Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

COMMENTS OF THE CITY OF WALNUT CREEK, CA

These Comments are filed by the City of Walnut Creek, California, in support of the comments filed by the National League of Cities and the National Association of Telecommunications Officers and Advisors ("NATOA"). The undersigned is also a member of the Board of Directors of the California and Nevada Chapter of NATOA ("SCAN NATOA, Inc.") and the author of a book on telecommunications and cable franchising, "Telecommunications" (Solano Press 2002). However, these comments do not necessarily reflect the views of SCAN NATOA, Inc.

The current system whereby local franchising authorities issue franchises to cable providers has worked extremely well to promote competition and protect the general public. Any action by the FCC to further limit local authority beyond the dictates of the Cable Act is both unnecessary and beyond the scope of the Commission's authority. The suggestion by the telephone companies that local franchising authorities are generally a barrier to competition is a complete falsehood. This suggestion is a red-herring, a smokescreen for the telephone companies' desire to simply reduce their costs in order to increase ample profit margins and to gain an unfair, government-imposed competitive advantage over the incumbent cable companies.

Competition in Walnut Creek

Walnut Creek, CA, is a city with a population of approximately 65,000 located 25 miles East of San Francisco. Like virtually all cities, Walnut Creek strongly supports competition amongst telecommunications companies. In 1997, the City Council adopted telecommunications policies supporting competition and recognizing the benefits competition provides in the form of lower prices and better services. In response to these policies, city staff began to actively recruit a competitor to the incumbent cable operator. The City

was able to gain the interest of such a competitor, Seren Innovations, which filed an application for a new cable franchise in February 1999. The City and Seren were able to quickly negotiate a cable franchise agreement within 5 months, which was formally approved by the City Council in September 1999. Seren and its successor, Wave Broadband, have successfully operated the system ever since, gaining an approximate 40% market share in competition against the incumbent, Comcast.

In the summer of 2005, AT&T (then operating as SBC) began constructing Project Lightspeed in Walnut Creek. The City sent AT&T the Seren franchise agreement and offered to enter into the identical agreement with AT&T, giving AT&T entry into the market virtually overnight. AT&T refused, arguing it wasn't a cable company so couldn't be required to enter into a cable franchise agreement. The City responding by saying that it was agreeable to entering into a more streamlined agreement that wouldn't be considered a "franchise" agreement. The City then sent AT&T a proposed two-page agreement with business terms (i.e. franchise fees, PEG access support and I-Net terms) that were the same as the Seren agreement. AT&T again refused to enter into the agreement, citing numerous objections. Among other things, AT&T refused to agree to allow the City to enforce the FCC customer service standards, stating that it did not want to have to spend the money to hire the staff necessary to comply with enforcement of the standards. AT&T indicated it was willing to pay a 5% of gross revenues fee, but was unwilling to pay the fee on advertising revenues, even though federal law specifically allows the inclusion of such revenues and even though Comcast and Seren were both paying franchise fees on advertising revenues. AT&T indicated it was unwilling to comply with build out requirements, despite the fact that its existing system served the entire city. Instead, AT&T sued the City in federal court and has threatened to sue other cities in the area.

The Telephone Companies' Arguments that Local Franchising Authorities are Barriers to Entry Do Not Withstand Scrutiny

In the NPRM, the telephone companies give essentially six arguments in support of their assertion that local franchising authorities are barriers to entry (see paragraphs 5-6 of NPRM):

First, they argue that it will take too long to obtain thousands of local franchises. However, based on my discussion of this issue with numerous local franchising authorities, the overwhelming majority of local franchising authorities are more than willing to grant the telephone companies a franchise on the same terms as the incumbent's franchise. Walnut Creek offered to grant AT&T a franchise on the same terms as the incumbent, but

AT&T refused. The reality is that the "speed to market" argument is a smoke screen for the real issue: AT&T is simply unwilling to compete on the same terms with the incumbent cable companies and is seeking an unfair, government-imposed competitive advantage. Note that prior to its acquisition by AT&T, Ameritech was able to obtain numerous local cable franchises without significant difficulty. It is also worth noting that in a number of states, franchises are granted by the State, either by a State commission or through an automatic "statewide franchise" such as in Texas. A number of other states are considering similar legislation. As a result, the telephone companies are overstating the number of local franchises they will actually need. The telephone companies can obtain most of these virtually overnight by simply agreeing to the same terms as the incumbent.

Second, the telephone companies argue that build-out requirements demanded by LFA's are a barrier, particularly when their existing facilities do not coincide perfectly with the boundaries of the local agency. However, situations where their existing facilities do not cover an entire city are rare. Generally the incumbent local exchange carriers service areas continue to coincide with the LATA's in which they were historically permitted to operate, and only in rare situations do their respective service areas divide individual cities. While their service areas may divide counties, generally counties do not require a cable operator to provide service throughout the County (see e.g. San Bernardino County, California, which has granted numerous franchises to serve only portions of the County). The reality is that AT&T and perhaps other telephone companies simply do not want to serve low-income areas. As noted in the NPRM, AT&T has stated that it intends to focus almost exclusively on affluent neighborhoods, with less than 5% of its deployment in "low value" neighborhoods. Allowing AT&T to cherry-pick the most profitable areas would inevitably result in higher prices and reduced availability of services in "low value" neighborhoods; not only would these neighborhoods not received competitive services, competition in "high value" neighborhoods would force the incumbents to reduce rates in those neighborhoods while raising rates in and/or seeking their own exemptions to avoid serving "low value" neighborhoods. In any event, to the extent that there are unique circumstances in which there is a compelling reason not to build out the same area covered by the incumbent, in many cases the LFA has the authority to grant an exception. Certainly an LFA is in the best position to know its community and whether build out requirements are appropriate.

