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May 29, 1996

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FEDERAL COMMUNICATIONS COMMISSION
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EX PARTE Re: CS Docket 96-46

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Mr. William F. Caton
Acting Secretary
Federal Communications Commission
Room 222
1919 M Street, N.W.
Washington, D.C. 20554

Dear Mr. Caton:

Please enter into the record the attached letter and portions of NYNEX Comments and Reply Comments which were delivered today to Commissioner Quello and to Ms. J. Chorney of Chairman Hundt's office, Ms. S. Toller of Commissioner Chong's office and Ms. M. McManus of Commissioner Ness's office.

These materials describe NYNEX's position on the role of local governments in Open Video Systems regulations.

Sincerely,

Gerald E. Udwin

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To: The Honorable James H. Quello

From: Jerry Udwin

Date: May 29, 1996

Re: Open Video Systems (CS Docket 96-46)

You had asked about the request from some local governments to be allowed to prohibit Open Video Systems operators from choosing which areas they will serve.

Congress did not give cities that power. In fact, local governments' own filings do not cite Congressional authority for them to dictate what areas an Open Video System operator must wire.

Congress does allow cities to collect payments equivalent to the franchise fees that a cable operator pays. And, Congress allows cities to protect public rights of way. NYNEX has no problem with those provisions.

However, Congress bans cities from other regulation of Open Video Systems. That's because Congress was creating a different way to provide competition to cable, through a set of rules different from cable regulation. Instead of being subject to franchise regulation, the Open Video System operator has to accept limitations on the number of channels that the operator can control.

Allowing an OVS operator to make a business decision on where to offer video service, as the <u>second</u> video entrant into the market, is the same as the FCC's already allowing the local telephone company's competitors to choose which phone customers to serve.

If the Commission allows cities to assert franchise-type requirements upon Open Video Systems, the viability of OVS will become highly doubtful.

I'm attaching the pages from NYNEX's Comments and Reply Comments which describe Congress's pre-emption of local regulation of OVS.

Please pass them along to Jim Coltharp, and let me know if you have any questions.

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Importantly, only unaffiliated program suppliers and those seeking access to an open video system should be able to file complaints; competitors in the market should not be permitted to tax the resources of the OVS operator and the Commission by using the dispute resolution procedure for competitive advantage.

While NYNEX generally favors the use of alternative dispute resolution procedures, it is concerned that the very short time frame established by the Act for resolution of complaints will make it difficult for the Commission to resolve a dispute if a significant portion of the 180-day period is devoted to alternative dispute resolution procedures. Nevertheless, the Commission should respect any agreement between an OVS operator and an unaffiliated program provider to submit disputes between the parties to arbitration, mediation or any other commercially reasonable procedure for dispute resolution. If a programmer files a complaint without having complied with an alternative dispute resolution procedure to which it has previously agreed, the Commission should dismiss the complaint.

K. Pre-emption of State and Local Regulation.

In implementing Section 653 of the Act, the Commission should make it clear that state or local regulation of open video systems is preempted, except to the extent that local governments receive payments in lieu of franchise fees pursuant to Section 653(c)(2)(B).[67] Preempting state and local regulation of open video systems will assure that the regulatory approach established in Section 653 is faithfully implemented and that OVS operators are not

[67] Section 653(c)(2)(B) permits franchising authorities to assess fees on the gross revenues of open video systems equal to those imposed on the local cable system.

burdened by obligations Congress did not intend to apply. Preemption will also forestall future disputes and litigation concerning state and local authority over open video systems, and thus further Congress's goal of spurring the rapid introduction of OVS services.

State and local regulation can be preempted either by Congressional or agency action. Congress may expressly preempt state and local law or, through legislation, clearly indicate its intent to "occupy the field" of regulation, leaving "no room for the States to supplement."[68] Congress has made it unmistakably clear that, in enacting Section 653, it intended to "occupy the field" of OVS regulation. That section establishes a comprehensive and streamlined regulatory scheme designed to spur the swift introduction of OVS service by telephone companies, unburdened by either common carrier regulation or local franchising requirements. Further, the Act vests complete authority in the Commission to implement its provisions: to adopt ground rules, to approve OVS operators' certifications and to resolve disputes. The comprehensiveness of the statutory scheme, the specificity with which it directs the Commission to implement its provisions, and the swiftness with which it requires

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[68] *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 699-705 (1984), *quoting Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Furthermore, regardless of whether Congress has preempted state or local law, the Commission itself has authority to preempt such law "to the extent it is believed that such action is necessary to achieve its purposes." *City of New York v. FCC*, 486 U.S. 57, 63 (1988). An agency's decision to preempt will not be disturbed on review if its decision represents "a reasonable accommodation of conflicting policies that were committed to the agency's care, . . . unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." *Id.* at 64 (citation omitted). *See also, Computer & Communications Indus. Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983); *North Carolina Utilities Comm'n v. FCC*, 552 F.2d 1036 (4th Cir.), *cert. denied*, 434 U.S. 874 (1977).

Commission action so as to "hasten the development of video competition"[69] simply do not permit state or local authorities to play any role in the regulation of this service.[70]

Even if the Commission were not convinced that Congress had "occupied the field" of OVS regulation, the Commission itself should preempt all state and local regulation, except to the extent that local franchising authorities may collect fees pursuant to Section 653(c)(2)(B). Such preemption is clearly necessary to achievement of Congress's goal of fostering vigorous competition with cable operators by encouraging swift telephone company entry into local video markets.[71]

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[69] Conference Report at 173.

