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	)	MB Docket No. 05-311
by the Cable Television Consumer Protection and	)	
Competition Act of 1992	)	

COMMENTS OF
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

Daniel L. Brenner
Michael S. Schooler
Diane B. Burstein

Counsel for the National Cable &
Telecommunications Association
1724 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 775-3664

February 13, 2006

TABLE OF CONTENTS

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	)	MB Docket No. 05-311
by the Cable Television Consumer Protection and	)	
Competition Act of 1992	)	

COMMENTS OF
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

The National Cable & Telecommunications Association (NCTA) hereby submits its comments in the above-captioned proceeding.

NCTA is the principal trade association representing the cable television industry in the United States. Its members include cable operators serving more than 90% of the nation's cable television subscribers, as well as more than 200 cable programming networks and services. NCTA's members also include suppliers of equipment and services to the cable industry. The cable industry is also the nation's largest broadband provider of high speed Internet access after investing $100 billion over ten years to build out a two-way interactive network with fiber optic technology.

INTRODUCTION AND SUMMARY

In this proceeding, the Commission is considering whether and to what extent it should adopt rules implementing Section 621(a)(1) of the Communications Act of 1934, which provides that "a franchising authority . . . may not unreasonably refuse to award an additional competitive franchise." 47 U.S.C. § 541(a)(1). Nothing in the Act specifically directs the Commission to adopt such rules or otherwise implement this prohibition. Indeed, Congress specifically provided a different mechanism for enforcing it, authorizing appeals of denials of second franchises in federal district court or in state court.

During the 13 years since this prohibition was enacted, there has been no evidence that franchising authorities have been unreasonably refusing to grant additional franchises or that the judicial proceedings authorized by Section 621(a)(1) have been an insufficient means to enforce the prohibition. To the contrary, as the Commission points out, "anecdotal evidence suggests that new entrants *have* been able to obtain cable franchises."[1]

The Commission says that "there have been indications that in many areas the current operation of the local franchising process is serving as an unreasonable barrier to entry."[2] But the only "indications" cited by the Commission are the self-serving comments of telephone companies who claim that compliance with franchise requirements makes their entry more costly and time-consuming than would otherwise be the case. These comments cite no instance of a telephone company being denied a franchise, nor do they provide examples of otherwise viable competitive entrants who chose not to enter because of allegedly unreasonable demands by franchising authorities. In fact, all evidence suggests that telephone companies are applying for – and having little trouble obtaining – franchises from state and local governments.

There is no suggestion anywhere that local franchising authorities are insisting that telephone companies comply with more stringent or burdensome requirements than are imposed on existing cable operators. Instead, telephone companies argue that a franchising authority's willingness to grant new entrants franchises with the *same* terms and conditions as are imposed

---

1 Notice at ¶ 8 (emphasis added).

2 *Id.*, ¶ 5.

on existing franchisees – or even, in some cases, with less stringent requirements – thwarts competition and is tantamount to an unreasonable *denial* of a franchise.

But regulating like services alike is both reasonable and pro-competitive. Indeed, imposing regulatory requirements on one competitor but not on another is more likely to distort the competitive marketplace. It results in winners and losers being chosen on the basis of regulatory disparities rather than on the basis of who can best and most efficiently meet consumer demand.

There may be instances where it is appropriate to give new entrants favorable treatment in order to jump-start competition in a marketplace in which such competition does not exist. But, as the Commission has found, competition is the norm in today's video marketplace. Throughout the nation, most households can already choose from among at least three strong, competitive providers of multichannel video programming, including one or more franchised cable operators and two national direct broadcast satellite (DBS) providers.

In these circumstances, if the government imposes certain costs, requirements, and social obligations on one marketplace competitor, it is hardly unreasonable to impose such costs and obligations on *all* competitors. To the contrary, to do otherwise would be unfair to incumbents and would undermine rather than promote the benefits of competition to consumers. In fact, as NCTA has previously shown, asymmetrical regulation could make consumers worse off than they were before the new competitor entered the community.

In particular, as the attached study by Economists Incorporated shows, if telephone companies are not required, as are existing cable operators, to serve all neighborhoods in a community, residents of lower-income neighborhoods will likely be adversely affected. Telephone companies argue that it would be easier – and more profitable – for them to provide "competitive" service if they could limit their deployment to areas with comparatively lower costs of deployment and comparatively higher income. But Economists Incorporated's analysis demonstrates that such disparate regulation would undermine the ability of existing operators to continue to serve customers in those areas that are the most costly and least lucrative to serve – the customers that SBC (now AT&T) has referred to dismissively as "low-value" customers.

It may be that some franchise requirements unreasonably restrict the ability of cable operators, both existing and incipient, to offer competitive services and facilities that best meet the marketplace demand of consumers. But if this is the case, the remedy is to remove such restrictions from *all* franchisees – not simply to exempt new entrants.

In 1984, Congress took the important step of enacting a federal framework that specifically delineates and constrains the authority of local, state, and federal governments to regulate cable television. Such a framework remains essential to ensure that regulation is no greater than necessary to implement important government interests and social responsibilities and to allocate regulatory authority, in each case, to the regulating entity best suited to define and enforce such responsibilities. And periodic review of Title VI is especially appropriate in order to streamline and eliminate regulation – for *all* cable operators – that is unnecessary and counterproductive in today's vibrantly competitive marketplace.

But Section 621(a)(1) is not a mandate for such review by the Commission. In some instances, Congress has specifically *directed* the Commission to adopt rules and standards and/or has identified the Commission as the adjudicator of disputes over the propriety of local regulation. In other cases, where Congress has remained silent, the Commission retains authority to interpret and enforce franchising authorities' responsibilities, although courts may also adjudicate disputes over those responsibilities.

But in a very limited number of instances – including Section 621(a)(1) – Congress has specifically provided for *judicial*, not FCC, review of the reasonableness of franchising authorities' regulatory requirements. As the legislative history makes clear, Congress specifically decided that there should be no across-the-board federal standards for determining the reasonableness or unreasonableness of franchising determinations in this area. By establishing a judicial remedy, it meant to give the Commission no role in adopting such standards or otherwise implementing or enforcing Section 621(a)(1).

Congress enacted Title VI in order to "clarify the authority of Federal, state and local government to regulate cable through the franchise process," and it did so with a comprehensive statutory framework that "firmly establish[ed] the authority at each level of government."[3] Congress left little room for regulation beyond what was specifically mandated or authorized in the provisions of Title VI.

I. THERE IS NO EVIDENCE THAT FRANCHISING AUTHORITIES ARE REFUSING TO GRANT ADDITIONAL FRANCHISES

In 1992, when Congress enacted the amendments to Section 621(a)(1) prohibiting franchising authorities from unreasonably denying additional franchises, the video marketplace was markedly different. Most cable communities were served by only one franchised cable operator, and DBS did not yet exist as a significant competitor to cable systems. A core purpose of the 1992 Cable Act was to promote competition in the provision of multichannel video services to consumers – both from DBS and from additional competitive cable systems.

Congress sought to enhance prospects for competition from DBS (and other new competitors) by enacting the "program access" provisions of Section 628, which ensured such

---

3 Report of the Committee on Energy and Commerce of the House of Representatives, H.R. Rep. No. 98-934, 98th Cong., 2d Sess. 23-24 (1984) (hereinafter "1984 House Report).

competitors access to satellite-delivered cable program networks owned by cable operators. And it sought to promote head-to-head competition among cable systems by adopting the amendments to Section 621(a)(1).

Even before the 1992 amendments, there was little evidence that franchising authorities were refusing to grant additional competitive cable franchises. For the most part, the absence of head-to-head competition resulted not from exclusive contracts (which were prohibited under many state and local laws even before the 1992 Cable Act) or refusals to grant second franchises but from the economics of the capital-intensive cable business. Few operators could justify incurring the costs of constructing and maintaining what were then simply one-way video facilities if they had to split the limited potential video revenues from the homes they passed with other competing operators. And therefore, few operators *sought* franchises in areas already served by another operator.

But partly as a result of digital technology and the convergence of video, voice and data services, and partly because of the repeal in 1996 of the longstanding prohibition on the provision of cable service by local telephone companies, more entities are now seeking to compete as landline competitors with existing cable operators in the provision of cable service. And all evidence indicates that franchising authorities are willing and eager to authorize them to do so.

The lack of franchising obstacles was true a decade ago, when, shortly after repeal of the cable-telco cross-ownership prohibition, Ameritech embarked on a large-scale initiative to provide cable service over newly constructed standalone video facilities. Ameritech did not waste time complaining about or seeking to avoid the franchising process. It simply went about obtaining cable franchises generally, and it did so without any signs of resistance, unreasonable demands or delays by local franchising authorities.

To the contrary, Ameritech boasted of the speed with which it was able to obtain franchises and deploy its cable systems. Upon signing its 100th franchise agreement in 1999, Ameritech proudly noted that "[w]e've achieved a new franchise at the rate of one every two weeks."[4] Ameritech's steady and rapid progress in obtaining franchises continued until the company was acquired by SBC, which was not interested in providing competitive video service. SBC quickly sold Ameritech's systems, just as it terminated the fledgling efforts of both Pacific Telesis and Southern New England Telephone to offer competitive cable service after acquiring those companies.[5]

Now, the telephone companies are again promising to provide competitive multichannel video programming service – and, again, there are nothing but signs of welcome from local franchising authorities. There is not a single reported instance of a franchising authority refusing to grant a franchise to a telephone company applicant, and, therefore, no instance of a telco appealing such a denial as authorized by Section 621(a)(1).

