunications/data network is not automatically converted to a 'cable system' once subscribers start receiving video programming."[399] For instance, we find that the provision of video services pursuant to a cable franchise does not provide a basis for customer service regulation by local law or franchise agreement of a cable operator's entire network, or any services beyond cable services.[400] Local regulations that attempt to regulate any non-cable services offered by video providers are preempted because such regulation is beyond the scope of local franchising authority and is inconsistent with the definition of "cable system" in Section 602(7)(C).[401] This provision explicitly states that a common carrier facility subject to Title II is considered a cable system "to the extent such facility is used in the transmission of video programming . . . ."[402] As discussed above, revenues from non-cable services are not included in the base for calculation of franchise fees.

123. In response to requests that we address LFA authority to regulate "interactive on-demand services,"[403] we note that Section 602(7)(C) excludes from the definition of "cable system" a facility of a common carrier that is used solely to provide interactive on-demand services.[404] "Interactive on-demand services" are defined as "service[s] providing video programming to subscribers over switched networks on an on-demand, point-to-point basis, but does not include services providing video programming

(Continued from previous page)
operator to connect with the existing PEG feeds, with such costs borne by the OVS operator. 47 C.F.R. § 76.1505(d).

[397] Verizon Comments at 75.

[398] *See* Verizon Comments at 21. *See also* South Slope Comments at 11; NCTA Comments at 12.

[399] Verizon Comments at 83.

[400] Verizon Comments at 75.

[401] 47 U.S.C. § 522(7)(C). *See also* Verizon Comments at 82-87.

[402] 47 U.S.C. § 522(7)(C).

[403] *See* BellSouth at 42; NATOA Reply at 27-28.

[404] 47 U.S.C. § 522(7)(C).

prescheduled by the programming provider."[405] We do not address at this time what particular services may fall within the definition.

124. We note that this discussion does not address the regulatory classification of any particular video services being offered. We do not address in this *Order* whether video services provided over Internet Protocol are or are not "cable services."[406]

D. Preemption of Local Laws, Regulations and Requirements

125. Having established rules and guidance to implement Section 621(a)(1), we turn now to the question of local laws that may be inconsistent with our decision today. Because the rules we adopt represent a reasonable interpretation of relevant provisions in Title VI as well as a reasonable accommodation of the various policy interests that Congress entrusted to the Commission, they have preemptive effect pursuant to Section 636(c). Alternatively, local laws are impliedly preempted to the extent that they conflict with this *Order* or stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.[407]

126. At that outset of this discussion, it is important to reiterate that we do not preempt state law or state level franchising decisions in this *Order*.[408] Instead, we preempt only local laws, regulations, practices, and requirements to the extent that: (1) provisions in those laws, regulations, practices, and agreements conflict with the rules or guidance adopted in this *Order*; and (2) such provisions are not specifically authorized by state law. As noted above,[409] we conclude that the record before us does not provide sufficient information to make determinations with respect to franchising decisions where a state is involved, issuing franchises at the state level or enacting laws governing specific aspects of the franchising process. We expressly limit our findings and regulations in this *Order* to actions or inactions at the local level where a state has not circumscribed the LFA's authority. For example, in light of differences between the scope of franchises issued at the state level and those issued at the local level, it may be necessary to use different criteria for determining what may be unreasonable with respect to the key franchising issues addressed herein. We also recognize that many states only recently have enacted comprehensive franchise reform laws designed to facilitate competitive entry. In light of these facts, we lack a sufficient record to evaluate whether and how such state laws may lead to unreasonable refusals to award additional competitive franchises.

127. Section 636(c) of the Communications Act provides 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 superseded."[410] In the *Local Franchising NPRM*, the Commission tentatively concluded that, pursuant to the authority granted under Sections 621 and 636(c), and under the Supremacy Clause,[411] the Commission

[405] 47 U.S.C. § 522(12).

[406] *See IP-Enabled Services*, 19 FCC Rcd 4863 (2004); Petition of SBC Communications Inc. for a Declaratory Ruling, WC Docket No. 04-36 (filed Feb. 5, 2004); Letter from James C. Smith, Senior Vice President, SBC Services Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 04-36 (filed Sept. 14, 2005).

[407] *Florida Lime and Avocado Growers v. Paul*, 373 U.S. 132, 142-43 (1963).

[408] *See supra* note 2.

[409] *Id*.

[410] 47 U.S.C. § 556(c).

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

may deem to be preempted any state or local law that stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Title VI.[412] For example, we may deem preempted any local law that causes an unreasonable refusal to award a competitive franchise in violation of Section 621(a)(1).[413] Accordingly, the Commission sought comment on whether it would be appropriate to preempt state and local legislation to the extent we find that it serves as an unreasonable barrier to the grant of competitive franchises.

128. The doctrine of federal preemption arises from the Supremacy Clause, which provides that federal law is the "supreme Law of the Land."[414] Preemption analysis requires a statute-specific inquiry. There are various avenues by which state law may be superseded by federal law. We focus on the two which are most relevant here. First, preemption can occur where Congress expressly preempts state law.[415] When a federal statute contains an express preemption provision, the preemption analysis consists of identifying the scope of the subject matter expressly preempted and determining if a state's law falls within its scope.[416] Second, preemption can be implied and can occur where federal law conflicts with state law.[417] Courts have found implied "conflict preemption" where compliance with both state and federal law is impossible or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[418]

129. Applying these principles to this proceeding, we find that local franchising laws, regulations, and agreements are preempted to the extent they conflict with the rules we adopt in this *Order*. Section 636(c) expressly preempts state and local laws that are inconsistent with the Communications Act.[419] This provision precludes states and localities from acting in a manner inconsistent with the Commission's interpretations of Title VI so long as those interpretations are valid.[420] It is the Commission's job, in the first instance, to determine the scope of the subject matter expressly preempted by Section 636.[421] As noted elsewhere, we adopt the rules in this *Order* pursuant to our interpretation of Section 621(a)(1) and other relevant Title VI provisions in light of the twin congressional goals of promoting competition in the multichannel video marketplace and promoting broadband deployment.[422] These rules represent a reasonable interpretation of relevant provisions in Title VI as well as a reasonable accommodation of the various policy interests that Congress entrusted to the Commission. They therefore have preemptive effect pursuant to Section 636(c).

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[412] *Local Franchising NPRM*, 20 FCC Rcd at 18589.

[413] *Id.*

[414] U.S. Const. Art. VI, cl. 2. *See also Hillsborough County, Florida v. Automated Med. Labs., Inc.*, 471 U.S. 707, 712-13 (1985).

[415] *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992).

[416] *Id*. at 517.

[417] *Florida Lime and Avocado Growers*, 373 U.S. at 142-43.

[418] *Id*.

[419] 47 U.S.C. § 556(c).

[420] *See, e.g.*, *Liberty Cablevision of Puerto Rico, Inc. v. Municipality of Caguas*, 417 F.3d 216 (1st Cir. 2005) (finding municipal ordinances that imposed franchise fees on cable operators were preempted under Section 636(c) where inconsistent with Section 622 of the Communications Act).

[421] *See Cipollone*, 505 U.S. at 517; *Capital Cities Cable*, 467 U.S. 691, 699 (1984).

[422] *See supra* paras. 2-4, 61-64.

130. Alternatively, we find that such local laws, regulations, and agreements are impliedly preempted to the extent that they conflict with this *Order* or stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.[423] Among the stated purposes of Title VI is to (1) "establish a national policy concerning cable communications," (2) "establish franchise procedures and standards which encourage the growth and development of cable systems and which assure that cable systems are responsive to the needs and interests of the local community," and (3) "promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems."[424] The legislative history to both the 1984 and 1992 Cable Acts identifies a national policy of encouraging competition in the multichannel video marketplace and recognizes the national implications that the local franchising process can have on that policy.[425] The national policy of promoting a competitive multichannel video marketplace has been repeatedly reemphasized by Congress, the Commission, and the courts.[426] The record here shows that the current operation of the franchising process at the local level conflicts with this national multichannel video policy by imposing substantial delays on competitive entry and requiring unduly burdensome conditions that deter entry.[427] And to the extent that local requirements result in LFAs unreasonably refusing to award competitive franchises, such mandates frustrate the policy goals underlying Title VI. The rules we adopt today, *e.g.*, limits on the time period for LFA action on competitive franchise applications,[428] limits on LFA's ability to impose build-out requirements,[429] and limits on LFA collection of franchise fees,[430]

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[423] *Florida Lime and Avocado Growers*, 373 U.S. at 142-43.

[424] 47 U.S.C. § 521 (1), (2) & (6).

[425] *See* H.R. REP. NO. 98-934, at 19 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 4655, 4656; S. REP. NO. 97-518, at 14 (1982) ("free and open competition in the marketplace" and the "elimination and prevention of artificial barriers to entry" are essential to the growth and development of the cable industry); H.R. REP. NO. 102-862, at 77-78 (1992) (Conf. Rep.), *as reprinted in* 1992 U.S.C.C.A.N. 1231, 1259-60.

[426] *See, e.g.*, 47 U.S.C. § 521(6) (stating that one of the purposes of Title VI is "to promote competition in cable communications"); *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 309 (1993) (recognizing "[o]ne objective of the Cable Act was to set out 'franchise procedures and standards which encourage the growth and development of cable systems and which assure that cable systems are responsive to the needs and interests of the local community.'" (citing 47 U.S.C. § 521(2))).

[427] *See, e.g.*, AT&T Reply at 6-7 ("today's standardless franchising process, and the anticompetitive substantive conditions demanded of new entrants by many LFAs … not only delay entry, but often prevent it altogether"); AT&T Comments at 43 (listing several conditions commonly imposed in the local franchising process that raise the cost of entry, deter broadband investment, and deny consumers the benefits of competition and choice); Verizon Comments at iv-vi (the franchising process is often marked by inordinate delay and is often used by many LFAs "as an opportunity to demand all manner of additional concessions, mostly unrelated to the provision of video services or the underlying purposes of franchise requirements, from the would-be competitor"); TIA Comments at 7-15 (many LFAs unreasonably delay the grant of competitive franchises and demand excessive concessions from potential entrants); USTA Comments at 19-20 ("The single biggest obstacle to widespread competition in the video service market is the requirement that a provider obtain an individually negotiated local franchise in each area where it intends to provide service"); FTTH Council Comments at 59-60 ("the franchising process as implemented by numerous LFAs across the country continues to suffer from numerous flaws that frustrate the twin Congressional objectives of promoting cable competition and fostering deployment of advanced services to all Americans"); Alcatel Comments at 19 ("[t]he regulatory obstacle of thousands of local video franchises potentially wielding their authority to adopt unreasonable requirements will invariably impede deployment by competitors and negatively impact investment in advanced technologies and services").

[428] *See supra* Section III.C.1.

[429] *See supra* Section III.C.2.

[430] *See supra* Section III.C.3.

are designed to ensure efficiency and fairness in the local franchising process and to provide certainty to prospective marketplace participants. This, in turn, will allow us to effectuate Congress' twin goals of promoting cable competition and minimizing unnecessary and unduly burdensome regulation on cable systems. Thus, not only are Section 636(c)'s requirements for preemption satisfied, but preemption in these circumstances is proper pursuant to the Commission's judicially recognized ability, when acting pursuant to its delegated authority, to preempt local regulations that conflict with or stand as an obstacle to the accomplishment of federal objectives.[431]

131. We reject the claim by incumbent cable operators and franchising authorities that the Commission lacks authority to preempt local requirements because Congress has not explicitly granted the Commission the authority to preempt.[432] These commenters suggest that because the Commission seeks to preempt a power traditionally exercised by a state or local government (*i.e.*, local franchising), under the Fifth Circuit's decision in *City of Dallas*,[433] the Commission can only preempt where it is given express statutory authority to do so.[434] However, this argument ignores the plain language of Section 636(c), which states that "any provision of law of any State, political subdivision, or agency therefore, or franchising authority … which is inconsistent with this chapter shall be deemed to be preempted and superseded."[435] Moreover, Section 621 expressly limits the authority of franchising authorities by prohibiting exclusive franchises and unreasonable refusals to award additional competitive franchises.[436] Congress could not have stated its intent to limit local franchising authority more clearly. These provisions therefore satisfy any express preemption requirement.[437]

132. Furthermore, as long as the Commission acts within the scope of its delegated authority in adopting rules that implement Title VI, including the prohibition of Section 621(a)(1), its rules have preemptive effect.[438] Courts assess whether an agency acted within the scope of its authority "without any presumption one way or the other"; there is no presumption against preemption in this context.[439] As noted above, Congress charged the Commission with the task of administering the Communications Act,

[431] *See, e.g., Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 369 (1986).

[432] *See* Comcast Comments at 36-37; Comcast Reply at 35-37; Burnsville/Eagan Comments at 35-36.

[433] *City of Dallas,* 165 F.3d at 341.

[434] *See* Comcast Comments at 37; Comcast Reply at 36; Burnsville/Eagan Comments at 35-36.

[435] 47 U.S.C. § 556(c).

[436] 47 U.S.C. § 541(a)(1).

[437] *See Liberty Cablevision of Puerto Rico v. Municipality of Caguas*, 417 F.3d 216, 221 (1st Cir. 2005) (Section 636(c) makes clear that Congress "unmistakably" intended to preempt state and local franchising decisions that are inconsistent with the Act, including Section 621); *Qwest Broadband Services, Inc. v. City of Boulder*, 151 F. Supp. 2d. 1236, 1243 (D. Colo. 2001) (a franchise provision in the Boulder, Colorado charter 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).

[438] *See City of New York v. FCC*, 486 U.S. 57, 64 (1988) ("statutorily authorized regulations of an agency will pre-empt any state or local law that conflicts with such regulations or frustrates the purposes thereof"); *Louisiana Public Serv. Comm.*, 476 U.S. at 369 ("a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation"); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 699 (1984) (when a federal agency promulgates regulations intended to preempt state law, courts uphold preemption as long as the agency's choice "represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute"); *Fidelity Federal Savings & Loan Ass'n*, 458 U.S. at 153 ("Federal regulations have no less pre-emptive effect than federal statutes").

[439] *New York v. FERC*, 535 U.S. 1, 18 (2002).

including Title VI, and the Commission has clear authority to adopt rules implementing provisions such as Section 621.[440] Consequently, our rules preempt any contrary local regulations.[441]

133. We also find no merit in incumbent cable operators' and local franchising authorities' argument that the scope of the Commission's preemption authority under Section 636(c) is limited by the terms of Section 636(a) of the Act.[442] Section 636(a) provides that nothing in Title VI "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."[443] The very reason for preemption in these circumstances is that many local franchising laws and practices are at odds with the express provisions of Title VI, as interpreted in this *Order*. Consequently, Section 636(a) presents no obstacle to preemption here. We therefore need not decide whether the state and local laws at issue relate to "matters of public health, safety, and welfare" within the meaning of Section 636(a).