[70] Although the Conference Report states that OVS operators are subject to the authority of local governments to manage public rights-of-way, Conference Report at 178, the Commission should make it clear that local governments cannot exercise their authority over public rights-of-way as a subterfuge to regulate open video services provided over franchised local exchange facilities.

[71] *See City of New York v. FCC*, 486 U.S. 57 (1988); *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141 (1982). *Cf. Exclusive Jurisdiction with Respect to Potential Violations of the Lowest Unit Change Requirements of Section 315(b) of the Communications Act of 1934, as amended*, 6 FCC Rcd 7511 (1991).

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maximize consumer choice of services that best meet their information and entertainment needs."[35]

III. STATE AND LOCAL GOVERNMENTS MUST NOT INDIRECTLY IMPOSE FRANCHISE REQUIREMENTS THROUGH THE POWER TO REGULATE THE USE OF THE STREETS

NYNEX has shown that, in enacting Section 653, Congress evidenced an intention to occupy the field and to preempt any state or local government regulation of OVS (NYNEX 30-32). The National League of Cities ("NLC") argues, however, that any preemption of the right of local governments to regulate the use of the streets by OVS operators would constitute a "taking" in violation of the Fifth Amendment. Since this right to regulate the use of the streets allegedly gives local governments a stake in the provision of OVS service, the NLC urges the Commission to require OVS operators to show in their OVS certifications that they have obtained all necessary approvals from the local government.

NLC's concerns over Congress' preemption of local regulatory authority is groundless and its certification proposal is unnecessary.[36] No one has proposed to preclude local governments from exercising their right to control the use of streets and

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[35] Conference Report at 172. Similarly, the Congressional purpose would be frustrated if OVS was not afforded cable compulsory license rights (Baseball 4, n. 1). However, it is clear that open video systems satisfy the definition of "cable systems" under the cable compulsory license. 47 U.S.C. § 111 (f). Moreover, it is manifest that Congress intended that compulsory license to apply to open video systems when it subjected OVS to must carry and retransmission consent requirements. Compliance with those requirements is dependent on a compulsory license and Congress could not have intended to impose must carry/ retransmission consent obligations on OVS while denying it the means to comply.

[36] *See* National League of Cities, et al 52-73.

rights-of-way ("ROW") or from obtaining reasonable compensation for their use. Nothing in the Act or its legislative history indicates that Congress intended to preempt that right, and the Conference Report states that "an operator of an open video system . . . shall be subject, to the extent permissible under State and local law, to the authority of a local government to manage its rights of way in a nondiscriminatory and competitively neutral manner."[37] Further, nothing in the NPRM purports to limit local governments from exercising these powers. And, since Section 653(c)(2)(B) permits local franchise authorities to impose fees, there is no "taking" of property of the local governments.[38] On the contrary, this payment of franchise-like fees should be viewed to fully convey franchise-like rights of access equal to CableCos.

The Act does preclude, however, local governments from using their ROW power to regulate the streets as a pretext for imposing franchise-type requirements on open video systems. Local governments cannot use that power to require, for example, that OVS operators provide facilities, equipment or other benefits as a condition to using local streets, nor can they specify the program services the OVS operators must offer. Congress has made it unmistakably clear that it intended to "occupy the field" of open video regulation, leaving no room for state and local governments to supplement the

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[37] Conference Report at 178

[38] The Texas Cities argue that franchise authorities should be permitted to assess fees based on the cable service revenues of all video programmers using the open video system. *See* Comments of the Texas Cities 16-17. However, Congress specifically limited fees to those based on "the gross revenues of the operator" (Section 653(c)(2)(B)). Of course, the OVS operator must be permitted to recover those fees in the charges for use of the system.

regulatory scheme (NYNEX 30-32). Thus, local governments should not be permitted to make an end run around the statute by wielding their authority over the streets as a subterfuge for extracting concessions from OVS operators.[39]

Local governments may thus only regulate activities of OVS operators relating to protection of the environment, health and safety, and they may receive just compensation for use of the streets and ROW.[40] Given this limited role for local governments, there is no need for the certification showing the NLC urges. Indeed, LECs have a long history of cooperating with local governments in this respect. Moreover, requiring OVS operators to obtain local government approvals before filing their OVS certifications would provide the OVS operator's competitors with an opportunity to delay entry. By setting a ten-day period for approval of a certification, Congress evidenced its distaste for the prolonged approval period involved with VDT and instructed the Commission to expedite action on certification requests. The NLC's proposal is inconsistent with that legislative directive.

IV. CONCLUSION

Congress provided for Open Video Systems in the 1996 Act to encourage competition in the video services market now dominated by incumbent CableCos in

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[39] In fact, NYNEX's telephone franchise covers the use of telephone plant to provide OVS service, contrary to the assertion of the National League of Cities. *See* NLC 67-69. However, telephone franchises are issued by the state or local governments pursuant to the state's police power and the scope of those franchises is a question of state law.

[40] LECs also currently pay local governments inter alia gross receipt and other taxes and assessments pursuant to their telephone franchise, and they frequently pay administrative fees related to ROW management (e.g., street opening permits) thereby compensating the local governments for the use of the streets.