The problem is that local telephone companies are now more averse to the idea of having to obtain cable franchises than franchising authorities are to granting them. At least one large company, AT&T, has taken the position that should not be required to obtain a franchise from a local community to provide its multichannel video service. As to AT&T, there is no evidence

---

4 "Ameritech Signs 100th Cable Television Franchise," Ameritech Press Release, Apr. 13, 1999, www.nuzoo.com/AMR/news/releases/archive/2596.htm.

5 *See*, *e.g.*, "SBC Close to Sale of Americast," *Chicago Tribune*, May 15, 2001, Business Section, p.2 ("SBC, which bought Chicago-based Ameritech Corp. in the fall of 1999, has been trying to sell the systems since then because it wants to concentrate on its core telephony business."); "How the Midwest Might Be Won," *CableWorld*, Aug. 20, 2001, http://www.cableworld.com/cgi/cw/show_mag.cgi?pub=cw&mon=082001&file=midwest_won.inc.

that the local franchising process does or does not impose unreasonable burdens or delays – because AT&T has so far refused to engage in the process. Instead, it has sought legislation to vitiate the process (in Texas, successfully,[6] and in Congress[7]) and has challenged local franchising requirements in court (in, for example, Walnut Creek, California[8]). It has also claimed at the FCC that it is not a cable operator providing cable service over a cable system, and therefore asserts that it is not subject to the franchising and other requirements of Title VI.[9]

Verizon, for its part, believes that it is the franchising process itself – not any "unreasonable" refusals to grant such franchises – that is objectionable. As the NPRM notes, Verizon complains about various aspects of the process. Verizon says that it "takes too long," and that it requires new applicants to publicly "telegraph" their deployment plans to competitors. Verizon also complains about some of the requirements that franchising authorities seek to include in franchises, such as obtaining an enforceable commitment that Verizon will extend its video services within a reasonable period of time to all neighborhoods in the community. Verizon complains about "level playing field" provisions that require it to comply with the same obligations as other cable competitors in the community. But nowhere does Verizon assert or demonstrate any unwillingness or reluctance on the part of franchising authorities to *grant* it a franchise – the trigger for Section 621(a)(1).

---

6 *See, e.g.*, "SBC Lobbying Fruitful in Austin," *Fort Worth Star Telegram*, Aug. 19, 2005, p. B4.

7 *See, e.g.*, "AT&T Has Hurdles To Jump To Enter the TV Market," Detroit News, Jan. 27, 2006, http://www.detnews.com/apps/pbcs.dll/article?AID=/20060127/BIZ/601270357/1001.

8 *See* Complaint for Declaratory Judgment and Injunction, *Pacific Bell Telephone Co. v. City of Walnut Creek*, Case No. 05-4723 (N.D. Cal., Nov. 17, 2005).

9 Letter to Marlene H. Dortch, Secretary, FCC, from James C. Smith, SBC, WC Docket No. 04-36 (Sept. 14, 2005).

To the contrary, Ivan Seidenberg, Verizon's Chief Executive, noted last fall that "[w]e haven't been turned down anywhere we've gone."[10] When asked about "the big challenge of winning franchises," Mr. Seidenberg made clear that the franchising process was hardly an insurmountable barrier to entry:

> *We have the ability to work the current system....* We're bringing competition to every market that we operate in for video. Who's going to turn that down? I think this all gets worked out. It's a lot of noise. There's give and take on both sides. They have an interest in doing it. We have an interest in doing it.[11]

Franchising authorities confirm that they are not only willing but eager to grant additional cable franchises to telephone companies. As the mayor of Franklin Lakes, New Jersey recently stated, "I think most mayors around the state want to negotiate a franchise with Verizon. More competition for cable service is a good thing for consumers."[12] In many cases – and Franklin Lakes is an example – the refusal to negotiate a franchise is on the part of Verizon, not on the part of the franchising authority: "[R]ather than accept repeated invitations to my office, Verizon has been in Trenton pushing for special legislation that would exempt them from local cable franchise requirements."[13]

Here are the facts, to the extent that they are publicly available:[14] Verizon has already obtained at least 42 cable franchises from communities in Maryland, Virginia, Florida,

---

[10] "Verizon's Muddy TV Picture," *Business Week Online*, Sept. 28, 2005, http://www.businessweek.com/technology/content/sep2005/tc20050928_4147.htm?chan=db.

[11] "Verizon: We've Got To Fix It," *Business Week Online*, Sept. 28, 2005, http://www.businessweek.com/technology/content/sep2005/tc20050928_6174_tc057.htm (emphasis added).

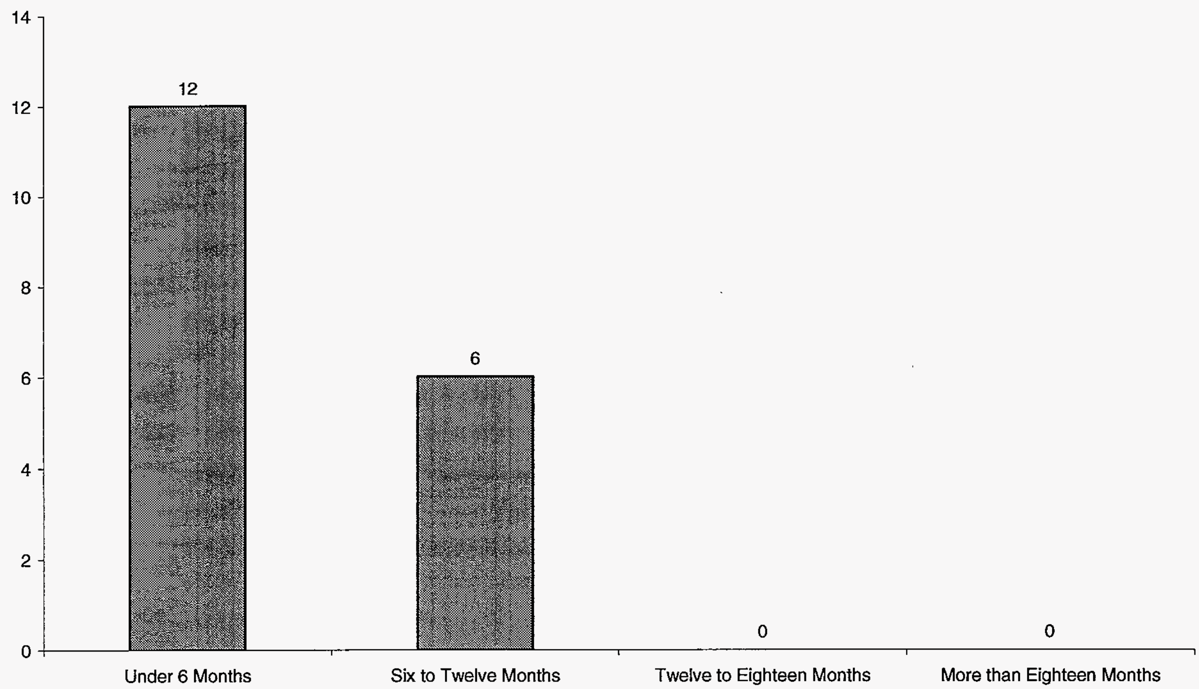
[12] Letter to the Editor from G. Thomas Donch, Mayor of Franklin Lakes, NJ, *Bergen Record*, July 17, 2005, http://www.bergen.com/page.php?qstr=eXJpcnk3ZjcxN2Y3dnFlZUVFeXkxNCZmZ2JlbDdmN3ZxZWVFRXl5NjcyMzgzOQ==.

[13] *Id.*

[14] To the extent that we have been able to gather facts for each of the 42 Verizon franchises, the facts are set forth in the attached chart (Attachment A).

California, New York, Massachusetts, and from the Texas Public Utility Commission. And despite its complaint that the process "simply takes too long," these franchises appear to have been negotiated and granted relatively quickly. In addition to 19 Texas franchises (which were granted by the Public Utility Commission pursuant to recently enacted state legislation 18 days after Verizon's applications), 12 franchises were granted in less than six months, and 6 were approved between 6 and 12 months of submission of Verizon's application.