134. We also reject the franchising authorities' argument that any attempt to preempt lawful local government control of public rights-of-way by interfering with local franchising requirements, procedures and processes could constitute an unconstitutional taking under the Fifth Amendment of the United States Constitution.[444] The "takings" clause of the Fifth Amendment provides: "[N]or shall private property be taken for public use, without just compensation."[445] We conclude that our actions here do not run afoul of the Fifth Amendment for several reasons. To begin with, our actions do not result in a Fifth Amendment taking. Courts have held that municipalities generally do not have a compensable "ownership" interest in public rights-of-way,[446] but rather hold the public streets and sidewalks in trust for the public.[447] As one court explained, "municipalities generally possess no rights to profit from their streets unless specifically authorized by the state."[448] Also, we note that

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[440] *See supra* paras. 53-64.

[441] *See Fidelity Federal Savings & Loan Assn. v. De la Cuesta*, 458 U.S. 141, 153-58 (1982); *City of New York,* 486 U.S. at 64. *See also* AT&T Comments at 41-42.

[442] *See* Comcast Comments at 39 (citing 47 U.S.C. § 556(a)). *See also* Florida Municipalities Comments at 18-19 (the Cable Act provides for limited preemption of local regulatory efforts in certain specific areas, none of which cover competitive franchises). Commenters further point to the legislative history for Section 636(a), which noted that a state may "exercise authority over the whole range of cable activities, such as negotiations with cable operators; consumer protection; construction requirements; rate regulation or deregulation; the assessment of financial qualifications; the provision of technical assistance with respect to cable; and other franchise-related issues – as long as the exercise of that authority is consistent with Title VI." *See* Comcast Comments at 39-40 (citing H.R. REP. NO. 98-934, at 94 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 4655, 4731).

[443] 47 U.S.C. § 556(a) (emphasis added).

[444] *See* Texas Coalition of Cities Comments at 29-35; Burnsville/Eagan Comments at 38. Burnsville/Eagan further argues that Fifth Amendment concerns would arise if the Commission were to interfere with the terms under which a competitive franchise is granted, thereby forcing modifications to existing cable franchises, pursuant to state and local level-playing-field requirements, thus depriving LFAs of lawful and reasonable compensation they negotiated with the incumbent cable operators for the use of public rights-of-way.

[445] U.S. Const. Amend. V.

[446] *See Liberty Cablevision,* 417 F.3d at 222.

[447] *See New Jersey Payphone Ass'n, Inc. v. Town of West New York*, 130 F.Supp.2d 631, 638 (D.N.J. 2001); *see also Liberty Cablevision,* 417 F.3d at 222 (recognizing that it is "'a mistake to suppose … [that] the city is constitutionally and necessarily entitled to compensation'" for use of the city streets).

[448] *See Liberty Cablevision,* 417 F.3d at 222.

telecommunications carriers that seek to offer video service already have an independent right under state law to occupy rights-of-way.[449] States have granted franchises to telecommunications carriers, pursuant to which the carriers lawfully occupy public rights-of-way for the purpose of providing telecommunications service.[450] Because all municipal power is derived from the state,[451] courts have held that "a state can take public rights-of-way without compensating the municipality within which they are located."[452] Given the municipality is not entitled to compensation when its interest in the streets are taken pursuant to state law, it is difficult to see how the transmission of additional video signals along those same lines results in any physical occupation of public rights-of-way beyond that already permitted by the states.[453]

135. Moreover, even if there was a taking, Congress provided for "just compensation" to the local franchising authorities.[454] Section 622(h)(2) of the Act provides that a local franchising authority may recover a franchise fee of up to 5 percent of a cable operator's annual gross revenue.[455] Congress enacted the cable franchise fee as the consideration given in exchange for the right to use the public ways.[456] The implementing regulations we adopt today do not eviscerate the ability of local authorities to impose a franchise fee. Rather, our actions here simply ensure that the local franchising authority does not impose an excessive fee or other unreasonable costs in violation of the express statutory provisions and policy goals encompassed in Title VI.[457]

136. Finally, LFAs maintain that the Commission's preemption of local governmental powers offends the Tenth Amendment of the U.S. Constitution.[458] The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[459] In support of their position, commenters argue

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[449] *See* Verizon Reply at 25.

[450] *See* Verizon Reply at 25; South Slope Comments at 10-11; NCTA Comments at 12.

[451] *See St. Louis v. Western Union Telegraph Co.,* 149 U.S. 465, 467 (1893); *Liberty Cablevision,* 417 F.3d at 221.

[452] *See City & County of Denver,* 18 P.3d 748, 761 (Colo. 2001).

[453] *See* Verizon Reply at 25-26. *See also C/R TV, Inc. v. Shannondale, Inc.,* 27 F.3d 104, 109 (4th Cir. 1994) (reasoning that the transmission of cable television signals "would not impose an additional burden on [a] servient estate" on which telephone poles, power lines, and telephone wires had previously been installed).

[454] *See U.S. v. Riverside Bayview Homes,* 474 U.S. 121, 128 (1985) (the Fifth Amendment does not prohibit takings, only uncompensated ones). Because we find that the statute provides just compensation, we need not address whether the takings clause of the Fifth Amendment encompasses the property interests of state and local governments in the same way that it applies to the property interests of private persons.

[455] 47 U.S.C. § 542(h)(2).

[456] In passing the 1984 Cable Act, Congress recognized local government's entitlement to "assess the cable operator a fee for the operator's use of public ways," and established "the authority of a city to collect a franchise fee of up to 5 percent of an operator's annual gross revenues." H.R. REP. NO. 98-934, at 26 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 4655, 4663.

[457] For the reasons stated above, we need not reach the issue of whether a "taking" has occurred with respect to a competitive applicant providing cable service over the same network it uses to provide telephone service, for which it is already authorized by the local government to use the public rights-of-way.

[458] *See* Michigan Municipal League Comments at 24 ("[a]ny action by the Commission to mandate the granting of a franchise directly or by means of state actions in favor of any party over the objection of the local franchising authority offends the Tenth Amendment of the U.S. Constitution"); Anne Arundel County Comments at 50 (same).

[459] U.S. Const. Amend. X.

that the Commission is improperly attempting to override local government's duty to "maximize the value of local property for the greater good" by imposing a federal regulatory scheme onto the states and/or local governments.[460] Contrary to the local franchising authorities' claim, however, they have failed to demonstrate any violation of the Tenth Amendment.[461] "If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States."[462] Thus, when Congress acts within the scope of its authority under the Commerce Clause, no Tenth Amendment issue arises.[463] Regulation of cable services is well within Congress' authority under the Commerce Clause.[464] Thus, because our authority in this area derives from a proper exercise of congressional power, the Tenth Amendment poses no obstacle to our preemption of state and local franchise law or practices.[465] Likewise, there is no merit to LFA commenters' suggestion that Commission regulation of the franchising process would constitute an improper "commandeering" of state governmental power.[466] The Supreme Court has recognized that "where Congress has the authority to regulate private activity under the Commerce Clause," Congress has the "power to offer States the choice of regulating that activity according to federal standards or having state law preempted by federal regulation."[467] And here, we are simply requiring local franchising authorities to exercise their regulatory authority according to federal standards, or else local requirements will be preempted. For all of these reasons, our actions today do not offend the Tenth Amendment.

137. We do not purport to identify every local requirement that this *Order* preempts. Rather, in accordance with Section 636(c), we merely find that local laws, regulations and, agreements are preempted to the extent they conflict with this *Order* and the rules adopted herein. For example, local laws would be preempted if they: (1) authorize a local franchising authority to take longer than 90 days to act on a competitive franchise application concerning entities with existing authority to access public rights-of-way, and six months concerning entities that do not have authority to access public rights-of-way;[468] (2) allow an LFA to impose unreasonable build-out requirements on competitive franchise applicants;[469] or (3) authorize or require a local franchising authority to collect franchise fees in excess of the fees authorized by law.[470]

138. One specific example of the type of local laws that this *Order* preempts are so-called "level-playing-field" requirements that have been adopted by a number of local authorities.[471] We find

[460] *See* Michigan Municipal League Comments at 25; Anne Arundel County Comments at 51.

[461] *See* Verizon Reply at 27-29.

[462] *See New York v. U.S.,* 505 U.S. 144, 156 (1992).

[463] *See id.* at 157-58.

[464] *See Crisp,* 467 U.S. at 700-701 (holding that cable services are interstate services).

[465] *See Qwest Broadband Services, Inc. v. City of Boulder*, 151 F.Supp.2d 1236, 1245 ("the inquiries under the Commerce Clause and the Tenth Amendment are mirror images, and a holding that a Congressional enactment does not violate the Commerce Clause is dispositive of a Tenth Amendment challenge) (citing *United States v. Baer,* 235 F.3d 561, 563 n.6 (10th Cir. 2000). *See also* Verizon Reply at 28.

[466] *See* Michigan Municipal League Comments at 25; Anne Arundel County Comments at 51.

[467] *See New York v. U.S.,* 505 U.S. at 167.

[468] *See supra* at Section III.C.1.

[469] *See supra* at Section III.C.2.

[470] *See supra* at Section III.C.3.

[471] *See, e.g.,* GMTC Comments at 15.

that these mandates unreasonably impede competitive entry into the multichannel video marketplace by requiring LFAs to grant franchises to competitors on substantially the same terms imposed on the incumbent cable operators.[472] As an initial matter, just because an incumbent cable operator may agree to franchise terms that are inconsistent with provisions in Title VI, LFAs may not require new entrants to agree to such unlawful terms pursuant to level-playing-field mandates because any such requirement would conflict with Title VI. Moreover, the record demonstrates that aside from this specific scenario, level-playing-field mandates imposed at the local level deter competition in a more fundamental manner. The record indicates that in today's market, new entrants face "steep economic challenges" in an "industry characterized by large fixed and sunk costs," without the resulting benefits incumbent cable operators enjoyed for years as monopolists in the video services marketplace.[473] According to commenters, "a competitive video provider who enters the market today is in a fundamentally different situation" from that of the incumbent cable operator: "[w]hen incumbents installed their systems, they had a captive market," whereas new entrants "have to 'win' every customer from the incumbent" and thus do not have "anywhere near the number of subscribers over which to spread the costs."[474] Commenters explain that "unlike the incumbents who were able to pay for any of the concessions that they grant an LFA out of the supra-competitive revenue from their on-going operations," "new entrants have no assured market position."[475] Based on the record before us, we thus find that an LFAs refusal to award an additional competitive franchise unless the competitive applicant meets substantially all the terms and

[472] *See* FTTH Council Comments at 28-31 ("there is substantial evidence that level playing field requirements have harmed new entrants or simply scared off applicants in the first place"); Verizon Comments at 76-80 (level-playing-field provisions are "protectionist requirements" for the benefit of the incumbent cable operator and are often cited as a basis for imposing all manner of additional costs and obligations, many of which are unreasonable and/or unlawful, on a would-be new entrant into the market); USTA Reply at 23-26, 32-34 (level-playing-field laws intrinsically limit the ability of LFAs to award franchises); *see also,* GAO Report, *Wire-Based Competition Benefited Consumers in Selected Markets* (Feb. 2004), GAO-04-241 Report at 21 (noting that one local official indicated that the level-playing-field law in his state was a factor in an interested competitive cable company's retracting a cable application); BSPA Comments at 4-5 (level-playing-field statutes are a superficial appeal to fairness that masks the real intent to protect the incumbent's market position, and such requirements delay or limit the growth of competition by negatively impacting the availability or use of capital); Letter from Lawrence Spiwak, President, Phoenix Ctr. For Advanced Legal and Econ. Pub. Policy Studies, to Marlene Dortch, Secretary, Federal Communications Commission at Attachment, *Phoenix Center Policy Paper Number 21: Competition After Unbundling: Entry*, *Industry Structure and Convergence*, 37 ("presence of a 'first mover' advantage means that requiring a new entrant to bear an entry cost simply because the incumbent cable operator has already borne it will have the effect of deterring entry substantially, even if such costs did not deter the incumbent cable operator from offering service") (March 13, 2006) ("*Phoenix Center Competition Paper*"); DOJ *Ex Parte* at 16. *But see* Comcast Comments at 40 (maintaining that state level-playing-field statutes are a legitimate and well-established exercise of state and local regulatory authority and are not inconsistent with the Communications Act); NATOA Reply at 43-44 (maintaining that there is little or no evidence to suggest that state level-playing-field laws have had anywhere near the draconian effect on the granting of competitive franchises as the telephone industry alleges).

[473] *See* USTA Reply at 24. *See also,* Verizon Reply at 65 ("In exchange for the costs they incurred to enter the market, the incumbent cable operators generally received exclusive franchises and enjoyed all of the benefits of being monopoly providers for years, often decades."); Mercatus Comments at 40 ("while a second cable operator will have to make the same unrecoverable investment previously made by the incumbent, it will not have the benefit of a monopoly over which to amortize it"); FTTH Council Comments at 3 ("New entrants are highly unlikely to ever obtain and enjoy the fruits of market power. Consequently, the burdens of the pre-existing franchising process from the perspective of these new entrants are not offset by the benefits that the monopolists enjoyed.").

[474] *See* FTTH Council Comments at 30 (quoting Andy Sarwal Declaration, para. 7); Verizon Comments at 77 (new entrants "[face] ubiquitous competition from strong and entrenched competitors, which in turn leads to lower market share and lower profit margins").

[475] *See* Verizon Reply at 65. *See also* USTA Reply at 24.

conditions imposed on the incumbent cable operator may be unreasonable, and inconsistent with the "unreasonable refusal" prohibition of Section 621(a)(1). Accordingly, to the extent a locally-mandated level-playing-field requirement is inconsistent with the rules, guidance, and findings adopted in this *Order*, such requirement is deemed preempted.[476]

IV. FURTHER NOTICE OF PROPOSED RULEMAKING

139. As discussed above, this proceeding is limited to competitive applicants under Section 621(a)(1).[477] Yet, some of the decisions in this *Order* also appear germane to existing franchisees. We asked in the *Local Franchising NPRM* whether current procedures and requirements were appropriate for any cable operator, including existing operators.[478] NCTA argues that if the Commission establishes franchising relief for new entrants, we should do the same for incumbent cable operators because imposing similar franchising requirements on new entrants and incumbent cable operators promotes competition.[479] Somewhat analogously, the BSPA argues that any new franchise regulatory relief should extend to all current competitive operators and new entrants equally; otherwise, the inequities would effectively penalize existing competitive franchisees simply because they were the first to risk competition with the incumbent cable operator.[480] The record does not indicate any opposition by new entrants to the idea that any relief afforded them also be afforded to incumbent cable operators.[481] Some incumbent cable operators discussed the potential impact of Commission action under Section 621 on incumbent cable operators. For example, Charter argues that granting competitive cable providers entry free from local franchise requirements would affect Charter's ability to satisfy its existing obligations; funds that Charter might use to respond to competition by investing in new facilities and services would instead be tied up in franchise obligations not imposed on Charter's competitors, which would undermine the company's investment and render its franchise obligations commercially impracticable.[482] AT&T

[476] We also find troubling the record evidence that suggests incumbent cable operators use "level-playing-field" requirements to frustrate negotiations between LFAs and competitive providers, causing delay and preventing competitive entry. *See, e.g.*, Letter from John Goodman, Broadband Service Providers Association, to Marlene Dortch, Secretary, Federal Communications Commission (March 3, 2006) (explaining that the incumbent cable operator used level-playing-field requirements to bring litigation against the LFA which delayed the negotiation process and made entry so expensive that it no longer became feasible for the new entrant); Texas Coalition of Cities Comments at 13 ("Most delays in *competitive franchise* negotiations result from the incumbent cable provider's demands that competitive providers' franchises contain virtually identical terms."); Verizon Reply at 65-66 ("incumbents' over-eagerness to support these anticompetitive requirements further evidences the need for the Commission to remove this roadblock to competition").