Third, they argue that the franchising process telegraphs to incumbents their plans, allowing the incumbent to take steps to prolong the franchise process and entrench their market positions. However, the incumbent has no power to prolong the franchise process. Indeed,

particularly in situations where the telephone company is subject to the same requirements as the incumbent, the incumbent wouldn't even have much to say about the issuance of a competitive franchise. In any event, in Walnut Creek and most other areas, the incumbent has recently upgraded its system and has a large market share, so there is little that the incumbent can do to further "entrench" its market position.

Fourth, they argue that level playing field laws require them to match the terms of the incumbent, which is unfair in part because of the different competitive situation facing the new entrant. Certainly it is true that the incumbent has an advantage in that it initially will have more subscribers to its cable service. However, the telephone company will have an advantage in that it has many more subscribers to its telephone service and, in many cases, to its Internet service. In Walnut Creek and Concord, CA, Seren came into town as an entirely new provider without even a single telephone customer, yet in competing with Comcast was able to obtain approximately a 40% market share after only a few years. It is also worth noting that while existing franchise terms were often negotiated in an environment where the incumbent was a near monopolist, the incumbent only generated revenues from cable service, not telephone or Internet. While a competitive entrant will need to share the market with the incumbent, the pie being shared is much larger, as revenues now include Internet revenues, advanced digital services, increased advertising opportunities, launch fees, etc.

Fifth, the telephone companies argue that some LFA's are making "outrageous demands" that aren't related to video services. However, the Cable Act already limits the types of matters that can be addressed in a cable franchise and preempts provisions that require or prohibit the provision of telecommunications services. To the extent an LFA violates these limitations, the Cable Act already provides remedies (see e.g. 47 U.S.C. section 556(c), preempting any franchise provision that is inconsistent with the Cable Act). In any event, there is no evidence that these "outrageous demands" are anything more than a rare exception to the usual practices of LFA's (if indeed they exist at all).

Granting Preferential Treatment to Telephone Companies Would be Anti-Competitive and Reduce Deployment of Broadband Infrastructure

The Commission has consistently advocated policies of encouraging competition and promoting the widespread deployment of broadband infrastructure. Granting the relief sought by the telephone companies would be contrary to both of these policies. If the telephone companies are given a competitive advantage by, for example, permitting them to cherry-pick, this will virtually eliminate competition in "low value" areas and make it difficult

for the incumbents to compete in the "high value" areas. The incumbents will inevitably seek their own exemptions from requirements that they serve "low value" areas, leaving these areas without most broadband services.

The Commission Lacks Jurisdiction to Adopt Rules Implementing Section 621(a)(1)

The overall construction of the Cable Act makes it clear that the Commission does not have jurisdiction to adopt rules implementing Section 621(a)(1).

In adopting the Cable Act, Congress specifically delineated the respective jurisdiction of the FCC and LFA's. Congress indicated that LFA's should retain the primary role in the regulation of cable systems. The legislative history of the Cable Act indicated,

> Primarily, cable television has been regulated at the local government level through the franchise process. . . . H.R. 4103 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.

H.R. Rep. No. 98-934, at 19 (1984).

The Cable Act specifically granted the Commission the authority to act on certain matters (see e.g. 47 U.S.C. section 532(c)(4), 532(e), 532(j), 533(a)(2), 533(c), 533(f), 534, 535, 536, 537, 542, 543, 544(e), 544(g), 544a, 548(c), 552(b), 554).

Section 621(a)(1) (47 U.S.C. section 541(a)(1)) provides that an LFA may not unreasonably refuse to award an additional competitive franchise. 47 U.S.C. section 555(a) specifically authorizes any operator affected by a final determination of an LFA under section 621(a)(1) to seek relief in court. Section 621(a)(1) does not make any mention of any Commission authority to enforce that section. Given that Congress had no trouble knowing how to craft language granting such authority in numerous other sections of the Cable Act, and given that Congress specifically created a judicial remedy, clearly Congress did not intend to give the Commission authority to enforce or interpret section 621(a)(1).

In conclusion, the City urges the Commission to recognize that it lacks jurisdiction to issue rules to implement section 621(a)(1). If the Commission nevertheless determines that it does have jurisdiction, the City urges the Commission not to adopt any rules, as additional rules are simply unnecessary and would stifle competition and broadband deployment.

Respectfully submitted,

Paul M. Valle-Riestra
Senior Assistant City Attorney
City of Walnut Creek

Cc: National League of Cities
NATOA
John Norton
Andrew Long
League of California Cities