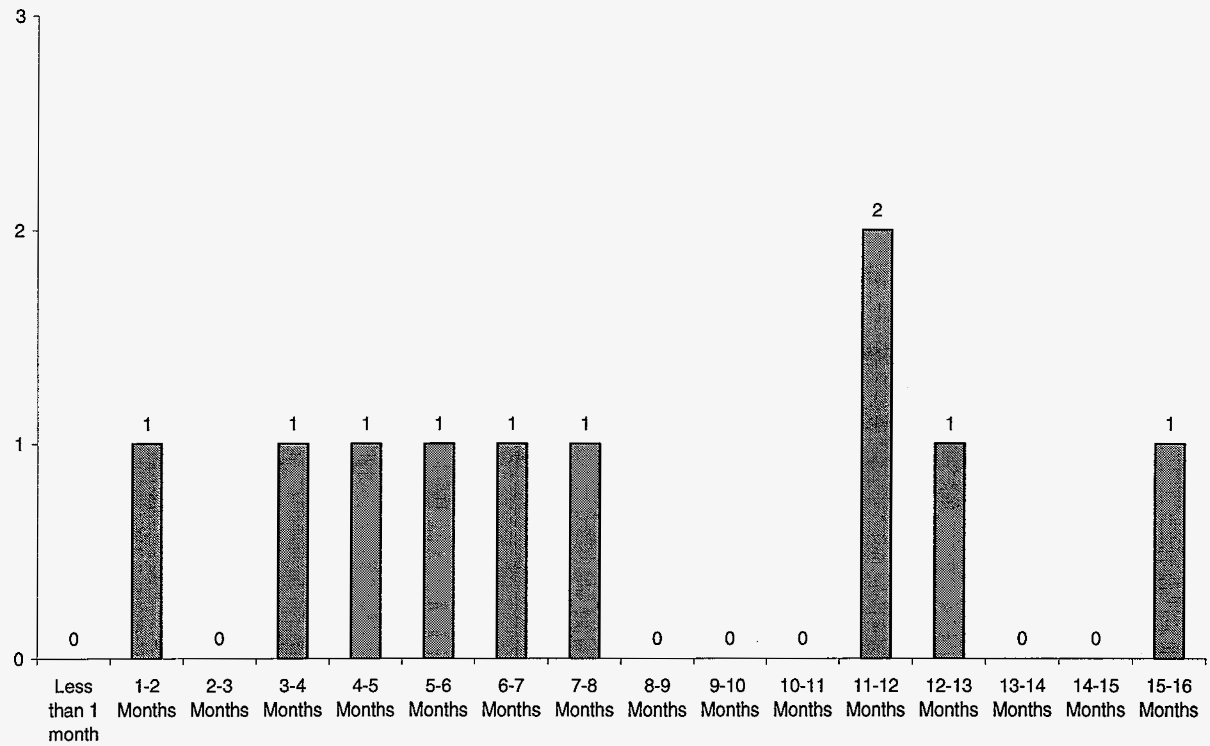
Instances of Number of Months for Verizon to Acquire a Video Franchise (for Locally Awarded Franchised Systems)



Note: There are five additional local Verizon franchises for which the application date is unknown.

In most cases where Verizon has received a franchise, it has not yet begun offering service. In some cases, more than nine months have elapsed after receiving a franchise before they have begun providing service. And in one case, Verizon took 15 months to begin offering service.[15]

Instances of Video Deployment
(Number of Months to offer Video Service after Local Franchise was Granted)



This suggests that while obtaining franchises can certainly impose some costs, burdens and review time, the process has not and will not be an impediment to deployment of competitive video service. It may not be possible for Verizon to obtain all of its cable franchises overnight, though they could certainly have initiated many more franchising processes in the past 18 months

---

15 AT&T, for its part, has not yet commercially launched its service. While it received authorization from the state of Texas to provide service to the San Antonio area, public reports suggest it is only providing a "controlled launch" to a limited number of homes. Launch of its IPTV service is not expected until mid-2006. *See* "Delays in Microsoft IPTV Debut Alarming," www.tvweek.com/printwindow.cms?articleID=29066.

if they were serious about moving with great speed. But it's also not possible to deploy all its planned facilities overnight. The facts indicate that just as was the case with Ameritech a decade ago, Verizon's ability to obtain franchises is easily keeping pace with its ability to deploy new broadband facilities.

II. IMPOSING FRANCHISING REQUIREMENTS ON NEW ENTRANTS THAT ARE SIMILAR TO THOSE IMPOSED ON EXISTING CABLE OPERATORS PROMOTES RATHER THAN THWARTS COMPETITION

There is no reason to believe that telephone companies could not obtain franchises in the blink of an eye if they were willing to accept terms and conditions substantially similar to those imposed on existing cable operators in the communities they seek to serve. As the local franchising authorities' representative testified last week before the FCC, "there is ample evidence to suggest that what has caused this lag in the growth of competition is the insistence by new applicants for franchise terms that are often materially different than those in existing cable franchises and are frequently contrary to municipal code."[16] When telephone companies complain that the franchising process imposes unreasonable requirements that effectively prevent them from entering a community, this is not the result of being presented with proposed franchise requirements that are more burdensome than those imposed on existing cable operators. To the contrary, they insist that subjecting them to the same – or even lesser – burdens is "unreasonable." (The fact that, as noted, Ameritech, then a smaller Bell Operating Company, successfully obtained 100 franchises speaks volumes about how serious this complaint really is.)

[16] Testimony of Lori Panzino-Tillery before the FCC on behalf of the National Association of Telecommunications Officers and Advisors, National League of Cities, United States Conference of Mayors, National Association of Counties (Feb. 10, 2006).

Verizon, for example, complains that the local franchising process "impedes cable competition" specifically because "it triggers so-called 'level playing field' laws."[17] But as a general matter, treating like services alike *promotes* competition. It ensures that marketplace success is determined by the ability of competitors to most efficiently meet the needs and interests of consumers – and not by artificial regulatory advantages.[18]

It is not unreasonable to consider, from time to time, whether existing regulations and requirements continue to serve important governmental purposes – for *all* competitors subject to those regulations. For example, *economic* regulations (such as rate regulation) that are imposed on entities presumed to have market power may serve no purpose if that market power has been eroded by marketplace competition.

In any event, the "reasonableness" of economic regulation is not an issue for telephone companies newly entering the market. Congress included in Title VI a self-correcting mechanism that removes the burdens of economic regulation from cable operators that face "effective competition."[19] Rate regulation, uniform pricing, "buy-through" restrictions and other provisions in Section 623 of the Act do not apply to new entrants, including telephone companies, because those competitors face "effective competition" from the existing cable operators as soon as they enter the marketplace.

Other statutory requirements, however, are not related to the presence of market power and instead represent a consensus of policymakers regarding the social obligations that should

---

[17] *Id.*

[18] *See, e.g., Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, Report and Order and Notice of Proposed Rulemaking*, at ¶¶ 1, 3, 16 nn. 44& 45 (rel. Sept. 23, 2005) (FCC goal of "developing a consistent regulatory framework across platforms by regulating like services in a similar functional manner….")

[19] *See* 47 U.S.C. § 543(a)(2).

apply to *all* providers of video programming services because of the unique role and importance of television in society. In those cases, it is reasonable to reconsider whether the social obligations continue to make sense and whether the particular requirements and obligations are necessary, in a competitive environment, to ensure that such obligations are met.[20]

If those obligations and responsibilities, unrelated to economic regulation, do continue to make sense, they should be shared by all competing providers of like services. If not, then there is no basis for imposing them on any of the competitors. To subject arbitrarily some competitors to obligations and burdens not imposed on others would only serve to distort the competitive marketplace.

The one obligation that telephone companies have clearly decided is "unreasonable" when applied to them is the requirement to offer service throughout a community. Section 621(a)(3) of the Communications Act directs franchising authorities to "assure that access to cable service is not denied to any group of potential residential cable subscribers because of the income of the residents of the local area in which such group resides."[21] In addition to this

[20] With respect to the entry of new IP-based competitors in the provision of telephone service, NCTA has advocated a similar approach of eliminating unnecessary economic regulation of providers facing competition while maintaining those regulations that are still deemed to embody important social responsibilities of all telco providers:

> Protecting VoIP services from unnecessary regulation does not require that important public policies be neglected. Even under a generally deregulatory regime, any VoIP service that meets a baseline test as proposed herein can, and should, meet certain public policy responsibilities and requirements such as the principles set forth in the Communications Assistance for Law Enforcement Act ("CALEA"), the offering of 911/E911, access for the disabled, and appropriate contributions to universal service. But the overall direction of public policy should be toward a deregulatory environment in which even the most vital public policy objectives are secured through the lightest possible regulation, so as not to forestall the many benefits of these new services.

NCTA, "Balancing Responsibilities and Rights: A Regulatory Model for Facilities-Based VoIP Competition," http://www.ncta.com/pdf_files/whitepapers/VoIPWhitePaper.pdf?PageID=365 at 4 (2005).

[21] 47 U.S.C. § 541(a)(3).

restriction on economic "redlining," most franchising authorities require cable operators to build out their facilities to serve all but the most sparsely populated areas of their communities.

Section 621(a)(4) requires franchising authorities to allow franchise applicants "a reasonable period of time to become capable of providing cable service to all households in the franchise area"[22] – but the phone companies bridle at the notion of reasonableness. Instead they try to portray buildout and anti-redlining obligations as unwarranted "barriers to entry."

This attempt to recharacterize a fundamental social obligation of competing video providers as a barrier to entry is in fact a transparent attempt to get the right to cherry-pick high-income neighborhoods. While the telephone companies protest this is not the case, their public statements, and in fact their selection of which communities to serve, calls their bluff.

Thus, as SBC, for example, has explicitly told prospective investors, their objective is to serve only the "high value" areas of the community without offering service to the "low value" areas.[23]

If the telephone companies were allowed to serve only the most lucrative neighborhoods, while cable operators are required to serve all neighborhoods, competition would not be enhanced but would suffer, and would in fact be denied to those who should benefit most. Consumers in the areas that the telephone companies chose not to serve would pay the highest price for such disparate regulatory treatment. The attached analysis by Michael G. Baumann of Economists Incorporated explains why this would be the case.[24]

---

[22] 47 U.S.C. § 541(a)(4).

[23] SBC, Investor Update, Lightspeed, Nov. 11, 2004, 13-14.