[477] *See supra* paras. 1, 113.

[478] *Local Franchising NPRM*, 20 FCC Rcd at 18588.

[479] NCTA Comments at 13 (quoting *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, 20 FCC Rcd 14853, 14855-56, 14864-65 (2005) "[T]reating like services alike promotes competition" by allowing the market to determine the better operator rather than providing one operator "artificial regulatory advantages"). *See also* Cox Reply at 2-4.

[480] BSPA Comments at 2-3.

[481] *See, e.g.*, BSPA Comments at 2-3 (any new regulatory relief in franchising should apply to all current competitive operators and potential new entrants). *But see* FTTH Council Comments at 24 (new entrants are not treated more favorably than incumbents when they are burdened with the same requirements as incumbents but do not have the same market power).

[482] Charter Comments at 3-4.

argues that competition will not harm incumbent cable operators: cable has handled the competition that DBS presents, and analysts predict that the new wave of competition will not put them out of business.[483]

140. We tentatively conclude that the findings in this *Order* should apply to cable operators that have existing franchise agreements as they negotiate renewal of those agreements with LFAs. We note that Section 611(a) states "A franchising authority may establish requirements in a franchise with respect to the designation or use of channel capacity for public, educational, or governmental use" and Section 622(a) provides "any cable operator may be required under the terms of any franchise to pay a franchise fee." These statutory provisions do not distinguish between incumbents and new entrants or franchises issued to incumbents versus franchises issued to new entrants. We seek comment on our tentative conclusion. We also seek comment on our authority to implement this finding. We also seek comment on what effect, if any, the findings in this *Order* have on most favored nation clauses that may be included in existing franchises. The Commission will conclude this rulemaking and release an order no later than six months after release of this *Order*.

141. In the *Local Franchising NPRM*, we also sought comment on whether customer service requirements should vary greatly from jurisdiction to jurisdiction.[484] In response, AT&T urges us to adopt rules to prevent LFAs from imposing various data collection and related requirements in exchange for a franchise.[485] AT&T claims that LFAs have imposed obligations that franchisees collect, track, and report customer service performance data for individual franchise areas.[486] AT&T states that it operates its call centers and systems on a region-wide basis, and that it is not currently possible or economically feasible for AT&T to comply with the various local customer service requirements on a franchise by franchise basis.[487] AT&T also asks us to affirm that LFAs may not, absent the franchise applicant's consent, impose any local service quality standards that go beyond the requirements of duly enacted laws and ordinances.[488] Verizon indicates that some localities have conditioned the grant of a franchise upon the submission of Verizon's data services to local customer service regulation.[489]

142. NATOA opposes AT&T's request for relief from local customer service standards, and argues that the Act and the Commission's rules explicitly provide for local customer service regulation.[490] Specifically, NATOA asserts that Section 632(d)(2) of the Cable Act allows for the establishment and enforcement of local customer service laws that go beyond the federal standards.[491] Other parties assert that customer service regulation is necessary to ensure that consumers have regulatory relief.[492]

[483] AT&T Reply at 5.

[484] *Local Franchising NPRM*, 20 FCC Rcd at 18588.

[485] AT&T Comments at 72-73.

[486] *Id.*

[487] *Id.* As discussed in Section III.C.2 above, AT&T's existing call center regions do not mirror local franchise areas. One region can encompass multiple franchise areas, and impose a multitude of regulations upon a new entrant.

[488] AT&T Comments at 73.

[489] Verizon Comments at 75.

[490] NATOA Reply at 40-41. *See also* New York City Comments at 3 (citing 47 U.S.C. § 552).

[491] 47 U.S.C. § 552(d)(2). *Accord* 47 C.F.R. § 76.309(b)(4).

[492] *See, e.g.*, Alliance for Public Technology Comments at 2-3; American Association of People with Disabilities at 2; Cavalier Comments at 6.

143. Section 632(d)(2) states that:

> [n]othing in this Section shall be construed to preclude a franchising authority and a cable operator from agreeing to customer service requirements that exceed the standards established by the Commission . . . . Nothing in this Title shall be construed to prevent the establishment and enforcement of any municipal law or regulation, or any State law, concerning customer service that imposes customer service requirements that exceed the standards set by the Commission under this section, or that addresses matters not addressed by the standards set by the Commission under this section.[493]

Given this explicit statutory language, we tentatively conclude that we cannot preempt state or local customer service laws that exceed the Commission's standards, nor can we prevent LFAs and cable operators from agreeing to more stringent standards. We seek comment on this tentative conclusion.

V. PROCEDURAL MATTERS

144. *Ex Parte Rules*. This is a permit-but-disclose notice and comment rulemaking proceeding. Ex Parte presentations are permitted, except during the Sunshine Agenda period, provided that they are disclosed as provided in the Commission's rules. *See generally* 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206(a).

145. *Comment Information*. Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 CFR §§ 1.415, 1.419, interested parties may file comments on or before 30 days after this *Further Notice of Proposed Rulemaking* is published in the Federal Register, and reply comments on or before 45 days of publication. 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. *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

- 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.

- 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

[493] 47 U.S.C. § 552(d)(2). *Accord* 47 C.F.R. § 76.309(b)(4).

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 8:00 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.

People with Disabilities: To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

146. *Initial Paperwork Reduction Act Analysis*. This *Further Notice of Proposed Rulemaking* 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).

147. *Initial Regulatory Flexibility Analysis*. As required by the Regulatory Flexibility Act,[494] the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial *number* of small entities of the proposals addressed in this *Further Notice of Proposed Rulemaking*. The IRFA is set forth in Appendix C. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines for comments on the *Second Further Notice*, and they should have a separate and distinct heading designating them as responses to the IRFA.

148. *Paperwork Reduction Act Analysis*. This document contains new information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. It will be submitted to the Office of Management and Budget (OMB) for review under Section 3507(d) of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the new information collection requirements contained in this proceeding. In addition, we note that pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, see 44 U.S.C. 3506(c)(4), we will seek specific comment on how the Commission might "further reduce the information collection burden for small business concerns with fewer than 25 employees."

149. In this present document, we have assessed the effects of the application filing requirements used to calculate the time frame in which a local franchising authority shall make a decision, and find that those requirements will benefit companies with fewer than 25 employees by providing such companies with specific application requirements of a reasonable length. We anticipate this specificity will streamline this process for companies with fewer than 25 employees, and that these requirements will not burden those companies.

[494] *See* 5 U.S.C. § 603.

150. *Final Regulatory Flexibility Analysis* As required by the Regulatory Flexibility Act,[495] the Commission has prepared a Final Regulatory Flexibility Analysis ("FRFA") relating to this *Report and Order and Further Notice of Proposed Rulemaking*. The FRFA is set forth in Appendix D.

151. *Congressional Review Act*. The Commission will send a copy of this *Report and Order and Further Notice of Proposed Rulemaking* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, see 5 U.S.C. § 801(a)(1)(A).

152. *Additional Information*. For additional information on this proceeding, please contact Holly Saurer, Media Bureau at (202) 418-2120, or Brendan Murray, Policy Division, Media Bureau at (202) 418-2120.

VI. ORDERING CLAUSES

153. IT IS ORDERED that, pursuant to the authority contained in Sections 1, 2, 4(i), 303, 303r, 403 and 405 of the Communications Act of 1934, 47 U.S.C §§ 151, 152, 154(i), 303, 303(r), 403 , this *Report and Order and Further Notice of Proposed Rulemaking* IS ADOPTED.

154. IT IS FURTHER ORDERED that pursuant to the authority contained in Sections Sections 1, 2, 4(i), 303, 303a, 303b, and 307 of the Communications Act of 1934, 47 U.S.C §§ 151, 152, 154(i), 303, 303a, 303b, and 307, the Commission's rules ARE HEREBY AMENDED as set forth in Appendix B. It is our intention in adopting these rule changes that, if any provision of the rules is held invalid by any court of competent jurisdiction, the remaining provisions shall remain in effect to the fullest extent permitted by law.

155. IT IS FURTHER ORDERED that the rules contained herein SHALL BE EFFECTIVE 30 days after publication of the *Report and Order and Further Notice of Proposed Rulemaking* in the Federal Register, except for the rules that contain information collection requirements subject to the Paperwork Reduction Act, which shall become effective immediately upon announcement in the Federal Register of OMB approval.

156. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this *Report and Order and Further Notice of Proposed Rulemaking*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

157. IT IS FURTHER ORDERED that the Commission SHALL SEND a copy of this *Report and Order and Further Notice of Proposed Rulemaking* in a report to be sent to Congress and the General Accounting Office pursuant to the Congressional Review Act, see 5 U.S.C. § 801(a)(1)(A).

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

[495] *See* 5 U.S.C. § 604.

APPENDIX A

List of Commenters and Reply Commenters

1. Abilene, TX
2. Access Channel 5, NY
3. Access Fort Wayne, IN
4. Access Sacramento, CA
5. Ad Hoc Telecom Manufacturer Coalition
6. Ada Township, et al.
7. Advance/Newhouse Communications
8. AEI-Brookings Joint Center for Regulatory Studies
9. Alamance County, NC
10. Albuquerque, NM
11. Alcatel
12. Alhambra, CA
13. Alliance for Public Technology
14. Alpina, MI
15. American Association of Business Persons with Disabilities
16. American Association of People with Disabilities
17. American Cable Association
18. American Consumer Institute
19. American Corn Growers Association
20. American Homeowners Grassroots Alliance
21. Anaheim, CA
22. Angels Camp, CA
23. Anne Arundel County, Carroll County, Charles County, Howard County and Montgomery County
24. Apex, NC
25. Apple Valley, MN
26. Appleton, WI
27. Archdale, NC
28. Arlington Independent Media, VA
29. Asheboro, NC
30. Ashland, KY
31. Ashokie, NC
32. Association of Independent Programming Networks
33. AT&T Inc.
34. Atascadero, CA
35. Bailey, NC
36. Banning, CA
37. Barrington, IL
38. Bellefonte, PA
39. Bellflower, CA
40. BellSouth
41. Benson, NC
42. Berks Community TV, PA
43. Beverly Hills, CA
44. Biddeford, ME
45. Billerica Access TV, MA
46. Billerica, MA
47. Birmingham Area Cable Board, MI

48. Blue Lake, CA
49. Bonita Springs, FL
50. Boston Community Access and Programming Foundation (BCAPF)
51. Boston, MA
52. Bowie, MD
53. Branford Commun. TV, CT
54. Brea, CA
55. Brisbane, CA
56. Broadband Service Providers Association
57. Brunswick, ME
58. Bucks County Consortium of Communities, PA
59. Burlington, NC
60. Burnsville/Eagan Telecommunications Commission; The City of Minneapolis, MN; The North Metro Telecommunications Commission; The North Suburban Communications Commission; and The South Washington County Telecommunications Commission ("City of Minneapolis")
61. Cable Access St. Paul, MN
62. Cable Advisory Council of South Central CT
63. Cablevision Systems Corporation
64. Cadillac, MI
65. Calabash, NC
66. California Alliance for Consumer Protection
67. California Farmers Union
68. California Small Business Association
69. California Small Business Roundtable
70. Cambridge Public Access Corp, MA
71. Cambridge, MA
72. Campbell County Cable Board, KY
73. Cape Coral, FL
74. Capital Community TV, OR
75. Carlsbad, CA
76. Carrboro, NC
77. Cary, NC
78. Castalia, NC
79. Caswell County, NC
80. Cavalier Telephone, LLC/Cavalier IP TV, LLC
81. Cedar Rapids, Iowa
82. Center for Digital Democracy
83. Central St. Croix Valley Joint Cable Comm, MN
84. Certain Florida Municipalities
85. Champaign, IL
86. Champaign-Urbana Cable TV and Telecomm Commission, IL
87. Chapel Hill, NC
88. Charlotte, NC
89. Charter Communications, Inc.
90. Chicago Access Corp, IL
91. Chicago, IL
92. Cincinnati Bell, Inc.
93. Cincinnati, OH
94. Citizen's Community TV, CO
95. City and County of San Francisco, CA
96. City of Los Angeles

97. City of Philadelphia
98. City of St. Louis, Missouri
99. City of Ventura, California
100. Clackamas County, OR
101. Clark County, NV
102. Clay County, FL
103. Clayton, NC
104. Clinton Township, MI
105. Clovis, CA
106. College Twp, PA
107. Comcast Corporation
108. Communications Support Group, Inc.
109. Community Access TV, IL
110. Community Programming Board of Forest Park et al, OH
111. Concord, CA
112. Concord, NC
113. Consumer Coalition of California
114. Consumer Electronics Association
115. Consumers First
116. Consumers for Cable Choice
117. Coral Springs, Florida
118. Coralville, IA
119. Coronado, CA
120. Cox Communications, Inc.
121. Cypress, CA
122. Daly City, CA
123. Dare County, NC
124. Darlington, SC
125. Davis, CA
126. Del Mar, CA
127. Delray Beach, FL
128. Democratic Processes Center
129. Discovery Institute’s Technology & Democracy Project
130. Dortches, NC
131. Dublin, CA
132. Durham, NC
133. Eden, NC
134. El Cerrito, CA
135. Elk Grove, IL
136. Elon, NC*
137. Enumclaw, WA
138. Escondido, CA
139. Esopus, NY
140. Evanston, IL
141. Fairfax Cable Access, VA
142. Fairfax County, Virginia
143. Fairfax, CA
144. Faith, NC
145. Fall River Community TV, MA
146. Fargo, ND
147. Farmington, MN