[24] This discussion of the Baumann paper and the paper itself were submitted by NCTA in its comments on the Commission's Notice of Inquiry in connection with its Twelfth Annual Report on competition in the video marketplace. *See* NCTA Comments, MB Docket No. 05-255 at 16-24 and Attachment A (Sept. 19, 2005). As

The effect of imposing reasonable timelines for deploying networks to all neighborhoods in a community is to ensure that neighborhoods which SBC (now AT&T) would call "low value areas" get served. For incumbent cable operators, revenues generated in neighborhoods which cost less to serve and/or in which customers purchase more options subsidize other neighborhoods. As Baumann points out, "The revenues from subscribers in these high value areas may be of critical importance to the cable operator in covering the costs of upgrading and expanding the entire cable system. In effect, the revenue from these areas cross-subsidizes the cost of upgrading other areas."[25]

But this cross-subsidization[26] cannot be sustained if a significant competitor is allowed to construct facilities and provide service only in the areas where costs are lowest and/or expected revenues are highest. As Baumann points out, proponents of allowing such cream skimming by new telco entrants envision a result in which "all consumers are better off because the incumbent's price is lower everywhere and some consumers have the added choice of subscribing to the entrant's service."[27] But this is not a sustainable outcome.

---

the NPRM makes clear, the Commission is addressing in this proceeding issues regarding telco entry that it raised in the Video Competition Notice of Inquiry.

25 M. Baumann, "The Adverse Effects of Asymmetric Build-Out Requirements in Cable Television" at 4 (attached to these Comments as Attachment B).

26 Cross-subsidy here refers to the fact that different customers have different net costs associated with providing facilities and services. Customers residing in high density housing have lower per-mile construction costs associated with their service, for example. This type of cross-subsidy, common to all businesses with variable customer cost structures, differs from the regulatory cross-subsidy practiced by historically rate-regulated utilities like power and telephone companies and policed by regulators. This latter unlawful practice assigns costs from unregulated activities to the regulated, rate-of-return rate base, thereby easing entry into unregulated activities by regulated utilities. Build-out requirements assume that customers may have variable costs associated with serving them; nevertheless the public policy benefits of such nearly ubiquitous service outweigh the disadvantages to the provider of serving only lower-cost customers.

27 Baumann at 5.

The telephone company will, as the result of cream skimming, have lower per-subscriber costs and higher per-subscriber revenues than the competing cable operator. Thus, it will be able to charge less than that operator – and this will, indeed, likely force the operator to lower its price in the area served by the telco. But it cannot simply lower prices across the board, making everybody better off. As Baumann explains, "[w]ithout the ability to finance the cross-subsidies needed to support the low value areas, *the incumbent's situation has to change*."[28] And the change is likely to harm consumers in the long run, "*particularly those in the low value areas.*"[29]

Facing effective competition from DBS providers and telephone companies, cable operators will no longer be subject to uniform pricing constraints. So, one alternative might simply be to raise prices in the higher-cost areas that the telephone companies choose not to enter. But this may not be a viable alternative. Operators may not be able to raise prices in those areas without losing more revenue than they gain – either because of competition from DBS or because customers are simply unwilling or unable to pay such higher prices for any multichannel subscription service.

In that case, as Baumann explains, allowing a significant new entrant to cream skim the "high value" areas of a community may threaten the quality – or the continued existence – of cable service in the "low value" areas that the new entrant chooses to ignore: "The incumbent may be able to maintain, but not upgrade, the current level of service in the low value area. Alternatively, the incumbent may not be able to continue to serve all of the low value areas."[30]

---

[28] *Id.* at 8 (emphasis added).

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

[30] *Id.*

In these circumstances, *exempting* new entrants from the buildout and anti-redlining obligations imposed on existing operators would actually pose a greater threat to fair marketplace competition than *imposing* such obligations. This is especially true in a video marketplace in which consumers are already enjoying the benefits of vigorous competition among cable operators and two strong DBS services. And it would also directly undermine President Bush's policy goal of promoting ubiquitous competitive broadband availability throughout the nation, including areas that might otherwise be underserved.[31]

Franchises, reasonable timelines for ubiquitous deployment, and related anti-redlining requirements present no significant barriers to the competitive entry of telephone companies into the already competitive video marketplace. Freeing them from such obligations would, on the other hand, impose an "incumbent burden" on existing providers – the "opposite of an entry barrier" on the new entrant – which would distort competition and make consumers worse off.[32] As Baumann points out, "if constraints apply only to the incumbent, then which firm or firms survive is not a function solely of the competitive marketplace, but is influenced by the asymmetric enforcement of governmental regulations. And, in the end, it is possible that many fewer customers will get cable service."[33]

---

[31] "This country needs a national goal for broadband technology, for the speed of broadband technology. We ought to have a universal, affordable access for broadband technology by the year 2007, and then we ought to make sure as soon as possible thereafter, consumers have got plenty of choices when it comes to purchasing the broadband carrier." Remarks by President Bush, March 26, 2004, http://www.whitehouse.gov/news/releases/2004/03/20040326-9.html.

[32] *Id.* at 4.

[33] Baumann at 8.

The upshot is that it is not at all unreasonable for franchising authorities to ask telephone companies to live by the same rules and regulations as their landline competitors in the provision of cable service. Especially with respect to the buildout requirements that telephone companies want to avoid, asymmetric regulation not only distorts fair marketplace competition but is likely to have distinctly adverse effects on consumers, especially in areas that are least economical to serve.

III. THE CABLE ACT GIVES COURTS, RATHER THAN THE FCC, RESPONSIBILITY TO ENFORCE THE "UNREASONABLE REFUSAL TO AWARD AN ADDITIONAL FRANCHISE" PROVISION OF SECTION 621

As the preceding analysis shows, there is no reason to believe that the franchising process is thwarting competition in the video marketplace. In particular, there would be no sound policy reason for the Commission to rule that franchise requirements that apply to existing cable operators are unreasonable when applied to telephone companies – even if the Commission had authority to do so. But the Commission does not, in any event, have such authority under Section 621(a)(1) of the Act, or elsewhere.

A. Section 621(a)(1) Vests Local Franchising Authorities with the Power to Award Competitive Franchises, Subject to Court Review of Competitive Franchise Denials

The Cable Communications Policy Act of 1984, which expressly regulated cable television for the first time, addressed a "need for national standards which clarify the authority of Federal, state and local government to regulate cable through the franchise process."[34] Congress "passed the Cable Act in large measure to 'establish guidelines for the exercise of

[34] 1984 House Report at 23.

federal, state, and local authority with respect to the regulation of cable systems.'"[35] In some areas, the FCC was assigned sole responsibility and any contrary state and local requirements were preempted. In some cases, "Congress did not expressly delegate adjudicatory or regulatory authority to any particular administrative, judicial or legislative body,"[36] but it imposed a uniform, federal standard. In other areas, franchise authorities were delegated power to regulate.[37]

Section 621, which expressly addresses issues of the local franchise, specifies that a franchising authority, not the federal government, may award franchises in accordance with the provisions of Title VI.[38] As the Supreme Court put it, the 1984 Act "left franchising to state or local authorities; those authorities were also empowered to specify the facilities and equipment that franchisees were to use, provided such requirements were 'consistent with this title.'"[39]

---

35 *Amer. Civil Liberties Union v. FCC*, 823 F.2d 1554, 1559 (D.C. Cir. 1987) (*quoting* Section 601(3), 47 U.S.C. § 521(3)).

36 *Id.*

37 *See e.g., Cable Television Assoc. of NY v. Finneran*, 954 F.2d 91, 98 (2d Cir. 1992) ("In short, in the Cable Act Congress attempted to create a comprehensive and reticulated scheme for regulating cable television and to define the relative spheres of authority of the states and the federal government. The Act cut back on federal authority in some places – particularly control of franchising.")

38 *See, e.g.*, 1984 House Report at 59 ("matters subject to state and local authority include, to the extent not addressed in the legislation, certain terms and conditions related to the grant of a franchise (e.g., duration of the franchise term, delineation of the service area); the construction and operation of the system (e.g., extension of service, safety standards, timetable for construction) and the enforcement and administration of a franchise (e.g., reporting requirements, bonds, letters of credit, insurance and indemnification, condemnation, and transfers of ownership)").

39 *City of New York v. FCC*, 486 U.S. 57, 61 (1988).

Prior to 1992, "much dispute ha[d] arisen over the power of a franchising authority to grant an exclusive franchise."[40] Several courts had suggested that de facto exclusive franchises were unconstitutional when there existed physical capacity for more than one cable operator.[41]

In 1992, Congress amended Section 621 to conform federal law by expressly limiting local franchising authorities' discretion to award exclusive franchises. Congress also prohibited "unreasonable" refusals to award additional competitive franchises.[42] Congress provided that "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." Section 635 – which also applies specifically to denials of requests to renew or modify franchises – specifically provides for *judicial* review in state or federal court.[43]

The amendments to Section 621 nowhere mention any FCC role in implementing this provision or adjudicating grants or denials of competitive franchise applications. Nonetheless,

---

40 *See* Brenner, Price and Meyerson, *Cable Television and Other Nonbroadcast Video* §3:19 (2004 ed.) ("Brenner, Price and Meyerson.")

41 *Preferred Communications, Inc. v. City of Los Angeles, Cal.*, 754 F.2d 1396 (9th Cir. 1985), *judgment aff'd and remanded on other grounds*, 476 U.S. 488 (1986) and *Century Federal, Inc. v. City of Palo Alto, Cal.*, 648 F. Supp. 1465 (N.D. Cal. 1986). Challenges also were mounted to the immunity of a local franchising authority from federal antitrust statutes arising from a lack of specific authority to grant an exclusive franchise. Brenner, Price and Meyerson at §3:19.

42 *See generally Cox Communications, Inc., v. U.S.*, 992 F.2d 1178, 1181 (11th Cir. 1993) ("The Act overrules the exclusivity of government franchises by imposing a reasonableness requirement on a franchising authority's refusal to award an additional franchise.")

43 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), 625, or 626 may commence an action within 120 days after receiving notice of such determinations, which may be brought in (1) the district court of the United States for any judicial district in which the cable system is located; or (2) in any state court of general jurisdiction having jurisdiction over the parties.")

the Notice "tentatively conclude[s] that the Commission has authority to implement Section 621(a)(1)'s directive that LFAs not unreasonably refuse to award competitive franchises."[44]

The Commission asserts that it is "charged by Congress with the administration of Title VI, which, as courts have held, necessarily includes the authority to interpret and implement Section 621."[45] However, the legislative history of Section 621(a)(1) makes clear that Congress deliberately provided for case-by-case judicial review as opposed to federal standards defining "unreasonable" grounds for denial. The House version of the 1992 bill contained examples of reasons for denying an additional franchise that by definition were to be considered not "unreasonable."[46] The bill ultimately adopted, however, removed these examples from Section 621(a)(1) and added the judicial review provision.[47] As one federal court explained, "By choosing not to adopt a federally mandated list of reasonable grounds for denial, ...Congress intended to leave states [acting through franchising authorities] with the power to determine the bases on which to grant or deny additional franchises, with the only caveat being that the basis for denial must be 'reasonable.'"[48]

---

44 Notice at ¶ 15.

45 *Id.* The Notice cites to *City of Chicago v. FCC* in support of its authority over interpreting Section 621. That case, however, concerned the definitional question of whether the operator of a SMATV system was a cable operator of a cable system under the definitions of the Cable Act. The FCC unquestionably has authority to interpret the definitions of the Act.

46 Report of the Committee on Energy and Commerce of the House of Representatives, H.R. Rep. No. 102-628, 102nd Cong. 2d Sess. 90 (1992), at 90 ("Refusal to award a franchise shall not be considered unreasonable if, for example, it is on the ground: (1) of technical infeasibility; (2) of inadequate assurance that the cable operator will provide adequate public, educational, and governmental access channel capacity, facilities, or financial support; (3) of inadequate assurance that the cable operator will, within a reasonable period of time, provide universal service throughout the entire franchise area; (4) that such award would interfere with the right of the franchising authority to deny renewal; or (5) of inadequate assurance that the cable operator has the financial, technical, or legal qualifications to provide cable service.")

47 Congress did incorporate elements of the House bill's concepts in a different part of Section 621, which applies to the award of a franchise by a franchising authority. See Section 621(a)(4).

48 *Cable TV Fund 14-A, Ltd. v. City of Naperville*, 1997 WL 280692 (N.D. Ill. 1997).

Congress also did not mean for the Commission to adopt such federal standards. Its specific provision for judicial appeals reflects a recognition that whether denial of a competitive franchise application is unreasonable hinges on the particular facts and circumstances of an individual case. Congress provided similar relief in similar circumstances dealing with franchise modifications (Section 625) and franchise renewals (Section 626). In all three cases, courts are better positioned to judge the reasonableness of a local franchising authority's action under the circumstances than the FCC would be through across-the-board rules and standards.

In fact, until this proceeding, the Commission appeared to recognize that implementation and enforcement of Section 621(a)(1) was not within its purview, and it never proposed to adopt such rules or standards. It considered Section 621(a)(1) to be one of the "self-effectuating" provisions of the 1992 Cable Act, explaining that "if an applicant is denied a second franchise, it may appeal that decision in federal district court or in any state court of general jurisdiction."[49]

B. The FCC Cannot Find Authority Under Other Provisions of the Act

The Notice also tries in vain to find authority in other, more general provisions of the Act. The Notice claims jurisdiction under an imprecise mixture of Sections 621(a) and 636(c) of the Act and the Supremacy Clause, arguing that taken together these provisions preempt and supersede "any law or regulation of a State or LFA that causes an unreasonable refusal to award a competitive franchise in contravention of Section 621(a)."[50] But neither Section 636 nor the Supremacy Clause provide the Commission with a source of authority that overcomes the specific language of Section 621(a)(1).

---

49 Public Notice, "Self-Effectuating Provisions of the Cable Television Consumer Protection and Competition Act of 1992," 7 FCC Rcd. 7307 (1992).

50 Notice at ¶ 15.

Section 636(c) merely preempts "any provision of law" or "any provision of any franchise granted" that is inconsistent with the Act. It provides the Commission with no independent authority to adopt rules that may be inconsistent with various laws at the local level and then declare *those* laws preempted. Whatever authority the FCC has in this area must arise from some other provision of the Act.

Even if Section 636(c) were applicable, it would only apply to the extent a franchising authority's action was *inconsistent* with the Cable Act.[51] Nothing about the local process that determines how to grant a second franchise has been shown to be at all inconsistent with the Act. Instead, the telephone companies appear to object to provisions that are entirely permissible under the Act, not to some take-it-or-leave-it conditions which are forbidden by Title VI.[52]

The FCC also cannot bootstrap any authority here on the Supremacy Clause. The Supremacy Clause of Article VI of the Constitution "provides Congress with the power to pre-empt state law."[53] But Congress' authority to supersede state and local regulation with a comprehensive federal framework is not at issue here. Congress has done so, and, in Title VI, allocated certain responsibilities for implementing that framework to the Commission, while giving other responsibilities to state and local governments and to state and federal courts. While the ability to preempt extends to federal regulations, those regulations must be bottomed on clear statutory authority. Nothing in the Supremacy Clause gives the Commission the authority to appropriate responsibilities that Congress allocated elsewhere. "While it is certainly true, and a

---

51 *See, e.g.*, *James Cable Partners, L.P. v. City of Jamestown*, 43 F.3d 277, 281 (6th Cir. 1995) ("[Petitioner] is, of course, correct that a federal statute would supersede a conflicting local ordinance.... Preemption requires a conflict, however.")

52 Notice at ¶¶ 5 and 6 (*e.g.*, telephone company complaints that franchising process, among things, triggers level playing field laws, or "simply takes too long").

53 *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 368 (1986).

basic underpinning of our federal system, that state regulation will be displaced to the extent that it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,… it is also true that a federal agency may pre-empt state law only when and if it is acting within the scope of its congressionally delegated authority."[54] As described above, it is that delegated authority that is lacking here.

For similar reasons, the FCC cannot find any authority to act under its ancillary authority under section 4(i). That provision, standing alone, does not provide an independent source of FCC regulatory power. To exercise ancillary jurisdiction, not only must the Commission have general jurisdiction under Title I over the subject of the regulations, but also the regulation must be reasonably ancillary to the Commission's effective performance of specific statutorily mandated responsibilities. In *MPAA v. FCC*, the D.C. Circuit agreed with the analysis that "section 4(i) is not a stand-alone basis of authority and cannot be read in isolation … Section 4(i)'s authority must be 'reasonably ancillary' to other express provisions."[55] The FCC, thus, must identify some source of jurisdiction other than Section 4(i)[56] and must not conflict with a more specific statutory provision.

In particular, the Commission cannot rely its supposition of "policies" underlying Section 621(a)(1) to exercise authority that Congress chose not to grant to it in that very section. And the Commission certainly cannot rely on Section 706 of the Telecommunications Act of 1996, as

---

54 *Id.* at 374.

55 *Motion Picture Assn. of America, Inc. v. FCC*, 309 F.3d 796, 806 (D.C. Cir. 2002).

56 *See also American Library Assoc. v. FCC*, 406 F.3d 689, 702-703 (D.C. Cir. 2005) (noting that "Supreme Court refused to countenance an interpretation of the second prong of the ancillary jurisdiction test that would confer 'unbounded' jurisdiction on the Commission ….").

suggested by the NPRM. That provision directs the Commission to determine whether advanced telecommunications capability is being deployed in a reasonable and timely manner and, if not, to take steps to accelerate deployment by removing barriers to infrastructure investment and by promoting competition in the telecommunications marketplace.

The Commission has repeatedly found that advanced telecommunications capability *is* being deployed in a reasonable and timely manner, removing any authority to act under Section 706. But wholly apart from this finding, establishing standards that exempt telco providers of cable service from obligations and burdens imposed on existing cable competitors would not promote competition, as mandated by Section 706. To the contrary, as discussed above, it would distort and hamper fair competition and would have adverse effects on consumers. Thus, even if Congress had not limited the Commission's authority to the four corners of Title VI, there would be no jurisdiction – ancillary or otherwise – to be found in Section 706.

If the Commission were nevertheless somehow to find that it had authority to promote the pro-competitive purposes of Title VI by preempting certain local franchising requirements, such authority could not be limited to requirements imposed on new entrants. Promoting competitive provision of cable service depends on ensuring fair competition among competitors. To achieve such a purpose, *all* competing cable operators would have to be relieved of any requirements and obligations that were deemed to be unduly burdensome and costly. To do otherwise would distort and undermine fair competition – a goal that is antithetical to the Act.