148. Ferguson, PA
149. Ferndale, CA
150. Fiber-to-the-Home Council
151. Floral Park, NY
152. Florence, Kentucky
153. Florence, KY
154. Fort Worth, TX
155. Fortuna, CA
156. Foster City, CA
157. Foxboro Cable Access, MA
158. Franklin Lakes, NJ
159. Franklin, KY
160. Free Enterprise Fund
161. Free Press (Reply)
162. Free Press, Consumers Union, Consumer Federation of America
163. Freedomworks
164. Ft. Lauderdale, FL
165. Gainesville, FL
166. Garland, TX
167. Garner, NC
168. Geneva, IL
169. Georgia Municipal Association (GMA)
170. Gibsonville, NC
171. Gilroy, CA
172. Glenview, IL
173. Graham, NC
174. Grand Rapids, MI
175. Granite Quarry, NC
176. Great Neck/North Shore Cable Comm'n, NY
177. Greater Metro Telecommunications Consortium, et al. (GMTC)
178. Green Spring, K
179. Greensboro, NC*
180. Greenville, NC
181. Guilford County, NC
182. Harnett County, NC
183. Harris Township, PA
184. Haw River, NC
185. Hawaii Consumers
186. Hawaii Telcom Communications, Inc.
187. Henderson County, NC
188. Henderson, NV
189. Hialeah, FL
190. Hibbing Public Access TV, MN
191. High Point, NC
192. High Tech Broadband Coalition
193. Highlands, NC
194. Hillsborough, NC
195. Holly Springs, NC
196. Huntsville, AL
197. Imperial Beach, CA
198. Independent Multi-Family Communications Council

199. Indianapolis, IN
200. Institute for Policy Innovation
201. Intergovernmental Cable Comm Auth, MI
202. Iowa City, IA
203. Irvine, CA
204. Irwindale, CA
205. Itasca Comm TV, MN
206. Jackson, CA
207. Jamestown, NC
208. Jefferson County League of Cities Cable Comm’n, Kentucky
209. Jenkins, KY
210. Jersey Access Group, NJ
211. Kansas City, Missouri
212. Kernersville, NC
213. Killeen, TX
214. King County, WA
215. Kitty Hawk, NC
216. Knightdale, NC
217. La Puente, CA
218. Lake Forest, CA
219. Lake Lurie, NC
220. Lake Mills, WI
221. Lake Minnetonka Communications Comm, MN
222. Lake Worth, FL
223. Lakewood, CA
224. Las Vegas, NV
225. LaVerne, CA
226. League of Minnesota Cities (LMC)
227. League of United Latin American Citizens of the Northeast Region+
228. Leavenworth, KS
229. Lee County, FL
230. Leibowitz & Associates, P.A.
231. Lenexa, KS
232. Lewisville, NC
233. Lexington, NC
234. Lincoln, CA
235. Lincoln, NE
236. Long Beach, CA
237. Longmont, CO
238. Loomis, CA
239. Los Angeles Cable Televisión Access Corp., CA
240. Los Banos, CA
241. Lynwood, CA
242. Madison Hts, MI
243. Madison, NC
244. Madison, WI
245. Malverne, NY
246. Manatee County, Florida
247. Manhattan Community Access Corp., NY
248. Marin Telecomm Agency, CA
249. Martha's Vineyard Comm TV, MA

250. Maxton, NC
251. Mayodan, NC
252. Mayville, NY
253. Maywood, CA
254. Mecklenburg County, NC
255. Medford, OR
256. Medford, OR
257. Media Action Marin, CA
258. Media Bridges Cincinnati, OH
259. Mercatus Center
260. Metheun Comm TV, MA
261. Metropolitan Area Comm Comm'n, OR
262. Metropolitan Educational Access Corp, TN
263. Miami Valley Comm Council, OH
264. Miami-Dade County, Florida
265. Michigan Municipal League
266. Microsoft Corporation
267. Middlesex, NC
268. Midland, TX
269. Milpitas, CA
270. Minnesota Telecomm Alliance
271. Minority Media and Telecommunications Council, et al.
272. Missouri Chapter – National Association of Telecommunications Officers and Advisors (MO-NATOA)
273. Mobile, AL
274. Momeyer, NC
275. Monrovia, CA
276. Monterey Park, CA
277. Montrose, CO
278. Morrisville, NC
279. Mount Morris, MI
280. Mt. Hood Cable Regulatory Commission (MHCRC)
281. Murfeesboro, TN
282. Murfreesboro, NC
283. Murrieta, CA
284. National Association of Broadcasters
285. National Black Chamber of Commerce
286. National Cable & Telecommunications Association
287. National Caucus and Center on Black Aged
288. National Grange
289. National Hispanic Council on Aging
290. National Taxpayers Union
291. National Telecommunications Cooperative Association
292. NATOA, NLC, NACO, USCM, ACM, and ACD
293. Naval Media Center, US
294. New Jersey Board of Public Utilities (NJBPU)
295. New Jersey Division of the Ratepayer Advocate
296. New York City
297. New York State Conference of Mayors (NYCOM)
298. Newton Comm Access Cntr, MA
299. Norfolk, VA

300. North Kansas City, MO
301. North Liberty, IA
302. North Richland Hills, TX
303. Northbrook, IL
304. Northern Berkshire Comm TV Corp, MA
305. Northern Dakota County Cable Comm Comm'm
306. Northwest Suburbs Cable Commun Comm'n, MN
307. Norwalk, CA
308. Oceanside Comm TV, CA
309. Onslow Cnty, NC
310. Ontario, CA
311. Orange County, FL
312. Organization for the Promotion and Advancement of Small Telecommunications Companies
313. Orion Neighborhood TV, MI
314. Oxford, NC
315. Pacific Research Institute
316. Pac-West Telecomm, Inc.
317. Palmetto, FL
318. Palo Alto, CA (on behalf of Joint Powers)
319. Pasadena, CA
320. Patton, PA
321. Peachtree City, GA
322. Pennsville, NJ
323. Perris, CA
324. Philadelphia, PA
325. Pike County, Kentucky
326. Pike County, KY
327. Pikeville, Kentucky
328. Pikeville, KY
329. Pinetops, NC
330. Pittsboro, NC
331. Plainfield, MI
332. Pleasant Garden, NC
333. Pleasant Hill, CA
334. Plymouth, MA
335. Pocatello, ID
336. Post Falls, ID
337. Poway, CA
338. Prince George's Community TV, Inc.
339. Prince George's County, MD
340. Princeton Community TV, NJ
341. Public Cable Television Authority
342. Public Utility Commission of Texas
343. Public, Educational and Government Access Oversight Comm of Metro Nashville
344. Queen Anne's County, MD
345. Quote Unquote, NM
346. Qwest Communications International Inc.
347. Ramsey/Washington Counties Suburban Cable Commun. Comm'n, MN
348. Rancho Cordova, CA
349. Rancho Santa Margarita, CA
350. Randolph County, NC

351. RCN Telecom Services, Inc.
352. Red Oak, NC
353. Redding, CA
354. Reidsville, NC
355. Renton, WA
356. Richmond, KY
357. River Bend, NC
358. Rockingham County, NC
359. Rockwell, NC
360. Rolling Hills Estates, CA
361. Rowan County, NC
362. Sacramento Metro Cable TV Commission, CA
363. Saint Charles, MO
364. Salem, OR
365. Salt Lake City, UT
366. San Diego, CA
367. San Dimas, CA
368. San Jose, CA
369. San Juan Capistrano, CA
370. San Marcos, CA
371. San Mateo County Telecomm Auth, CA
372. Sanford, NC
373. Santa Clara, CA
374. Santa Clarita, CA
375. Santa Cruz County Community TV
376. Santa Rosa, CA
377. Santee, CA
378. Saratoga Springs, NY
379. Scotts Valley, CA
380. Seattle, WA
381. Sebastopol, CA
382. Self-Advocacy Association of New York State, Inc.
383. Shaler, PA
384. Sierra Madre, CA
385. Signal Hill, CA
386. Siler City, NC
387. Simi Valley, CA
388. Sjoberg’s, Inc.
389. Skokie, IL
390. Smithfield, NC
391. Solana Beach, CA
392. South Orange Village, NJ
393. South Portland, ME
394. South San Francisco, CA
395. South Slope Cooperative Telephone Company
396. Southeast Michigan Municipalities
397. Southwest Suburban Cable Commission (SWSCC)
398. Spring Hope, NC
399. Springfield, MO
400. St. Charles, IL
401. St. Paul, MN*

402. St. Petersburg, FL
403. Standish, ME
404. State College Bourough, PA
405. State of Hawaii
406. Statesville, NC
407. Sun Prairie Cable Access TV, WI
408. Sunapee, NH*
409. Sunnyvale, CA
410. Susanville, CA
411. Tabor City, NC
412. Tampa, FL
413. Taylor, MI
414. Telco Retirees Association, Inc.
415. Telecommunications Industry Association
416. Temecula, CA
417. Texas Coalition of Cities for Utility Issues (TCCFUI)
418. Texas Municipal League and the Texas City Attorneys Association
419. The Progress & Freedom Foundation
420. Time Warner Cable
421. Tobaccoville, NC
422. Toppenish, WA
423. Torrance, CA
424. Truckee, CA
425. Tulsa, OK
426. Tuolumne, CA
427. Ukiah, CA
428. United States Internet Industry Association
429. United States Telecom Association
430. United States-Mexico Chamber of Commerce
431. URTV Asheville, NC
432. Valley Voters Organized Toward Empowerment
433. Vancouver Educational Telecommunications Consortium (VETC)
434. Vass, NC
435. Verizon
436. Vermont Public Service Board (VPSB)
437. Video Access Alliance
438. Villages of Larchmont & Mamaroneck, NY
439. Virginia Cable Telecommunications Association (VCTA)
440. Vista, CA
441. Wake Forest, NC
442. Walnut Creek, CA
443. Walnut Creek, California
444. Warrenville, IL
445. Washington State Grange
446. Wayland, MA
447. Wendell, NC
448. West Allis, WI
449. West Palm Beach, FL
450. Westport, WI
451. Wheaton, IL
452. Whitakers, NC

453. White Plains Cable Access TV, NY
454. White, SD
455. Whittier, CA
456. Wilbraham, MA
457. Wilson, NC
458. Winchester, KY & KY Regional Cable Comm.
459. Windham Community TV, NH
460. Winston-Salem, NC
461. Wisconsin Association of Public, Educational and Government Access Channels (WAPC)
462. Women Impacting Public Policy
463. Worchester, MA
464. World Institute on Disability
465. Yanceyville, NC
466. Yuma, AZ
467. Zebulon, NC
468. Zeeland, MI

APPENDIX B

Rule Changes

Part 76 of Title 47 of the Code of Federal Regulations is amended as follows:

Part 76 –MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE

1. Revise Subpart C title to read as follows:

Subpart C – Cable Franchise Applications

2. Insert into new Subpart C the following:

§76.41 Franchise Application Process

(a) Definition. *Competitive Franchise Applicant.* For the purpose of this section, an applicant for a cable franchise in an area currently served by another cable operator or cable operators in accordance with 47 U.S.C. § 541(a)(1).

(b) A competitive franchise applicant must include the following information in writing in its franchise application, in addition to any information required by applicable state and local laws:

(1) the applicant's name;

(2) the names of the applicant's officers and directors;

(3) the business address of the applicant;

(4) the name and contact information of a designated contact for the applicant;

(5) a description of the geographic area that the applicant proposes to serve;

(6) the PEG channel capacity and capital support proposed by the applicant;

(7) the term of the agreement proposed by the applicant;

(8) whether the applicant holds an existing authorization to access the public rights-of-way in the subject franchise service area as described under subsection (b)(5);

(9) the amount of the franchise fee the applicant offers to pay; and

(10) any additional information required by applicable state or local laws.

(c) A franchising authority may not require a competitive franchise applicant to negotiate or engage in any regulatory or administrative processes prior to the filing of the application.

(d) When a competitive franchise applicant files a franchise application with a franchising authority and the applicant has existing authority to access public rights-of-way in the geographic area that the applicant proposes to serve, the franchising authority must grant or deny the application within 90 days of the date the application is received by the franchising authority. If a competitive franchise applicant does not have existing authority to access public rights-of-way in the geographic area that the applicant proposes to serve, the franchising authority must grant or deny the application within 180 days of the date the application is received by the franchising authority. A franchising authority and a competitive franchise applicant may agree in writing to extend the 90-day or 180-day deadline, whichever is applicable.

e) If a franchising authority does not grant or deny an application within the time limit specified in subsection (d), the competitive franchise applicant will be authorized to offer service pursuant to an interim franchise in accordance with the terms of the application submitted under subsection (b).

f) If after expiration of the time limit specified in subsection (d) a franchising authority denies an application, the competitive franchise applicant must discontinue operating under the interim franchise specified in subsection (e) unless the franchising authority provides consent for the interim franchise to continue for a limited period of time, such as during the period when judicial review of the franchising authority's decision is pending. The competitive franchise applicant may seek judicial review of the denial under 47 U.S.C. § 555.

g) If after expiration of the time limit specified in subsection (d) a franchising authority and a competitive franchise applicant agree on the terms of a franchise, upon the effective date of that franchise, that franchise will govern and the interim franchise will expire.

APPENDIX C

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 the *Further Notice of Proposed Rulemaking* ("*Further 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 *Further Notice* provided in paragraph 145 of the item. The Commission will send a copy of the *Further Notice*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration ("SBA").[3] In addition, the *Further 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 *Further Notice* continues 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 as discussed in the *Report and Order* ("*Order*"). Specifically, the *Further Notice* solicits comment on whether the Commission should apply the rules and guidelines adopted in the *Order* to cable operators that have existing franchise agreements, and if so, whether the Commission has authority to do so. The *Further Notice* also seeks comment on whether the Commission can preempt state or local customer service laws that exceed Commission standards.

B. Legal Basis

3. The *Further Notice* tentatively concludes that the Commission has authority to apply the findings in the *Order* to cable operators with existing franchise agreements. In that regard, the *Further Notice* finds that neither Section 611(a) nor Section 622(a) distinguishes between incumbents and new entrants or franchises issued to incumbents and franchises issued to new entrants.[5]

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.[6] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[7] In addition, the term "small business" has the

[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] *See* 47 U.S.C. §§ 531(a), 542(a).

[6] 5 U.S.C. § 603(b)(3).

[7] 5 U.S.C. § 601(6).

same meaning as the term "small business concern" under the Small Business Act.[8] 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").[9]

5. *Small Businesses*. Nationwide, there are a total of approximately 22.4 million small businesses, according to SBA data.[10]

6. *Small Organizations*. Nationwide, there are approximately 1.6 million small organizations.[11]

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. 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 *Further Notice*.

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."[12] As of 1997, there were approximately 87,453 governmental jurisdictions in the United States.[13] 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.

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.

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 $13.0 million or less in revenue annually.[14] According to Census Bureau data for 1997, there were a total of

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[8] 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."

[9] 15 U.S.C. § 632.

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

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

[12] 5 U.S.C. § 601(5).

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

[14] 13 C.F.R. § 121.201, North American Industry Classification System (NAICS) 517510.

1,311 firms in this category, total, that had operated for the entire year.[15] 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.[16] The most recent estimates indicate that there were 1,439 cable operators who qualified as small cable system operators at the end of 1995.[17] 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."[18] The Commission has determined that there are 67,700,000 subscribers in the United States.[19] 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.[20] Based on available data, the Commission estimates that the number of cable operators serving 677,000 subscribers or fewer, totals 1,450.[21] The Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed $250 million,[22] 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.[23] As noted above, the SBA has created a small business size standard for Cable and Other

[15] 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).

[16] 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).

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

[18] 47 U.S.C. § 543(m)(2).