C. The Fact That Telephone Companies Already Have Permission To Use Rights-of-Way To Provide Telephone Service Does Not Provide The Commission With Authority Under Section 621(a)(1)

The Commission suggests that "it is not clear how the primary justification for a cable franchise – *i.e.*, the locality's need to regulate and receive compensation for the use of public rights of way – applies to entities that already have franchises that authorize the use of their rights-of-way."[57] It asks whether Section 621(a)(1) somehow gives it "authority to establish different – specifically, higher – standards for 'reasonableness' with respect to such entities."[58]

As discussed above, Congress gave the Commission *no* authority to implement or establish standards pursuant to Section 621(a)(1). It is important, however, to point out in addition that the fact that the Title VI requirement that cable operators obtain cable franchises was not meant simply to protect the locality's need to regulate the use of rights of way. Congress adopted a comprehensive regulatory framework establishing the rights and social responsibilities of all entities providing cable service. Most of these responsibilities have nothing to do with the manner in which rights of way are used, but, in many cases, Congress determined that they were best implemented and enforced at the local level, by the franchise agreement and the local franchising authority.

That's why Congress did not merely give franchising authorities discretion to require franchises for the use of their rights of way but instead provided that cable operators *must* obtain franchises. Under the statutory framework, providers of cable service must obtain a separate cable franchise that reflects the mandates and responsibilities of Title VI, regardless of whether they already have a permit to use the rights of way for other purposes.[59]

---

57 Notice at ¶ 22.

58 *Id.*

59 *See* 47 U.S.C. § 541(b)(1). SBC (now AT&T) has argued in a separate proceeding that it does not need a cable franchise – not only because it has "pre-existing" permission to use the public rights of way to provide telephone service but also because it allegedly will not be providing cable service. *IP-Enabled Services*, WC Docket No. 04-36 (filed Sept. 14, 2005). NCTA has previously shown the flaws in this argument. Among other things, SBC's proposed service will provide linear channels of programming to subscribers, a function that fits squarely within the definition of cable service provided over a cable system. Response of NCTA, WC Docket No. 04-36 (filed Nov. 1, 2005).

That an entity has an existing right of way is not instructive as to the regulatory treatment of businesses that use that right of way. A bank may have an ATM network that uses extensive rights of way to connect its ATM machines with a home office computer. But if the bank wanted to enter the telephone or video business using that network, it could hardly claim that its rights of way for its banking network eliminated further regulatory inquiry. The fact that telephone companies have permission to use rights of way for the provision of telecommunications services does not immunize them from the franchise requirements of Title VI. Nor does it confer upon the Commission any greater regulatory authority under Section 621(a)(1) than it would otherwise have – which, as we have shown, is none.

D. The Commission Cannot Regulate Franchising Procedures That Do Not Constitute a Denial of a Competitive Franchise

The Notice also specifically proposes to implement Section 621(a)(1) in a way that significantly broadens the scope of that section. It proposes that the FCC adopt rules governing not only unreasonable *denials* of competitive franchises, but also the imposition 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."[60] The Notice suggests that "either by (1) creating unreasonable delays in the process, or (2) imposing unreasonable regulatory roadblocks," procedures for obtaining a competitive franchise may "effectively constitute a *de facto* 'unreasonable refusal to award an additional competitive franchise' within the meaning of Section 621(a)(1)."[61] This analysis is at odds with the words of Section 621(a)(1) and the structure of the Cable Act.

---

[60] Notice at ¶ 19.

[61] *Id.*

The plain language of Section 621(a)(1) addresses the "unreasonable refusal to award" an additional franchise, and says nothing about the timetables or procedures that obtaining a competitive franchise might entail at the local level. If the meaning of "unreasonabl[y] refus[ing] to award … an additional competitive franchise" is at all ambiguous, the next sentence makes clear that Congress intended the "denial" of a competitive franchise to be covered by this provision. It provides a judicial remedy for cable operators adversely affected by any "final determination" made by a LFA under Section 621(a)(1). Nothing in the plain language of the relevant provision suggests that Congress intended to confer authority on the FCC to interfere with franchising authority procedures for awarding a competitive franchise.[62]

* * *

Title VI, with its specific and comprehensive allocation of rights, responsibilities and enforcement authority, leaves little room in any event for the exercise of ancillary jurisdiction and other regulation outside the four corners of the statute. With respect to Section 621(a)(1), both the scope of the prohibition and the remedy for violations are clearly articulated. The provision leaves no room for the Commission to implement and enforce – much less expand the scope of – its express terms.

---

[62] Nor does the FCC have any authority to "preempt state-level legislation to the extent that [the Commission] find[s] it serves as an unreasonable barrier to the grant of competitive franchises." Notice at ¶24. As described above, state level playing field statutes are wholly consistent with the policies of the 1992 Cable Act. *See City of Naperville*, *supra*, at ¶ 16 ("it is certainly reasonable for the state to mandate denial of an additional franchise when the potential competitor is only willing to compete unfairly, pursuant to a franchise that, taken as a whole, contains terms more favorable or less burdensome than those in the existing franchise. Thus, the Court finds no conflict between the Overbuild Act and either Section 541 of the Cable Act or the pro-competitive purposes of the Act and the [state] Overbuild Act is therefore not preempted.") In addition, several level playing field statutes were in effect at the time of the 1992 Act's passage. As the *Naperville* court noted, "Congress could certainly have expressly preempted level playing field laws and their standards if it had intended to prevent states from denying additional franchises based on such laws. *See Amsat Cable Ltd. v. Cablevision of Connecticut,* 6 F.3d 867, 876 (2d Cir.1993) (finding significance in the fact that state laws under consideration were in effect when Cable Act was passed and were not expressly preempted or otherwise limited by the Act).)" *Id.* at ¶ 16 n. 19.

CONCLUSION

Periodic review of the provisions of Title VI by Congress to take into account marketplace developments is wholly appropriate. Some regulatory requirements may well have outlived their usefulness, and others may need to be streamlined or amended. But there is no evidence that efforts by phone companies to compete by obtaining cable franchises is being stymied or deterred by the franchising process. To the contrary, local governments are welcoming of additional competition. Relieving those competitors from franchise requirements that continue to apply to existing cable operators would distort marketplace competition in a way that harms rather than benefits consumers. Therefore, while the Commission lacks authority to implement or enforce Section 621(a)(1), it would have no public policy basis for doing so in any event.

Respectfully submitted,

/s/ Daniel L. Brenner

Daniel L. Brenner
Michael S. Schooler
Diane B. Burstein

Counsel for the National Cable &
Telecommunications Association
1724 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 775-3664

February 13, 2006

ATTACHMENT A

City	State	Date Franchise was Applied for	Date Franchise was Granted	Date Video service was deployed	Number of Days to Acquire the Franchise	Number of Days to Offer Video After Franchise was granted
Keller[i]	Texas	June 1, 2004	February 1, 2005	September 22, 2005	243	233
Sachse[ii]	Texas	October 18, 2004	December 6, 2004	January 5, 2006	49	394
Westlake[iii]	Texas	N/A	January 10, 2005	January 5, 2006		359
Wylie[iv]	Texas	N/A	January 25, 2005	January 5, 2006		344
Columbia[v]	Maryland	May 13, 2005	January 3, 2006	Video Not Offered	235	41+
Ellicott City[vi]	Maryland	May 13, 2005	January 3, 2006	Video Not Offered	235	41+
Fairfax (County)[vii]	Virginia	July 15, 2005	September 26, 2005	Video Not Offered	73	140+
Fairfax (City)[viii]	Virginia	September 6, 2005	September 27, 2005	Video Not Offered	21	139+
Herndon[ix]	Virginia	March 8, 2005	July 19, 2005	November 21, 2005	133	125
Quantico[x]	Virginia	N/A	April 4, 2005	Video Not Offered		315+
Falls Church[xi]	Virginia	January 3, 2006	January 23, 2006	Video Not Offered	20	21+
Temple Terrace[xii]	Florida	November 30, 2004	May 17, 2005	December 6, 2005	168	203
Manatee[xiii]	Florida	December 17, 2004	August 30, 2005	February 1, 2006	256	178
Hillsborough[xiv]	Florida	April 12, 2005	February 1, 2006	Video Not Offered	295	12+
Bradenton[xv]	Florida	N/A	February 8, 2006	Video Not Offered		5+
Beaumont[xvi]	California	October 14, 2004	November 2, 2004	February 7, 2006	19	462
Hermosa Beach[xvii]	California	April 10, 2005	January 10, 2006	Video Not Offered	274	34+
Apple Valley[xviii]	California	June 30, 2005	November 8, 2005	Video Not Offered	131	97+
Murrieta[xix]	California	February 17, 2005	September 6, 2005	Video Not Offered	201	160+
Massapequa Park[xx]	New York	August 31, 2005	Local: September 26, 2005 NYPSC: December 14, 2005	January 24, 2006	26 105	120 41
Nyack[xxi]	New York	October 27, 2005	Local: November 28, 2005 NYPSC: February 8, 2006	Video Not Offered	32 104	77+ 5+
South Nyack[xxii]	New York	October 24, 2005	Local: November 29, 2005 NYPSC: February 8, 2006	Video Not Offered	36 107	76+ 5+
Woburn[xxiii]	MA	April 20, 2005	September 30, 2005	January 24, 2006	163	116
Reading[xxiv]	MA	August 15, 2005	January 25, 2006	Video Not Offered	163	19+
Hulmeville[xxv]	PA	N/A	February 6, 2006	Video Not Offered		7+

i Application date: "As Verizon Enters Cable Business, It Faces Local Static," The Wall Street Journal, October 28, 2005; Franchise date: Fairfax County Franchise Application; Launch date: "Verizon FiOS TV is Here!," Verizon Press Release, September 22, 2005.

ii Application date: Email from Terry Smith, Sachse City Secretary; Franchise date: Fairfax County Franchise Application; Launch date: "More Verizon Customers in North Texas Get Competitive Choice," Verizon Press Release, January 5, 2006.

iii Franchise date: Town of Westlake Board of Aldermen Minutes, January 10, 2005; Launch date: "More Verizon Customers in North Texas Get Competitive Choice," Verizon Press Release, January 5, 2006.

iv Franchise date: Wylie City Council Minutes, January 25, 2005; Launch date: "More Verizon Customers in North Texas Get Competitive Choice," Verizon Press Release, January 5, 2006.