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

[20] 47 C.F.R. § 76.901(f).

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

[22] 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).

[23] *See* 47 U.S.C. § 573.

Program Distribution.[24] This standard provides that a small entity is one with $13.0 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.[25] 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.

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

14. We anticipate that any rules 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). Local franchising authorities ("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

15. 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."[26]

16. As discussed in the *Further Notice*, Sections 611(a) and 622(a) do not distinguish between new entrants and cable operators with existing franchises.[27] As discussed in the *Order*, the Commission has the authority to implement the mandate of Section 621(a)(1) to ensure that LFAs do not unreasonably refuse to award competitive franchises to new entrants, and adopts rules designed to ensure that the local franchising process does not create unreasonable barriers to competitive entry for new entrants. Such rules consist of specific guidelines (*e.g.*, maximum timeframes for considering a competitive franchise application) and general principles regarding franchise fees designed to provide LFAs with the guidance necessary to conform their behavior to the directive of Section 621(a)(1). As noted above, applying these rules regarding the franchising process to cable operators with existing franchises likely would have at most a *de minimis* impact on small governmental jurisdictions. Even if that were not the case, however, we believe that the interest of fairness to those cable operators would outweigh any impact on small entities. The alternative (*i.e.*, continuing to allow LFAs to follow procedures that are unreasonable) would be unacceptable, as it would be inconsistent with the Communications Act. 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

[24] 13 C.F.R. § 121.201, NAICS code 517510.

[25] *See* http://www.fcc.gov/mb/ovs/csovscer.html (visited December 19, 2006), http://www.fcc.gov/mb/ovs/csovsarc.html (visited December 19, 2006).

[26] 5 U.S.C. §§ 603(c)(1)-(4).

[27] 47 U.S.C. §§ 531(a), 542(a).

the Commission might implement the tentative conclusions while at the same time imposing lesser burdens on small entities.

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

17. None.

APPENDIX D

Final Regulatory Flexibility Act Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended ("RFA")[1] an Initial Regulatory Flexibility Analysis ("IRFA") was incorporated in the *Notice of Proposed Rulemaking* ("*NPRM*") to this proceeding.[2] The Commission sought written public comment on the proposals in the NPRM, including comment on the IRFA. The Commission received one comment on the IRFA. This present Final Regulatory Flexibility Analysis ("FRFA") conforms to the RFA.[3]

A. Need for, and Objectives of, the Report and Order

2. This Report and Order ("*Order*") adopts rules and provides guidance to implement Section 621 of the Communications Act of 1934, as amended (the "Communications Act").[4] Section 621 of the Communications Act prohibits franchising authorities from unreasonably refusing to award competitive franchises for the provision of cable services.[5] The Commission has found that the current franchising process constitutes an unreasonable barrier to entry for competitive entrants that impedes enhanced cable competition and accelerated broadband deployment. The Commission also has determined that it has authority to address this problem. To eliminate the unreasonable barriers to entry into the cable market, and to encourage investment in broadband facilities, in this *Order* the Commission (1) adopts maximum time frames within which local franchising authorities ("LFAs") must grant or deny franchise applications (90 days for new entrants with existing access to rights-of-way and six months for those who do not); (2) prohibits LFAs from imposing unreasonable build-out requirements on new entrants; (3) identifies certain costs, fees, and other compensation which, if required by LFAs, must be counted toward the statutory 5 percent cap on franchise fees; (4) interprets new entrants' obligations to provide support for PEG channels and facilities and institutional networks ("I-Nets"); and (5) clarifies that LFA authority is limited to regulation of cable services, not mixed-use services. The Commission also preempts local laws, regulations, and franchise agreement requirements, including level-playing-field provisions, to the extent they impose greater restrictions on market entry for competitive entrants than what the *Order* allows. The rule and guidelines are adopted in order to further the interrelated goals of enhanced cable competition and accelerated broadband deployment. For the specific language of the rule adopted, see Appendix B.

B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

3. Only one commenter, Sjoberg's, Inc. submitted a comment that specifically responded to the IRFA. Sjoberg's, Inc. contends that small cable operators are directly affected by the adoption of rules that treat competitive cable entrants more favorably than incumbents. Sjoberg's Inc. argues that small cable operators are not in a position to compete with large potential competitors. These arguments were considered and rejected as discussed below.

4. We disagree with Sjoberg's Inc. assertion that our rules will treat competitive cable entrants more favorably than incumbents. While the actions we take in the *Order* will serve to increase

[1] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et. seq.*, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"), Pub. L. No. 104-121, Title II, 110 Stat. 847 (1996). The SBREFA was enacted as Title II of the Contract With America Advancement Act of 1996 ("CWAAA").

[2] *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*, 20 FCC Rcd 18581 (2005) ("*NPRM*").

[3] *See* 5 U.S.C. § 604.

[4] 47 U.S.C. § 541(a)(1).

[5] *Id*.

competition in the multichannel video programming ("MVPD") market, we do not believe that the rules we adopt in the *Order* will put any incumbent provider at a competitive disadvantage. In fact, we believe that incumbent cable operators are at a competitive advantage in the MVPD market; incumbent cable operators have the competitive advantage of an existing customer base and significant brand recognition in their existing markets. Furthermore, we ask in the *Further Notice of Proposed Rulemaking* whether the findings adopted in the *Order* should apply to existing cable operators and tentatively conclude that they should.

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

Entities Directly Affected By Proposed Rules

5. The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the rules adopted herein.[6] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small government jurisdiction."[7] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[8] 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).[9]

6. The rules adopted by this *Order* will streamline the local franchising process by adopting rules that provide guidance as to what constitutes an unreasonable refusal to grant a cable franchise. The Commission has determined that the group of small entities directly affected by the rules adopted herein consists of small governmental entities (which, in some cases, may be represented in the local franchising process by not-for-profit enterprises). Therefore, in this FRFA, we consider the impact of the rules on small governmental entities. A description of such small entities, as well as an estimate of the number of such small entities, is provided below.

7. *Small governmental jurisdictions.* Small governmental jurisdictions are "governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand."[10] As of 1997, there were approximately 87,453 governmental jurisdictions in the United States.[11] 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.

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[6] 5 U.S.C. § 603(b)(3).

[7] *Id*. § 601(6).

[8] *Id*. § 601(3) (incorporating by reference the definition of "small business concern" in 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." 5 U.S.C. § 601(3).

[9] 15 U.S.C. § 632. Application of the statutory criteria of dominance in its field of operation and independence are sometimes difficult to apply in the context of broadcast television. Accordingly, the Commission's statistical account of television stations may be over-inclusive.

[10] 5 U.S.C. § 601(5).

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

Miscellaneous Entities

8. 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 conclusions.

Cable Operators

9. 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 $13.0 million or less in revenue annually.[12] 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.[13] 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.

10. 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.[14] The most recent estimates indicate that there were 1,439 cable operators who qualified as small cable system operators at the end of 1995.[15] 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.

11. 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."[16] The Commission has determined that there are 67,700,000 subscribers in the United States.[17] 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.[18] Based on available data, the Commission estimates that the

[12] 13 C.F.R. § 121.201, North American Industry Classification System (NAICS) code 517510.

[13] 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).

[14] 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).

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

[16] 47 U.S.C. § 543(m)(2).

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

[18] 47 C.F.R. § 76.901(f).

number of cable operators serving 677,000 subscribers or fewer, totals 1,450.[19] The Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed $250 million,[20] 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.

12. Open Video Services. Open Video Service ("OVS") systems provide subscription services.[21] As noted above, the SBA has created a small business size standard for Cable and Other Program Distribution.[22] This standard provides that a small entity is one with $13.0 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.[23] 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.

Telecommunications Service Entities

13. 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."[24] 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.[25] We have therefore included small incumbent local exchange carriers in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

14. *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.[26] According to

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

[20] 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).

[21] *See* 47 U.S.C. § 573.

[22] 13 C.F.R. § 121.201, NAICS code 517510.

[23] *See* http://www.fcc.gov/mb/ovs/csovscer.html (visited December 19, 2006), http://www.fcc.gov/mb/ovs/csovsarc.html (visited December 19, 2006).

[24] 15 U.S.C. § 632.

[25] 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).

[26] 13 C.F.R. § 121.201, NAICS code 517110 (changed from 513310 in Oct. 2002).

Commission data,[27] 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.[28]

15. *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.[29] According to Commission data,[30] 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.[31]

D. Description of Projected Reporting, Record Keeping and other Compliance Requirements

16. The rule and guidance adopted in the *Order* will require *de minimus* additional reporting, record keeping, and other compliance requirements. The most significant change requires potential franchisees to file an application to mark the beginning of the franchise negotiation process. This filing requires minimal information, and we estimate that the average burden on applicants to complete this application is one hour. The franchising authority will review this application in the normal course of its franchising procedures. The rule will not require any additional special skills beyond any already needed in the cable franchising context.

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

17. The RFA requires an agency to describe any significant alternatives that it has considered

[27] 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.

[28] *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.

[29] 13 C.F.R. § 121.201, NAICS code 517110.

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

[31] *See supra* note 28.

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 or reporting requirements under the rule for 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 small entities.[32]

18. In the *NPRM*, the Commission sought comment on the impact that rules interpreting Section 621(a)(1) might have on small entities, and on what effect alternative rules would have on those entities. The Commission also invited comment on ways in which the Commission might implement Section 621(a)(1) while at the same time impose lesser burdens on small entities. The Commission tentatively concluded that any rules likely would have at most a *de minimis* impact on small governmental jurisdictions, and that the interrelated, high-priority federal communications policy goals of enhanced cable competition and accelerated broadband deployment necessitated the establishment of specific guidelines for LFAs with respect to the process by which they grant competitive cable franchises. We agree with those tentative conclusions, and we believe that the rules adopted in the *Order* will not impose a significant impact on any small entity.

19. In the *Order*, we provide that LFAs should reasonably review franchise applications within 90 days for entities existing authority to access rights-of way, and within six months for entities that do not have such authority. This will result in decreasing the regulatory burdens on cable operators. We declined to adopt shorter deadlines that commenters proposed (*e.g.*, 17 days, one month) in order to provide small entities more flexibility in scheduling their franchise negotiation sessions. In the *Order*, we also provide guidance on whether an LFA may reasonably refuse to award a competitive franchise based on certain franchise requirements, such as build-out requirements and franchise fees. As an alternative, we considered providing no guidance on any franchising terms. We conclude that the guidance we provide minimizes any adverse impact on small entities because it clarifies the terms within which parties must negotiate, and should prevent small entities from facing costly litigation over those terms.

F. Report to Congress

20. The Commission will send a copy of the *Order*, including this FRFA, in a report to be sent to Congress pursuant to the *Small* Business Regulatory Enforcement Fairness Act of 1996.[33] In addition, the Commission will send a copy of the *Order*, including the FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the *Order* and FRFA (or summaries thereof) will also be published in the Federal Register.[34]

[32] 5 U.S.C. § 603(c)(1)-(c)(4)

[33] *See* 5 U.S.C. § 801(a)(1)(A).

[34] *See id*. § 604(b).

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)

Greater competition in the market for the delivery for multichannel video programming is a primary and long-standing goal of federal communications policy. In passing the 1992 Cable Act, Congress recognized that competition between multiple cable systems would be beneficial, would help lower cable rates, and specifically encouraged local franchising authorities to award competitive franchises. Section 621 of the statute reads, "A franchising authority may not grant an exclusive franchise and *may not unreasonably refuse to award an additional competitive franchise*."

Telephone companies are investing billions of dollars to upgrade their networks to provide video. As new providers began actively seeking entry into video markets, we began to hear that some local authorities were making the process of getting franchises unreasonably difficult, despite clear statutory language. The record collected by the Commission in this proceeding cited instances where LFAs sat on applications for more than a year or required extraordinary in kind contributions such as the building of public swimming pools and recreation centers.

Such unreasonable requirements are especially troubling because competition is desperately needed in the video market. As we just found, from 1995 to 2005, cable rates have risen 93%. In 1995 cable cost $22.37 per month. Last year, cable cost $43.04 per month. Today's Communications Daily reports that prices for expanded basic are now about $50 per month. The trend in pricing of cable services is of particular importance to consumers. Since 1996 the prices of every other communications service have declined while cable rates have risen year after year after year.

This item appropriately removes such regulatory barriers by giving meaning to the words Congress wrote in section 621 of the Cable Act. Specifically, the Commission finds that an LFA is unreasonably refusing to grant a competitive franchise when it does not act on an application within a reasonable time period, imposes taxes on non-cable services such as broadband, requires a new entrant to provide unrelated services or imposes unreasonable build-out requirements.

The widespread deployment of broadband remains my top priority as Chairman and a major Commission objective. During my tenure as Chairman, the Commission has worked hard to create a regulatory environment that promotes broadband deployment. We have removed legacy regulations, like tariffs and price controls, that discourage carriers from investing in their broadband networks, and we worked to create a regulatory level playing-field among broadband platforms. And we have begun to see some success as a result of the Commission's policies. High-speed connections to the Internet have grown over 400% since I became Commissioner in July 200.

The ability to deploy broadband networks rapidly however, is intrinsically linked to the ability to offer video to consumers. As the Commission stated in the Notice in this proceeding: "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."

Similarly, in a 2005 Policy Paper, the Phoenix Center found that video is "is now the key driver for new fiber deployment in the residential market." The Phoenix Center went on to say that: "If a new entrant cannot readily provide consumers multichannel video over an advanced network, then the prospects for success will be diminished substantially due to a reduction in the entrant's potential revenues. Quite simply, the ability to sell video services over these fiber networks may be a crucial factor in getting those fiber networks deployed." By enhancing the ability of new entrants to provide video services then we are advancing our goal of universal affordable broadband access for Americans, as well as our goal of increased video competition.

I am also committed to seeing that consumers are able to realize the benefits of competition in the forms of better services and lower prices. In recent years however, consumers have had limited choice among video services providers and ever increasing prices for those services. But as was just demonstrated in our annual price survey, cable competition can impact cable bills. Again, it found that only in areas where there was competition from a second cable operator did average price for cable service decrease. I am pleased that the steps taken by the Commission today will expressly further this type of competition and help ensure that lower prices are available to as many Americans as possible as quickly as possible.

Addressing build-out requirements was particularly difficult. This item seeks to strike a balance between encouraging as widespread deployment of broadband as possible while not deterring entry altogether. I believed it would have been appropriate to provide examples of build-out requirements that would be reasonable in addition to illustrating those that could not be.[1]

[1] For example, I would have been willing to find that it would seem reasonable for an LFA to require that, beginning five years after the effective date of a new entrant's franchise and every 3 years thereafter, if in the portion of the franchise area where the new entrant has chosen to offer cable service at least 15 percent of the households subscribe to such service, the new entrant increase by 20 percent the households in the franchise area to which the new entrant offers cable service by the beginning of the next 3-year interval, until the new entrant is capable of providing cable service to all households in the franchise area.

DISSENTING 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)

I think that all of my colleagues and I can agree on the central importance of encouraging video competition. It is abundantly clear that cable rates are rising faster than inflation and that wireline cable competition can be helpful in bringing those rates down. Consumers deserve rules that will bring such competition to their doorsteps because consumers are not being well-served by the lack of competition today.

I think my colleagues and I can also agree on the central importance of broadband deployment. As I have often pointed out, our nation is falling behind in the international broadband race. Encouraging new entrants into the video market could at least assist in the challenge of building out broadband infrastructure, although it doesn't represent anything near the totality of what a real broadband strategy would look like.

But agreeing on the many benefits of video competition is hardly the same thing as coming up with rules that will actually encourage honest-to-goodness competition within the framework of the statutes that Congress has given us. The item before us today doesn't get us there and I cannot support it as written.

In recent days we had discussions attempting to craft an item with which I would feel more comfortable. Chairman Martin engaged in those discussions in good faith and I thank him for that. My goal was to encourage an item that preserves a local authority's statutory right to seek specific and far-reaching build-out requirements, protects each community's ability to negotiate for PEG and I-NET facilities, and maintains truly meaningful local ability to deal with the huge companies that are coming into our cities and towns to build important infrastructure.

Throughout the consideration of this item and even as we discussed ways to improve it in recent days, I have been troubled at the lack of a granular record that would demonstrate that the present franchising system is irretrievably broken and that traditional federal-state-local relationships have to be so thoroughly upended. If we are going to preempt and upend the balances inherent in long-standing federal-state-local jurisdictional authorities, we should have a record clearly demonstrating that those local authorities are not up to the task of handling this infrastructure build-out and that competition can be introduced only by preempting and upsetting these long-standing principles of federalism. My colleagues may recall that when we launched the NPRM on this item, I made it very clear how important the compilation of a compelling granular record would be in my consideration of this proceeding. I do not believe that either today's item or the record behind it makes such a showing. The various examples of "unreasonable" franchise requirements that the item enumerates are not closely or carefully supported by the record and often fail to rise beyond isolated episodes or anecdotal evidence.

Many people questioned, and continue to question, the Commission's legal authority to do what it is doing today. It is clear that those questions remain and that the Commission has been asked by those with oversight powers to more conclusively demonstrate our authority to undertake the actions we initiate today. I believe it is the better course of wisdom in so far-reaching a proceeding, in light of the concern being expressed by those with oversight responsibilities of this Commission, to thoroughly answer those questions, to lay out the basis of our claimed legal authority, and to explain what legal risks this action entails before taking action. Under the circumstances, proceeding on such a controversial decision today does not put an end to this issue. It only invites more delay, more confusion, and more possibility of legal challenge.

As we face the challenge of providing ubiquitous high-speed broadband to all our citizens, we need the certainty of a national strategy to get the job done. Right now this nation is hobbled because it has no such strategy, no plan for the infrastructure build-out our people need to be productive and competitive citizens of the world. The United States is ranked number twenty-one in the International Telecommunications Union's Digital Opportunity Index. It is difficult to take much comfort from being twenty-first in the Twenty-first century. The kind of broadband strategy I am talking about demands a level of consensus and national buy-in by the many diverse interests and entities that would be responsible for implementing it. While I have never equated franchise reform as anything remotely equivalent to a national broadband strategy, I do believe a properly-crafted and legally-certain franchising reform could facilitate some level of broadband build-out. That is what I attempted to work toward here. But if our decision is only going to increase concern, increase the questions and increase the risk, then I think we should pause, take a deep breath, answer the questions and reach out for more consensus. I don't say unanimity, of course, but at least a level of comfort that builds an environment wherein the next few years can see the job actually getting done rather than spent in contentious debate or court challenge because our reasoning was deemed inadequate.

So I thank my colleagues, and especially the Chairman, for the discussions we have had—discussions that were both in good faith and substantive—but in light of the concerns I have just discussed, I cannot support this afternoon's outcome. Unlike so many other proceedings coming before the Commission, I was nowhere near certain as I came to work this morning how the vote on this item would go. I actually thought that perhaps we would take the short time needed, answer the questions that had been posed, and then reassess where we were as to proceeding with an item. That was my preference. Instead it appears a majority will proceed to approve an item that, as drafted right now, is without important enhancements I have been advocating and without sufficient buy-in from the world beyond the FCC to assure its effectiveness. I must therefore respectfully dissent.

DISSENTING 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)

The policy goals of this *Order*, to promote competitive video offerings and broadband deployment, are laudable. But while I support these goals, today's item goes out on a limb in asserting federal authority to preempt local governments, and then saws off the limb with a highly dubious legal scheme. It substitutes our judgment as to what is reasonable – or unreasonable – for that of local officials – all in violation of the franchising framework established in the Communications Act.

Today's *Order* is certain to offend many in Congress, who worked long and hard on this important issue, only to have a Commission decision rushed through with little consultation. The result will be heavy oversight after-the-fact, and a likely rejection by the courts. It will solve nothing, create much confusion, and provide little certainty or progress on our shared goal of promoting real video competition and universal broadband deployment.

This outcome is disappointing because I believe we must do everything we can to encourage competitive video offerings. As I was driving to work this morning, I saw a line of Verizon trucks installing FiOS in my neighborhood. I must admit, I am very excited about this new service, and plan to subscribe. FiOS is now available because our local county officials approved a franchise for Verizon. If they had not, I imagine many of my neighbors would have complained loudly. Maybe that is why Verizon has repeatedly told Wall Street investors, "[e]ven in those states where we don't have the whole state, places like Pennsylvania, we have become very successful now in getting franchising. So we don't see that as an issue going forward."[1] I am pleased with their efforts and their success, and want to encourage their continued investment.

As I said in the underlying *Notice of Proposed Rule Making*, "Congress clearly sought to promote competitive cable offerings and to facilitate the approval of competitive cable franchises in the Cable Act of 1992."[2] I agree the Commission should do what it can within the current legal framework to facilitate increased video competition because it benefits American consumers, promotes U.S. deployment of broadband networks and services, and enhances the free exchange of ideas in our democratic society.

Notwithstanding these worthy goals, I, unfortunately, cannot support this *Order* because the FCC is a regulatory agency, not a legislative body. In my years working on Capitol Hill, I learned enough to know that today's *Order* is legislation disguised as regulation. The courts will likely reverse such action because the Commission cannot act when it "does not really define specific statutory terms, but rather takes off from those terms and devises a comprehensive regulatory regimen…. This extensive quasi-legislative effort to implement the statute does not strike [me] as merely a construction of statutory phrases."[3]

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[1] *Final Transcript*, Thomson StreetEvents, VZ-Verizon at UBS 34th Annual Global Media Conference, Dec. 6, 2006, at page 7, available at, http://investor.verizon.com/news/20061206/20061206_transcript.pdf.

[2] Statement of Commissioner Jonathan S. Adelstein, *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, FCC 05-180 (rel. Nov. 18, 2005) ("*Local Franchising NPRM*").

[3] *Kelley v. E.P.A.*, 15 F.3d 1100, 1108 (DC. Cir. 1994). While the Commission contends that "[d]espite the parameters established by the Communications Act, … operation of the franchising process has proven far more

(continued…)

Today's *Order* is disappointing because while there is bipartisan agreement that the current video franchising framework should be refined to better reflect marketplace realities, technological advancement, and consumer demands, the decision skips the fine-tuning and performs an extreme makeover. The majority accomplishes today what the elected representatives of the American people have tried to do through the legislative process. In doing so, the Commission not only disregards current law and exceeds its authority, but it also usurps congressional prerogatives and ignores the plain meaning of Title VI, the cannons of statutory construction, and the judicial remedy Congress already provided for unreasonable refusals. In crafting a broadly aggressive and legally tenuous solution, the majority attempts the legal equivalent of triple axels and quadruple toe loops that would only impress an Olympic judge who is willing to overlook slips, stumbles, and falls.

We might keep in mind former President Ronald Reagan's views on federalism and the role of local governments. In his first State of the Union Address, President Reagan exhorted Americans to give power back to local governments:

> Together, after 50 years of taking power away from the hands of the people in their states and local communities we have started returning power and resources to them. … Some will also say our states and local communities are not up to the challenge of a new and creative partnership. Well, that might have been true 20 years ago. … It's no longer true today. This Administration has faith in state and local governments and the constitutional balance envisioned by the Founding Fathers.[4]

More recently, President George W. Bush echoed this trust in local government, asserting that "government closest to the people is more responsive and accountable."[5] While the Commission has long viewed the cable franchising process as "a deliberately structured dualism,"[6] today's decision is a clear rebuke of this storied relationship with local government.

Congressional action in 1984, 1992, and 1996 re-affirmed further that it is Congress' intent that "the franchise process take[s] place at the local level where city officials have the best understanding of local communities' needs and can require cable operators to tailor the cable system to meet those needs."[7] This is clearly set forth in the purposes of Title 6, wherein Congress made clear that Title 6 would establish the proper local, state and federal roles.[8] Congress established a framework whereby state and local authorities, within certain federal limits, are primarily responsible for the administration of the franchising process. That process is inherently local and fact-specific. Indeed, a one-size-fits-all

(Continued from previous page)
complex and time consuming than it *should be*," (Order, ¶ 3), the proper inquiry is whether the franchising process is operating *as Congress intended*. Today's *Order* ignores this important question. In so doing, the Commission disregards the parameters established in the Cable Act and imposes its view of how the franchising process *should be*.

[4] President Ronald Reagan, *State of the Union Address*, January 26, 1982, available at, http://www.reagan.utexas.edu/archives/speeches/1982/12682c.htm.

[5] George W. Bush, "What the Congress Can Do For America," WALL ST. J., January 3, 2007, at A13.

[6] *Cable Television Report and Order,* 36 F.C.C. 2d 143, 207 ¶177, *recon.*, 36 F.C.C. 2d 326 (1972).

[7] H.R. Rep. No. 934, 98th Congress, 2d Sess. at 24.

[8] 47 U.S.C. § 521 (3).

approach is antithetical to clear congressional intent that cable systems be "responsive to needs and interests of local community."[9]

To be sure, the franchising process is not perfect and, by definition, negotiations may result in some delay. But Congress, after much deliberation, created this process to achieve certain stated policy objectives, which are clearly set out in the Act. [10] Regardless of how commenters now feel about this carefully calibrated and negotiated balance, Congress delegated authority to state and local governments to make certain decisions and to determine the merit of granting cable franchises in their respective communities. It then set forth a judicial remedy if a party is aggrieved by a denial of franchising.[11] While Congress has the power to revisit this scheme, and has strongly considered doing so, until then this Commission must adhere to the law as written.

Yet today, the Commission is federalizing the franchising process, taking it upon itself to decide, in every local dispute, what is "unreasonable," without actually looking at specific, local examples to determine the real situation.[12] Instead of acknowledging the vast dispute in the record as to whether there are actually any unreasonable refusals being made today, the majority simply accepts in every case that the phone companies are right and the local governments are wrong, all without bothering to examine the facts behind these competing claims, or conduct any independent fact-finding. This is breathtaking in its disrespect of our local and state government partners and in its utter disregard for agency action based on a sound record.

Today's *Order* also displays a fundamental misunderstanding about the commitment of franchising authorities to bring competition to their citizens. By law, a franchise under Title 6 confers a right of access to people's property.[13] Unlike members of this Commission, many state and local officials are elected and directly accountable to their citizens. Our knee-jerk embrace of everything interested companies say while discounting local elected officials on a matter grounded in local property rights certainly does not inspire a great deal of confidence in the Commission's ability on the federal level to arbitrate every local dispute in the country and fairly decide who is unreasonable and who is not. Even if the Commission had such power, there is no mechanism outlined in this *Order* to establish how that process would work. Consequently, the end result will likely be litigation, confusion, abuse of the process, and a certain amount of chaos. It is sadly ironic that this agency, which has been recently in violation of one of its own 90 day statutory deadlines, is telling localities to do as I say, not as I do.[14]

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[9] 47 U.S.C. § 521(2).

[10] One of the principal purposes of Title VI is to "establish franchise procedures and standards which encourage the growth and development of cable systems and which assure that cable systems are responsive to the needs and interests of the local community." 47 U.S.C. § 521(2).

[11] 47 U.S.C. § 555.

[12] See Letter from David L. Smith, City Attorney, City of Tampa , to Kevin Martin, Chairman, FCC, dated January 5, 2007 (stating "[h]ow disappointing it was to learn that … the FCC would embrace as truth an allegation in a rulemaking that has such far-reaching implications to so many, without doing any follow-up with the jurisdiction named to confirm it accuracy.").

[13] *See* 47 U.S.C. § 541 (a)(2).

[14] See, e.g., In the Matter of Comcast Corporation's Request for Waiver of 47 C.F.R. § 76.120(a)(1), CSR-7017-Z, CS Docket No 97-80, DA-06-2543, CS Docket No 97-80, filed 4/19/06 (waiver proceeding placed on public notice 5/17/06 and decided 1/10/2007, well past the statutory "shot clock"); 47 U.S.C. § 549(c) ("the Commission shall grant any such waiver request within 90 days of any application filed under this subsection.").

Over the past two years, Congress held nearly two dozen hearings on franchising, and sought to amend the Cable Act in an effort to reform the current franchising process and "strike the right balance between national standards and local oversight."[15] Yet, the Commission has finalized in the dark of night what Congress was unable to resolve in two years of intensive public deliberations. In contrast to the Senate where I used to work, one might call the FCC the world's least deliberative body. And the final product shows it.

Congress would not have expended effort on a major piece of legislation had its members believed it was not necessary to grant the Commission explicit authority to do what the majority now contends the Commission can do under existing law. The House bill proposed a national cable franchising regime, while the Senate bill proposed an expedited competitive franchise process which would have required local authorities to issue franchises pursuant to a standard application drafted by the Commission. Today's *Order* turns federalism on its head by putting the Commission in the role of sole arbiter of what is a "reasonable" or "unreasonable" LFA practice and short-circuiting the franchising process if an arbitrary shot clock has expired.

While Congress worked to change federal law to create a role for the Commission in the franchising process, there was and continues to be considerable state and local activity to reform the local franchising process. To date, nearly half of all states have adopted state-wide franchise reform or mandatory state franchise terms, or have engaged in a democratic process to enact meaningful franchise reform legislation.[16] Hundreds of other localities have approved new franchises, and many more are in the works.

When we launched this proceeding, the central question was "whether the local franchising process truly is a hindrance to the deployment of alternative video networks, as some new entrants assert[ed]."[17] Indeed, the *Local Franchising NPRM* explicitly solicited "empirical data" and "concrete examples" regarding problems in the franchising process that FCC could resolve. In response, the record evidence provides scant, dated, isolated, and unverified examples that fall far short of demonstrating a systematic failure of state and local governments to negotiate in good faith and in a reasonable fashion.