[v] Application date and Franchise date: Howard County Franchise Agreement.

[vi] Application date and Franchise date: Howard County Franchise Agreement.

[vii] Application date: Knapp, John W. Letter to Fairfax County Board of Supervisors. July 15, 2005; Franchise date: Fairfax County franchise agreement;

[viii] Application date: Sisson, Robert L. Memo to Fairfax City Mayor and City Council; Franchise date: City of Fairfax City Council Minutes, September 27, 2005.

[ix] Application date: Telephone conversation with Town Attorney's office; Franchise date: "Herndon Lets Verizon Offer Cable," The Washington Post, July 20, 2005; Launch date: "Herndon, Va. Gets FiOS TV," Telephony Online, November 22, 2005.

[x] Franchise date: Fairfax County franchise application.

[xi] Application date and Franchise date: City of Falls Church Ordinance No. TO6-01.

[xii] Application date: Telephone conversation with Kathy Tack, City of Temple Terrace; Franchise date: City of Temple Terrace Ordinance No. 1141; Launch date: "Verizon to Launch FiOS TV in Temple Terrace; First Rollout in Florida," Verizon Press Release, December 6, 2005.

[xiii] Application date: "Verizon Talking About Cable TV With Manatee," Sarasota Herald-Tribune, December 18, 2004; Franchise date: Manatee County Commission Minutes, August 30, 2005; Launch date: "FiOS TV Expands in Florida," Multichannel News, February 1, 2006.

[xiv] Franchise date: "Verizon Is Granted Authority to Offer FiOS TV to 735,000 Hillsborough County Residents in Florida," Verizon Press Release, February 1, 2006.

[xv] Franchise date: "Residents of Bradenton, Florida, to Get Verizon FiOS TV," Verizon Press Release, February 8, 2006.

[xvi] Application date: City of Beaumont Staff Report; Franchise date: Fairfax County franchise application; Launch date: "Verizon Launches FiOS TV in Beaumont, Calif.; City First in State to Receive New Service," Verizon Press Release, February 7, 2006.

[xvii] Application date: Telephone conversation with Michael Earl, City Official; Franchise date: City of Hermosa Beach City Council Minutes, January 10, 2005.

[xviii] Application date: Email from Bruce Williams, Apple Valley Town Manager; Franchise date: Town of Apple Valley Town Council Minutes, November 8, 2005.

[xix] Application date: Email from Al Vollbrecht, Murrietta Administrative Services Consultant; Franchise date: "Verizon Awarded Second Video Franchise in California," Verizon Press Release, September 7, 2005.

[xx] Application date: Formal application per member company research. Franchise date: "Trustees Approve Verizon Franchise," Massapequan Observer, September 30, 2005; State of New York Public Service Commission press release dated December 14, 2005. Launch date: "Verizon Launches FiOS TV in Massapequa Park; First Rollout in New York," Verizon Press Release, January 24, 2006.

[xxi] Application date and Franchise date: Telephone conversation with Mary White, Nyack Village Clerk; State of New York Public Service Commission Order and Certificate of Confirmation dated February 8, 2006.

[xxii] Application date and Franchise date: Telephone conversation with Sara Siler, South Nyack Village Clerk; State of New York Public Service Commission Order and Certificate of Confirmation dated February 8, 2006.

[xxiii] Application date: Email from William Campbell, Woburn City Clerk; Franchise date: "City of Woburn Wards Video Franchise to Verizon, Providing More Choice and Benefits to Consumers," Verizon Press Release, September 30, 2005; Launch date: "Verizon Launches FiOS TV in Woburn; First Rollout in Massachusetts," Verizon Press Release, January 24, 2006.

[xxiv] Application date: Telephone conversation with Paula in Town Manager's office; Franchise date: "Reading Board of Selectmen Grants Verizon Authority to Officer FiOS TV to More Than 23,000 Potential Viewers," Verizon Press Release, January 26, 2006

[xxv] Franchise date: "Borough of Hulmeville Awards Video Franchise to Verizon," Verizon Press Release, February 7, 2006.

ATTACHMENT B

The Adverse Effects of Asymmetric Build-Out Requirements in Cable Television

Michael G. Baumann

September 14, 2005

Executive Summary

An incumbent cable operator typically has an obligation to serve all customers in its franchise area. That duty requires the operator to expand its capacity to meet the growth and location of customer demand and has necessitated substantial capital expenditures as cable operators have updated their systems. An incumbent burden is said to exist if incumbents face costs of regulation that are not imposed on entrants. If a regulator allows entry by competing firms that are not subject to the same regulation as the incumbent, such asymmetric entry may severely reduce the incumbent's ability to abide by its franchise requirements.

If asymmetric entry were allowed it is likely that some groups of consumers, particularly those in the low value areas, would be harmed. Given the variation of conditions across franchises it is difficult to predict exactly what would happen to an incumbent firm. The incumbent may be unable to upgrade and expand, or even to maintain, its service in low value areas.

Asymmetric entry may allow some consumers to make choices about cable services that they find economically attractive, but may also produce results that are undesirable with respect to broader social goals. Symmetric regulation, or a revision of the incumbent operator's obligations, is required. Otherwise, the incumbent operator is at a disadvantage when competing with the entrant and has a reduced incentive to maintain, upgrade, and expand its cable system.

The Adverse Effects of Asymmetric Build-Out Requirements in Cable Television

Introduction

Verizon and SBC are in the process of launching new fiber-based video services that will compete with incumbent cable operators. Both of these telecommunications companies argue that the deployment of their services will be delayed if they are subject to the same regulations as cable operators. They argue that since they already have been granted franchises to offer telephone service they should not be required to obtain second cable franchises. Even when these companies recognize the need to deal with local cable franchising authorities, they nonetheless argue that they should not be subject to the same obligations as incumbent cable operators.

Existing franchise agreements generally require a cable system to serve most or all of the households in its franchise area. If franchising authorities maintain this universal coverage condition on incumbent cable systems but not on new entrants, existing cable systems will encounter a competitive disadvantage, known as incumbent burden.[1] This burden could limit the incumbent's ability to respond to price competition from the entrant. Moreover, applying different rules to entrants will potentially limit an incumbent operator's incentive and ability to maintain and upgrade its cable system. It may no longer be profitable for the incumbent to incur the costs of upgrading service if it is required to upgrade the entire franchise area while the entrant does not face a similar requirement.

Under asymmetric requirements, consumers in the entrant's service area may initially have a choice about which cable service they find economically attractive, but in the longer term

---

[1] J. Gregory Sidak and Daniel F. Spulber, *Deregulatory Takings and the Regulatory Contract*: Cambridge University Press (1997), pp. 4-5, 30.

there could be undesirable effects with respect to broader social goals. If regulators want to maintain universal service, they will have to impose the requirement on everybody.

Franchise Requirements

The obligation to provide cable service to most or all households within a franchise area is known as a universal service requirement. Such requirements are not unique to the cable industry, and historically have been applied to other industries such as electric power and telecommunications. There are several reasons why governments and regulators may want to pursue the goal of universal service—reasons of equity, of economic development, and possibly even of economic efficiency (if there are sizeable network externalities).

Generally, in order to attain the objective of universal service, the incumbent firm is required to serve all of a given area, an obligation known as a coverage constraint. In the case of cable service, the coverage constraint is all or most of the entire franchise area. Typically, pricing restrictions are also imposed on the incumbent firm. Constraints on prices may take the form of uniform pricing, which requires a firm to offer its services at a uniform price to all its customers. Any losses a firm incurs because of these restrictions are commonly financed by internal cross-subsidies.

Cross-subsidization comes in many forms, including rate averaging where the costs of providing service differ based on location. For example, consider a firm that faces two types of consumers, high-cost (say rural) and low-cost (say urban) customers. Economic efficiency is maximized when each consumer type pays a price that equals the marginal cost of serving that consumer. If a coverage obligation is imposed along with a uniform pricing constraint, the observed price will be some average of the prices that would be charged each type of consumer. Rural customers will face a price below what they would otherwise be charged, while urban customers will pay a somewhat higher price. The universal service constraint creates some loss in efficiency due to the distortion in prices, and this loss should be balanced against the value that the public authority places on universal service.[2]

With cable systems, it is often the case that there are differences in the costs of serving different geographic areas. While programming costs per subscriber do not vary by area, the per-subscriber cost of maintaining the physical plant may be higher in some areas. In addition, due to variations in household income and demand, certain geographic areas may generate larger revenues per subscriber as a result of the programming and other services purchased. The revenues from subscribers in these high value areas may be of critical importance to the cable operator in covering the costs of upgrading and expanding the entire cable system. In effect, the revenue from these areas cross-subsidizes the cost of upgrading other areas.