According to the Telecommunications Industry Association, "some recent examples of overly-burdensome, and … 'unreasonable,' extraneous obligations"[18] included: (1) Merton Group's two year negotiations with Hanover, New Hampshire, which concluded in December, 2004; (2) Knology's negotiations with Louisville, Kentucky in early 2000; (3) Knology's franchise negotiations with the greater Nashville, Tennessee area in March 2000; and (4) Grande Communication's negotiations with San Antonio and Corpus Christi, Texas in 2002. Additionally, Fiber-To-The-Home Council cites the efforts of Guadalupe Valley Telephone Cooperative to seek a franchise in the City of Bulverde, Texas in 2004. The *Order* itself relies on unconfirmed allegations by Verizon and AT&T about unreasonable demands and negotiations being drawn out over an extended period of time; and complaints by U.S. Telecom

[15] H.R. REP. No. 109-470, at 3 (2006).

[16] While the *Order* purportedly refrains from explicitly preempting "statewide franchising decisions" and only addresses "decisions made by [instrumentalities of the state, such as] county – or municipal level franchising authorities," this dubious distinction has a questionable legal basis. Under Title 6, LFAs derive their power by virtue of state law, so such distinctions are not for the FCC to make. Moreover, the Commission's contention that it does not have sufficient information in the record to consider the effect of franchising by states (some of which have had laws in place for a decade), but has sufficient record evidence to preempt 33,000 LFAs, is facially preposterous.

[17] Adelstein Statement, *Local Franchising NPRM*.

[18] Letter from Grant Seiffert, to Jonathan S. Adelstein, Commissioner, FCC, MB Docket No. 05-311 (dated December 11, 2006).

Association, Qwest, and Bell South about new entrants accepting franchise terms that they considered unreasonable in order to avoid further delay in obtaining the franchise, or, in one case, filing a "friendly lawsuit."

These examples, based on my review of the record evidence, represent the extent to which competitive video providers argue that LFAs are delaying in acting on franchise applications. However, considering the current franchising process has been in place nearly 15 years and there are over 30,000 LFAs, I find these sporadic examples, individually and collectively, wholly insufficient to justify the Commission's quasi-legislative attempt to federalize the local franchising process. These sparse allegations and anecdotal evidence do not rise to a level that warrants today's drastic, substantive measures. The Commission's blind acceptance of a few alleged instances as illustrative of a much broader problem is a poor and unfortunate reflection of the disregard for proper agency process. The Commission neither attempted to conduct any independent fact-finding or due diligence, nor verify the allegations made by parties who have a vested interest in the outcome of this proceeding.[19] Even more shocking, the Commission and the commenters fail to cite to a single actual, present day problem pending with any specific LFA.[20]

Notwithstanding the scant record evidence to justify agency preemption and the creation of a national, unified franchising process in contravention of federal law, the Commission conjures its authority to reinterpret and, in certain respects, rewrite section 621 and Title VI of the Communications Act, on just two words in section 621(a)(1)[21] – "unreasonably refuse." The Commission ignores the verb that follows: "to award." A plain reading section 621(a)(1) does not provide a wholesale "unreasonable" test for all LFA action. Rather, the statutory language focuses on the act of awarding a franchise. While I agree that the Commission has authority to interpret and implement the Communications Act, including Title VI,[22] the Commission does not have authority to ignore the plain meaning, structure and legislative history of section 621, and judicial precedent.[23]

[19] *Local Franchising NPRM*, ¶1 ("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. 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.")

[20] During the Commission's Agenda Meeting in Keller, Texas, on February 10, 2006, one Verizon official identified Montgomery County, Maryland, as an obstinate LFA that was insisting upon unreasonable illegal demand and delaying negotiations. Since that meeting, Verizon has in fact obtained a franchise in Montgomery County. *See* Press Release, Montgomery Country, Md., County Negotiates Cable Franchise Agreement with Verizon; Agreement Resolves Litigation, Provides Increased Competition for Cable Service (Sept. 13, 2006) (available at http://www.montgomerycountymd.gov/apps/News/press/PR_details.asp?PrID=2582). In fact, this *Order* blatantly ignores public statements that significantly undermine representations some proponents of this decision have made to the Commission. For example, AT&T has publicly stated that Project Lightspeed will be available to 90% of its "high-value" customers, but to less than 5% of its "low value" neighborhoods, but today the Commission undermines a locality's ability to ensure all residents are served. 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?csp=34 (last viewed 12/20/06). As Verizon's CEO of one major new entrant recently noted, "Any place it's come to a vote, we win." 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. Yet in today's *Order*, the Commission somehow determines that there is widespread bad faith only on the part of the LFAs, not the new entrants, in order to justify this sweeping federal preemption.

[21] 47 U.S.C. §541(a)(1).

[22] Admittedly, however, read together, sections 621(a)(1) and 635(a), clearly vest the courts, not the FCC, with exclusive jurisdiction over the determination of what constitutes "unreasonably refuse." In light of the fact that these two provisions were amended simultaneously in 1992, this is the only rational interpretation. As NATOA pointed out in its Comments, "[i]t is ludicrous to suggest that Congress, having provided that only "final" decisions

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While the Commission purports to limit its action today to interpreting "unreasonably refuse," the *Order* stretches section 621 well beyond the meaning that the statute can bear and, consequentially, changes the franchising process in fundamental ways. There are certain salient features of today's *Order* that raise serious legal and policy implications, requiring careful scrutiny. Most notably, the *Order*: (1) imposes a 90-day shot clock on LFAs to render a decision on the franchise application of a competitive applicant with existing rights-of-way; (2) deems a competitive entrant's franchise application granted after 90-days; (3) prohibits the denial of a competitive entrant's application based upon the entrant's refusal to comply with any build-out obligations; (4) prohibits the denial of a competitive entrant's application based upon the entrant's refusal to build and support PEG and I-net; and (5) authorizes a new entrant to refrain from obtaining a franchise when it is upgrading "mixed use" facilities that will be used for the delivery of video content.

The *Order* finds that franchising negotiations that extend beyond the time frames created today by the Commission amount to an unreasonable refusal to award a competitive franchise within the meaning of 621(a)(1). This finding ignores the plain reading of the first sentence of section 621(a)(1), which provides that a franchising authority "may not *unreasonably refuse to award* an additional competitive franchise."[24] On its face, Section 621(a)(1) does not impose a time limitation on an LFA's authority to consider, award, or deny a competitive franchise. The second and final sentence of section 621(a)(1) provides judicial relief, with no Commission involvement contemplated, when the competitive franchise has been "denied by *a final decision* of the franchising authority."[25] There is no ambiguity here: Congress simply did not impose a time limit on franchise negotiations, as it did on other parts of Title VI (see discussion *infra*). Hence, whether you read the first sentence alone or in context of the entire statutory provision or title, its plain and unambiguous meaning is contrary to the Commission's interpretation. Section 621(a)(1) provides an expressed limitation on the *nature*, not the timing, of the refusal to award a competitive franchise.[26]

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of the "denial" of a franchise application may be appealed, somehow intended, *sub silentio*, to have its own language gutted by allowing parties to bypass the last sentence of § 621(a)(1) entirely and go directly to the FCC." NATOA Comments at 28.

[23] The Senate Report of the 1992 Cable Act concluded that, "[b]ased 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 [not required]* to award second franchises. Accordingly, [the 1992 Cable Act,] as reported, prohibits local franchising authorities from unreasonably refusing to grant second franchises." S. Rep. No. 102-92, at 47 (1991)(emphasis supplied). Thus, an LFA's decision to not grant a franchise need only not be unreasonable.

As one federal district court observed:

> The House version contained a specific list of "reasonable" grounds for denial. H. R. Conf. Rep. No. 102-862, at 168-69 (1992). The Senate version, on the other hand, listed "technically infeasible" and left other reasonable grounds undefined. By choosing not to adopt a federally mandated list of reasonable grounds for denial in favor of an open-ended definition, *Congress intended to leave states with the power to determine the bases for granting or denying franchises, with the only caveat being that a denial must be "reasonable.*"

Knology, Inc. v. Insight Communications Co., L.P., 2001 WL 1750839 at * 2 (W.D. Ky. March 20, 2001) (citation omitted) (emphasis supplied).

[24] 47 U.S.C. §541(a)(1) (emphasis added).

[25] *Id.* (emphasis added).

[26] Congressional intent to qualify the nature of an LFA's refusal, not the timing of the refusal, is clear when you consider another provision of Section 621(a). Section 621(a)(4)(A) provides that "franchising authority shall allow

(continued…)

Even if I were able to move beyond this *Order*'s facially defective reading of 621(a)(1), the Commission's selection of 90 days as the only reasonable time frame for an LFA to consider the franchise application of a competitive provider that already has rights-of-way access before it is "deemed granted" is demonstrably inconsistent with the overall framework of Title VI, unsupported by the record evidence, and quite arbitrary.

The franchising framework established in Title VI does not support the Commission's decision to select 90 days as the deadline for a default grant – another Commission creation – to become effective.[27] Throughout Part III (Franchising and Regulation) of Title VI, when Congress specifically decided to impose a deadline for LFAs to consider sales of cable systems, modification of franchise obligations, and renewals of existing franchises, in all three instances, Congress chose 120 days.[28] In other sections of the Act, the prevalent time frame Congress imposed on LFAs and the Commission is 180 days.[29] Today, the Commission, without authority, cannot take the place of Congress and impose a tighter time frame than Congress ever contemplated to impose on LFAs in the franchising process. This is well beyond Commission "line-drawing" authority, which requires the Commission to operate within the established framework of the authorizing legislation.

While a 90-day deadline arguably could be considered "reasonable," that is not the statutory standard the Commission is purporting to use as the basis of its authority. We can only define "*unreasonable*" refusal, [30] which could be "foot-dragging" or "stonewalling" that amounts to a *defacto* denial of a franchise application. This is not the same as establishing an arbitrary, inflexible 90-day time frame, which overlooks the fact that 120 or 180 days may be reasonable under certain circumstances. While the Commission has line-drawing authority in some cases, the position taken in the *Order* is untenable on its face, given that Congress set a 120-day deadline for franchise transfers, which tend to be simpler than awarding new franchises, unless one is willing to assert that Congress itself was unreasonable. The aggressive schedule set here, while understandable and even desirable from a policy perspective, is evidence of the legislative nature of the *Order*.

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the applicant's cable system *a reasonable period of time* to become capable of providing cable service to all households in the franchise area." In that case, Congress explicitly qualified timing, not the scope of buildout. As demonstrated in the Order, the Commission's attempt to super-inflate the meaning of "unreasonably refuse" in 621(a)(1), and diminish the significance of "unreasonable period of time" in section 621(a)(4)(A) is transparently inconsistent and blatantly self-serving.

[27] The *Order* imposes a time limit of 90 days on LFAs to decide franchise applications from entities that already have access to public rights-of-way and a time limit of six months for applicants that are not already authorized to occupy the rights-of-way. Such a distinction does not exist in Title 6, notwithstanding the fact that Congress specifically contemplated phone companies – entities that already have access to public rights-of-way – obtaining franchises to provide video service.

[28] 47 U.S.C. § 537 (providing LFAs 120 days to act upon request for approval of sale or transfer on cable systems); 47 U.S.C. § 545 (providing LFAs 120 days to modify franchise obligations); and 47 U.S.C. § 546 (providing LFAs a "4-month period" to "renew the franchise or, issue a preliminary assessment that the franchise should not be renewed").

[29] *See, e.g.*, 47 U.S.C. § 543 (authorizing the Commission to "ensure that the rates for the basic service tier are reasonable" and requiring the Commission to develop regulations in 180 days).

[30] 47 U.S.C. § 541(a)(1). Today's *Order* specifically adopts rules that prohibit franchising authorities from "*unreasonably* refusing" to award competitive franchises. *Order* at ¶ 1.

To make matters worse, the Commission-created 90-day shot clock seems to function more like a waiting period, during which time the new entrant has little incentive to engage in meaningful negotiations. An objective review of the evidence shows that there is sufficient blame on both sides of the negotiation table. Sometimes, there are good reasons for delay; and at other times, one side might stall to gain leverage.[31] While the majority is certainly aware of these tactics, they fail to even mention the need for LFAs and new entrants to abide by, or so much as to have, reciprocal good faith negotiation obligations. The majority also has ignored the apparent need to develop a complaint or grievance mechanism for the parties to ensure compliance. Perhaps Congress might consider imposing on the Commission a binding deadline to resolve complaints, which would inject an incentive for both sides to negotiate, meaningfully and in good faith.[32]

Without anything other than the asserted authority to interpret “unreasonably refuse,” the Commission creates a regulatory reprimand for an LFA’s failure to render a final decision within the Commission-created time limits. The consequences of the failure to reach agreement within 90 days is that the LFA will be deemed to have granted the competitive entrant an interim franchise based on the terms proposed in the entrant’s franchise application. In practicality, this will confer rights-of-way access over local property. In selecting this remedy, the Commission purportedly “seeks to provide a meaningful incentive for local franchising authority to abide by the deadlines contained in the *Order*.”[33] While the policy goal is understandable and arguably consistent with congressional intent to encourage the award of competitive cable franchises, we do not have legal authority to establish punitive, one-sided consequences, in order to create an “incentive.” Moreover, the Commission ignores that by establishing a default grant of franchise applications effectively confers local property rights unilaterally and without regard for inherent local police powers and public health, safety and welfare.

The Commission cites no credible authority that empowers it to deem a new entrant’s franchise application granted by the LFA and thus confer local property rights.[34] When construing a statute, principles of construction caution against any interpretation that may contravene existing law or U.S. Constitution. In this case, I am wary of a federal agency, which purports not to preempt any state-based

[31] As the July 11, 2006, filing of the Greater Metro Telecommunications Consortium, the Rainer Communications Commission and the City of Tacoma, Washington explained: “[I]t is an oversimplification to believe that competitive entry into video programming can be facilitated by requiring a local government to act on a franchise application within a specific period of time. What the Commission may consider a delay is often a reasonable time for consideration, and indeed, the internal bureaucracies within many large companies often times dwarf the internal processes within local government, so that any rule the Commission might deem appropriate to apply regarding time to respond, must also be imposed upon the other party to negotiations.”

[32] The Commission purposefully stops short of creating reciprocal good faith obligations because that would authorize the parties to file a complaint with the Commission when negotiations fall apart. Such a complaint process would effectively serve as an enforcement mechanism, which would only increase this *Order*’s litigation exposure as quasi-legislative document. Nevertheless, today’s *Order* cannot be reasonably viewed as mere guidance to LFAs or a clarification of the term “unreasonably refuse” in section 621(a)(1). There is a real, punitive consequence if the LFA does not follow the Commission’s dictates – a “deemed granted” franchise, which incurably alters the dynamics of franchise negotiations.

[33] *Order* at ¶ 76.