Incumbent Burden

One of the effects of cross-subsidization is that it allows new entrants to a market to "cream skim" the low cost (or high value) customers, leaving the incumbent with the obligation to serve all customers. An incumbent burden is said to exist if incumbents face costs of regulation that are not imposed on entrants. An incumbent burden is the opposite of an entry barrier, in that an incumbent burden facilitates entry even if such entry would be uneconomic in the absence of regulation. Stated differently, incumbent burdens are analogous to the phenomenon of raising rivals costs, except that the rival whose cost is being raised is the incumbent rather than the entrant.[3]

The effect of imposing universal service obligations on service providers, and the impact of opening those services to entry and competition, has been studied extensively in the economics literature.[4] Entry and competition may limit the ability of the incumbent operator to

---

[2] H. Cremer, F. Gsami, A. Grimaud and J.J. Laffont, "Universal Service: An Economic Perspective," *Annals of Public and Cooperative Economics*, 72:1 (2001), pp. 21.

[3] Sidak and Spulber, pp. 30-31.

[4] See, for example, Barbara Cherry and Steven Wildman, "Unilateral and Bilateral Rules: A Framework for Increasing Competition While Meeting Universal Service Goals in Telecommunications," Chapter 3 in Barbara

use cross-subsidies. Charging uniform prices may open the door to "cream skimming," and may threaten the viability of the incumbent operator.[5]

Entry Assuming Uniform Pricing

If there is no elimination of the uniform price requirement, the incumbent cable operator cannot lower price to compete with the entrant in just those areas the entrant chooses to serve. The incumbent may be able to respond to entry by lowering its overall price somewhat, but it is limited in its ability to compete. The incumbent's price will be a compromise between its desire to have a low price in certain areas in order to compete with the entrant and to have a higher price in areas where there is no entry. Therefore, the price of the incumbent will in general be higher than that of the entrant.[6] In contrast, the entrant can undercut the incumbent's pricing and provide the same level of service as the incumbent in certain low cost (or high revenue) areas. An entrant would certainly be expected to take into account costs and potential revenues when deciding which geographic areas to enter. New entrants will first target those low cost (or high revenue) customers.

Under this scenario, it has been argued that all consumers are better off because the incumbent's price is lower everywhere and some consumers have the added choice of subscribing to the entrant's service.[7] While these commentators note that there is a decrease in

---

Cherry, Steven Wildman, and Allen Hammond IV, eds., *Making Universal Service Policy: Enhancing the Process Through Multidisciplinary Evaluation*, Lawrence Erlbaum Associates: Mahwah, New Jersey (1999); J. Gregory Sidak and Daniel F. Spulber, *Deregulatory Takings and the Regulatory Contract*: Cambridge University Press (1997); H. Cremer, F. Gsami, A. Grimaud and J.J. Laffont, "Universal Service: An Economic Perspective," *Annals of Public and Cooperative Economics*, 72:1 (2001), pp. 5-43, and T. Valletti, S. Hoernig, and P. Barros, "Universal Service and Entry: The Role of Uniform Pricing and Coverage Constraints," *Journal of Regulatory Economics* 21:2 (2002), pp. 169-190.

[5] Cremer, Gsami, Grimaud and Laffont, p. 29.

[6] Given the obligation and costs incurred to serve all households, the incumbent may not have the ability or the incentive to lower its price at all.

[7] See, for example, "The Consumer Welfare Cost of Cable 'Build-out' Rules," Phoenix Center Policy Paper Number 22, July 2005. In an effort to show that uniform build-out requirements are harmful, the paper at one points cites an FCC finding that the "local franchise process is, perhaps, the most important policy-related barrier to competitive entry in local cable markets." The issue being discussed relates to exclusive franchise contract

the incumbent's profits after entry, they fail to note that the lower profits will diminish the incumbent's ability and incentive to maintain and upgrade service in the less profitable areas.

Even though the incumbent's cable system may already be built out, the system cannot remain stagnant. It requires upgrades, maintenance, and expansion where population growth occurs. It may not be economically viable for the incumbent to upgrade, maintain, and expand its cable system's infrastructure if regulators allow cream skimming. Applying different requirements to entrants will change the incumbent's incentives and may jeopardize the financial solvency of the incumbent.[8] Entry may eliminate the incumbent's ability to offset losses in low-revenue areas with revenues from high-revenue areas. Going forward, the incumbent may not be able to profitably upgrade its system and continue to meet its coverage requirement. High cost, low revenue areas may well not be provided with cable service. If there is value to having cable service universally available, then this value will be lost.

Entry with Non-Uniform Pricing

The belief that entry will lower prices to all subscribers is based on the assumption that the incumbent will maintain a uniform price. However, following entry, the incumbent may be able to establish that one of the effective competition criteria has been met, and that it is no longer subject to the uniform pricing requirement. Of course, the incumbent may still elect to market its services using a uniform price even without a uniform pricing requirement. This decision will depend upon several factors including the extent to which the entrant overbuilds the franchise area, the entrant's price, and the cost of maintaining separate pricing schedules.[9]

---

rules, not build-out requirements, and the FCC goes on: "Recognizing the potential barrier that franchising poses, Congress, in order to further competition in the cable industry, prohibited the 'unreasonable' denial of a competitive franchise in the *1992 Cable Act.*" *In re 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 Delivery of Video Programming*, CS Docket No. 94-48, Appendix H at ¶ 43 (released September 28, 1994).

[8] Sidak and Spulber, p. 5.

[9] For example, advertising and marketing are likely to become more difficult, and potentially more costly, if the incumbent decides to offer different prices. The incumbent may choose to not use franchise-wide advertising to

If the incumbent decides to market its service using different prices, then the price charged in the area served by the entrant will be lower than it would have been if the incumbent continued under uniform pricing. By the same token, the price in other areas of the franchise will likely be higher than if the incumbent continued under uniform pricing after entry.[10] This is because the optimal uniform price lies between the optimal discriminatory prices whenever demands in the different areas are independent.

The exact price in the non-overbuild area will depend upon the cost of serving that area (e.g., programming and maintenance costs); the elasticity of demand in that area, which depends upon factors such as income; and other options available, such as DBS. It is certainly possible that the price in the non-overbuild area will be higher than the pre-entry price. In that case, entry will increase the price to some consumers. Nonetheless, the incumbent's ability to cross-subsidize less profitable areas will be reduced, as will the incumbent's ability and incentive to maintain and upgrade service those areas.

The Fate of Universal Service

The regulatory environment affects incentives for cable operators to make future investments in system maintenance and upgrades. The regulatory environment can also affect the outcome when a cable franchise comes up for renewal.

For a regulation such as universal service to be sustainable in the long run, it must be applied symmetrically. If not, the advantaged firms will likely drive out the other firms.[11] Since cross-subsidies embedded in current prices cannot be maintained under asymmetric regulations,

---

advertise a price and may not be able to offer franchise-wide incentives. While the incumbent could engage in targeted marketing to those areas served by the entrant, or identify customers and the rate they should be charged based on their address, it would have to maintain and update a database of areas served by the entrant as the entrant continued to roll out service.

[10] Mark Armstrong and John Vickers, "Price Discrimination, Competition and Regulation," *The Journal of Industrial Economics*, XLI (4) (1993), pp. 335-359, at 341.

[11] Cherry and Wildman, p. 47.

cream skimming makes the original regulatory model unviable. In other words, if you want universal service then you may have to impose it on everybody. Otherwise you may end up with some competitive areas but with other areas not being served.[12]

Without the ability to finance the cross-subsidies needed to support the low value areas, the incumbent's situation has to change. The actual outcome will depend on the degree to which the incumbent's ability to subsidize the low value area is reduced and what, if any, regulatory relief is provided. While one cannot predict with certainty what will happen given the variation in conditions across franchises, some groups of consumers, particularly those in the low value areas, will likely be harmed in the long run.[13]

The incumbent may be able to maintain, but not upgrade, the current level of service in the low value area. Alternatively, the incumbent may not be able to continue to serve all of the low value areas. Finally, the incumbent may be at such a disadvantage relative to the entrant that it will eventually exit the entire franchise area.

If identical regulations are applied to both the incumbent and the entrant, whether both firms survive or only one firm survives, and which one, is left to the competitive forces of the marketplace. Admittedly, the competition in the marketplace is subject to the constraint of universal service, but in the end all potential customers will have the ability to get cable service. Alternatively, if constraints apply only to the incumbent, then which firm or firms survive is not a function solely of the competitive marketplace, but is influenced by the asymmetric enforcement of governmental regulations. And, in the end, it is possible that many fewer customers will get cable service.

---

[12] It has been argued that a "build-out" requirement may deter entry in certain instances. If true, that is a strong demonstration of the cross-subsidization necessary to maintain cable service across the entire franchise area. The point here is that Congress has to weigh the potential impact of a coverage constraint on entry against the desirability of universal service.

[13] To the extent that the incumbent raises rates in the non-overlap area, some group of consumers may be harmed in the short run as well.

Having a different set of rules for entrants will also limit what franchise authorities can expect to negotiate in future franchise renewals. Incumbent cable operators will be less willing to pay franchise fees; to provide public, educational, and governmental channels; and to provide financial support for those channels. Indeed, such an unanticipated and asymmetric application of the rules for entrants may constitute a confiscation or taking by the government.