[34] The Commission’s reliance on ancillary authority it exercised in the early 1970s, well before congressional enactments in 1984, 1992 and 1996, is unavailing. In fact, such reliance reveals the Commission’s need to make too large a reach to justify it actions. *See* Letter from James L. Casserly, Counsel for Comcast Corporation, to Marlene Dortch, Federal Communications Commission , MB Docket No. 05-311 (filed December 13, 2006).

franchising law, but yet is prepared to step into the shoes of an LFA – an instrumentality of the state – to grant a franchise application with all the attendant rights-of-way privileges.[35]

The Commission rejected an approach that would have deemed an application "denied" once the shot clock expired without LFA action. This approach, I maintain, would have expedited the judicial review that was Congress' chosen remedy, and is infinitely more consistent with the letter and spirit of the Communications Act, Title VI, and specifically sections 621(a)(1) and 635. Nowhere in the Act is the Commission granted the authority to force localities to grant franchises. Simply put, the Commission's "deemed granted" approach in the *Order* is not a justifiable choice to fill the perceived gap left open by Congress when it did not provide a specific remedy against LFA action that is short of an outright denial of a franchise application. While it is generally proper for the Commission to exercise its "predictive judgment," that is only when the Commission has the requisite authority to act within a certain area and it stays within its authority. Neither exists in this case.

In terms of build-out, the Commission seems to make a deliberate effort to overlook the plain meaning of the statute and to substitute its policy judgment for that of Congress. The Commission concludes that it is unlawful for LFAs to refuse to grant a competitive franchise on the basis of an applicants' refusal to agree to any build-out obligations. The Commission's analysis in this regard is anemic and facially inadequate.

Section 621(a)(4)(A) provides 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." Absent express statutory authority, the Commission cannot declare it unreasonable for LFAs to require build-out to all households in the franchise area over a reasonable period of time. The Commission's argument in this regard is particularly spurious in light of the stated objective of this *Order* to promote broadband deployment and our common goal of promoting affordable broadband to all Americans. In the end, this is less about fiber to the home and more about fiber to the McMansion.

The Commission is correct on one point, that section 621(a)(4)(A) is actually a limitation on LFA authority. However, consistent with plain reading of the provision and its legislative history, Section 621(a)(4)(A) surely is not a grant of authority to the Commission and does not impose a limitation on the *scope* of a competitive provider's build-out obligations. Indeed, section 621(a)(4)(A) explicitly limits the "period of time" to build-out, but an LFA is unrestrained to impose full, partial, or no build-out obligations on all cable service providers. As long as an LFA gives a competitive provider "a reasonable period of time to become capable of providing cable service to all households in the franchise area," section 621(a)(4)(A) essentially shields build-out requirement from constituting an "unreasonable refusal" to grant a competitive franchise. While this policy could be changed by Congress to facilitate competitive entry, that is not the current state of the law. An LFA cannot be prohibited from requiring build-out to all households in the franchise area if an LFA allows "a reasonable period of time" to do so. The Commission has not been ordained with a legislative "blue pencil" to rewrite law. Congress specifically directed LFAs – not the FCC – to allow a reasonable period of time for build-out. As much as the Commission would like it be its role, Congress gave the role to LFAs, and it is Congress' purview to modify that explicit delegation of authority.

[35] *See generally*, Charter Communications v. County of Santa Cruz, 304 F.3d 927 (9th Cir. 2002) (holding that deference is accorded to legislative action of local government), especially in light of fact that the Commission does not have clear congressionally delegated authority in this case; and local regulations, in this case, are likely explicitly sanctioned by the Cable Act and consistent with the express provisions of the Act, *see* 47 U.S.C. § 556(a).

Assuredly, Section 621(a)(4)(A) does not impose "universal" or "uniform" build-out requirements on franchise applicants. This may be a reflection of congressional intent to focus on the needs of the locality.[36] However, it does not prohibit LFAs from requiring build-out obligations as a condition of franchise approval, so long as the competitive applicant is given a reasonable period of time.

The rapid deployment of broadband has been a goal of mine since I joined this Commission. Wireline competition in the video market, particularly, is critical as a means to constrain prices, which in itself is a worthy goal after year upon year of price hikes. It is also critical to the future of our democracy that Americans 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 limited number of gatekeepers who decide what deserves airing based on their own financial or ideological interests. But, in order for the Commission to promote these goals effectively, we must operate within our legal authority.

Perhaps the majority has failed to consider the real life consequences of today's *Order*. For instance, in New York City, competitive entrants could file the Commission-mandated informational filing that proposes to serve only Broadway, Madison, or Park Avenue. Under today's *Order*, the New York City franchising authority would be forbidden from denying the competitive franchise based solely on the fact that the new entrant refuses to certain build-out requirements. The LFA is placed in the difficult position of either denying outright the franchise and absorb the costs and fees for the ensuing litigation, or agree to a franchise that is not responsive to needs and interests of local community.

How can the majority declare build-out to be an impediment to entry when one of the major incumbent phone companies, AT&T, claims that it does not need a franchise to operate its video service, and the other, Verizon, has agreed to different, but favorable, build-out obligations with various states and localities? Under the federalist scheme of the Act, different jurisdictions can choose models that best suit their specific needs. For example, in New Jersey, the state-wide franchise reform law correlates build-out principally to population density, while build-out obligations in Virginia principally track the entrant's existing wireline facilities. And in New York City, Verizon and the LFA were actively negotiating universal build-out over a period of a few years.

The broad pen with which the majority writes today's *Order* does not stop with build-out. The *Order* also uses the Commission's alleged authority under Section 621(a)(1) to determine that any LFA refusal to award a competitive franchise because of a new entrant's refusal to support PEG or I-Net is *per se* unreasonable. Although the *Order* purports to provide clarification with respect to which franchise fees are permissible under the Act, it muddles the regime and leaves communities and new entrants with conflicting views about funding PEG and I-Net. Indeed, Congress provided explicit direction on what constitutes or does not constitute a franchise fee, with a remedy to the courts for aggrieved parties.

Today's Order should make clear that, while any requests made by an LFA unrelated to the provision of cable service *and* unrelated to PEG or I-NET are subject to the statutory five percent franchise fee cap, these are not the type of costs excluded from the term "franchise fee" by section 622(g)(2)(C). That provision excludes from the term "franchise fee" any "capital costs that are required by the franchise to be incurred by the cable operator for public, educational, or governmental access facilities." The legislative history of the 1984 Cable Act clearly indicates that "any franchise requirement for the provision of services, facilities or equipment is not included as a 'fee.'"[37]

[36] *See* 47 U.S.C. § 521 (2)(stating that the one of the central purposes of Title 6 is to "assure that cable systems are responsive to the needs and interests of the local community.") *See also* 47 U.S.C. § 521(3)(stating that another central purpose of Title 6 is to establish clear federal, state and local roles).

[37] The legislative history of 1984 Cable Act provides "in general, [section 622(g)(2)(C)] defines as a franchise fee only monetary payments made by the cable operator, and does not include as a 'fee' any franchise requirement for

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PEG facilities and access provide an important resource to thousands of communities across this country. Equally important, redundancy or even duplicative I-Net provides invaluable homeland security and public health, safety and welfare functions in towns, cities, and municipalities across America. It is my hope that today's decision does not undermine these and other important community media resource needs.

While my objections to today's *Order* are numerous and substantial, that should not overlook the real need I believe there is for franchise reform. Indeed, there is bipartisan support for reform in Congress, and most LFAs throughout this country are committed to bring video competition to their jurisdictions. My fundamental concern with this *Order* is that it is based on such paper-thin jurisdiction, but it is truly broad in scope. It ignores the plain reading of the section 621, usurps congressional prerogative and pre-empts LFAs in certain important respects that directly contradict the Act.

The sum total here is an arrogant case of federal power riding roughshod over local governments. It turns federalism on its head. While I can support certain efforts to streamline the process and preclude local authorities from engaging in unreasonable practices, this item blatantly and unnecessarily tempts the federal courts to overturn this clearly excessive exercise of the limited role afforded to us by the law. The likely outcome of being reversed in Federal Court could have pernicious and unintended consequences in limiting our flexibility to exercise our discretion in future worthy endeavors.

Accordingly, I dissent.

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the provision of services, facilities or equipment. As regards PEG access in new franchises, payments for capital costs required by the franchise to be made by the franchise to be made by the cable operator are not defined as fees under this provision." H.R. REP. No. 98-934, at 65 reprinted in 1984 U.S.C.C.A.N. 4702.

STATEMENT OF
COMMISSIONER DEBORAH TAYLOR TATE

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)

Today's item, like most we address as an expert agency, is full of sophisticated technical, legal, and policy arguments. At a high level, however, I view this as a continuation down a path of deregulatory policies designed to encourage new market entry, innovation, and investment. Indeed, "encourag[ing] more robust competition in the video marketplace" by limiting franchising requirements has long been a stated goal of the Commission as well as a driving force behind statutory terms we interpret today.

Section 621(a)(1) of the Communications Act of 1934, as amended (the "Act"), states that franchising authorities ("LFAs") may not "unreasonably refuse to award" a competitive franchise to provide cable services. I agree with our conclusion that we have the jurisdictional authority to interpret this section of the Act and adopt rules to implement it. In amending Section 621(a)(1) to include the phrase "unreasonably refuse to award," Congress explicitly limited the authority of LFAs. However, if an LFA does not make a final decision for months on end, or perhaps even years as the record indicates, new entrants are given no recourse. Also, unreasonable demands, similar to long delays, serve as a further barrier to competitive entry. It is nonsensical to contend that, despite the limitation on LFA authority in the Act, LFAs remain the sole arbiters of whether their actions in the franchise approval process are reasonable. Since the section's judicial review provision applies only to final decisions by LFAs, absent Commission action to identify "unreasonable" terms and conditions, franchise applicants would have no avenue for redress. I conclude that our broad and well-recognized authority as the federal agency responsible for administering the Act, including Title VI, permits us to identify such terms and conditions, and I support our exercise of that authority.

As with most orders, we explored numerous ways to achieve our goals. I ultimately support today's item, because I believe that, by streamlining timeframes for action and providing practical guidelines for both LFAs and new entrants, the item encourages the development of competition in the video marketplace and speeds the deployment of broadband across the country in a platform-neutral manner. These beneficial policy results should not be underestimated. Our annual reports to Congress on cable prices, including the report we adopt today, consistently show that prices are lower where wireline competition is present. And, of course, broadband deployment enhances our ability to educate our children for the jobs of tomorrow and ensures that the United States remains competitive in this global communications age.

Additionally, I am pleased that we recognize – and do not preempt – the actions of those states that have reformed their franchise rules. Their efforts to streamline the process for competitive entry are laudable.

Finally, it is critical that as we advance pro-competitive policies, we ensure that our policies do not unreasonably create asymmetry in the marketplace. Accordingly, I am encouraged that we resolve to address open issues regarding existing franchise agreements on an expedited basis. I encourage all interested parties to use your energies toward assisting us as we seek a way to apply more broadly our conclusions across all companies.

STATEMENT OF
COMMISSIONER ROBERT M. MCDOWELL

Re: 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)

I have long advocated the Commission doing all that it can to open new opportunities for entrepreneurs to have the freedom to construct new delivery platforms for innovative new services. More delivery platforms mean more competition. More competition means consumers can choose among more innovative offerings. As consumers become more empowered, prices fall and, as a result, new technologies become more available to help improve the lives of all Americans. In short, creating a de-regulatory environment where competition is given the chance to flourish kicks off a virtuous cycle of hope, investment, growth and opportunity.

Today, the Commission is taking a step forward in what I hope will be a noble quest to spur more competition *across* many delivery platforms and, where appropriate, *within* delivery platforms. While we already have some competition in the video market, American consumers are demanding even more competition. And that's the goal of our action today: more competition through de-regulation. Perhaps President Ronald Reagan foresaw an issue like this one when he said, "We have a healthy skepticism of government, checking its excesses at the same time we're willing to harness its energy when it helps improve the lives of our citizens." That is precisely what we are doing today: checking any government excesses at the local level to unleash free markets which will help improve the lives of all Americans.

This order strikes a careful balance between establishing a de-regulatory national framework to clear unnecessary regulatory underbrush, while also preserving local control over local issues. It guards against localities making unreasonable demands of new entrants, while still allowing those same localities to be able to protect important local interests through meaningful negotiations with aspiring video service providers. Local franchising authorities are still free to deny deficient applications on their own schedule, but we are imposing a "shot clock" to guard against unreasonable delay. After the shot clock runs out, if the locality has not granted or denied the application, an interim or temporary authority will be granted to give the parties more time to reach a consensus. If the LFA feels as though it cannot grant a franchise during this period, they are free to deny the application. And unhappy applicants still have the liberty to go to court, as codified under federal law.

Additionally, should communications companies decide to upgrade their existing non-cable services networks, localities may not require them to obtain a franchise. However, this order does not address whether video service providers can avoid local or federal jurisdiction over those video services because those services are carried over differing protocols, such as Internet protocol. That question is explicitly left for another docket.

In the same spirit of deference to localities, we are not pre-empting recently enacted state laws that make it easier for new video service providers to enter the market. Those important frameworks will remain intact. Similarly, on the important issue of build-out requirements, we preserve local flexibility to implement important public policy objectives, but we don't allow localities to require new entrants to serve everybody before they serve anybody.

Many commenting parties, Members of Congress, and two of my distinguished colleagues, have legitimately raised questions regarding the Commission's authority to implement many of these initiatives. I have raised similar questions. However, as the draft of this item has evolved and, I think, improved, my concerns have been assuaged, for the most part. The Commission has ample general and specific authority to issue these rules under several sections including, but not limited to, sections: 151, 201, 706, 621, 622, and many others. Furthermore, a careful reading of applicable case law shows that the courts have consistently given the Commission broad discretion in this arena. While I understand the concerns of others, after additional study, I feel as though we are now on safe legal ground. But I know that reasonable minds will differ on this point and that appellate lawyers are already on their way to the court house. That is the American way, I suppose.

This order is not perfect. If it were, it would say that all of the de-regulatory benefits we are providing to new entrants we are also providing to all video providers, be they incumbent cable providers, over-builders or others. I want to ensure that no governmental entities, including those of us at the FCC, have any thumb on the scale to give a regulatory advantage to any competitor. But the record in this proceeding does not allow us to create a regulatory parity framework just yet. That's why I am pleased that today's order and further notice contain the tentative conclusion that the relief we are granting to new entrants will apply to all video service providers once they renew their franchises.

Also, I have consistently maintained during my time here that if shot clocks are good for others then they are good for the FCC itself. Accordingly, I am pleased that the Chairman has agreed to release an order as a result of the further notice no later than six months from the release date of this order, and regardless of the appellate posture of this matter. Resolving these important questions soon will give much-needed regulatory certainty to all market players, spark investment, speed competition on its way, and make America a stronger player in the global economy. By the same token, it is no secret that I would also like to see the Commission act more quickly on petitions filed by any individual or industry group, especially if those petitions may help spur competition in any market, be it video, voice, data, wireless, or countless others. We should never let government inaction create market distortions.

I thank my entire staff, especially Cristina Pauzé, for their long hours, dedication and insight regarding this order. I also thank the tireless Media Bureau and the General Counsel's office for their tremendous efforts on this important matter. Lastly, I would like to thank Chairman Martin for his strong leadership on this issue.