Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

COMMENTS OF CABLEVISION SYSTEMS CORPORATION

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Cablevision Systems Corporation ("Cablevision") hereby submits its comments in the above-captioned docket.[1/] Cablevision operates under cable franchises to serve more than 3 million households in New York, New Jersey and Connecticut.

INTRODUCTION AND SUMMARY

Competition across all sectors of the communications marketplace is providing consumers with unprecedented levels of choice, innovation and technology. In the video market, consumers today have the opportunity to choose from among an expanding range of providers and service offerings. The national franchising framework enacted by Congress in 1984 and revised in 1992 provides the stability necessary to encourage investment by establishing limits on franchising regulation, while at the same time enabling franchising authorities to vindicate important local interests (which the FCC itself recognizes are not unreasonable).

The franchising framework established under Title VI of the Communications Act balances states' rights and home rule interests with a national policy favoring investment and competition in video that has led to more than $100 billion invested by cable operators alone,

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1/ *See In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, Notice of Proposed Rulemaking, MB Docket No. 05-311 (rel. Nov. 18, 2005) ("*Notice*").

along with billions of dollars of additional investments by Bell companies and other broadband providers. Title VI imposes limitations on state and local authority necessary to promote competition: it requires that cable franchises be non-exclusive, that franchising authorities may not dictate programming or technology, and that rate and service regulation may only be applied in limited circumstances. At the same time, Title VI recognizes the legitimate local role in areas such as assuring non-discrimination, local control over the right-of-way, and public access programming -- matters that the Commission itself has acknowledged are properly within the scope of cable franchising.

Despite the success and durability of this framework, the Bell companies contend that it impedes competition. Since announcing their intention to enter the video marketplace, Verizon and SBC (now AT&T) have made no secret of their aversion to cable franchising.[2/] Their allegations that franchise authorities impose unmanageable processes and outrageous demands, thereby stopping the telephone companies from offering cable service to customers, are simply inconsistent with the facts.

In these comments, Cablevision makes three main points:

The uniform franchising scheme established by Congress balances the national interest in encouraging competition and new investment with local needs and community interests. The Cable Act encourages investment, accommodates entry, and recognizes important local interests to ensure that marketplace success will be decided by service quality and innovation, rather than by government-granted regulatory advantages. To the extent that

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[2/] *See*, *e.g.*, "Verizon to FCC: No Franchise Required," *Multichannel News*, August 9, 2004, at 30 (Quoting Verizon official: "Frankly, we don't believe that we should be having to seek franchises to offer video services to our consumers."); "The Fiber-Optic Quagmire; The Baby Bells Want to Enter Cable's Market -- Without Paying the Same Fees," *Business Week*, December 6, 2004 (quoting SBC official: "A franchise obligation is right for the first provider").

franchising authorities are acting unreasonably, Congress has provided in the Cable Act a specific, exclusive judicial remedy, designed to adjudge claims of obstruction on the merits and remove barriers to entry.

The franchising process is not deterring competitive entry and delays in cable franchising experienced by Verizon and AT&T are of their own making. In Cablevision's service area, Verizon has quickly attained franchises wherever it has applied for them, in each case getting municipal approval within 30-35 days of its application. Further, under New York law (for example), Verizon is entitled to expedited local review of its franchise application in 30 days if it agrees to abide by the existing franchise. Verizon's success with franchising was highlighted by its own CEO, who recently told investors that it was making "good progress" on video franchising, that he does not think "there's a big issue associated with timing" and that it does not pose "any impediment to our rolling out FiOS during the year 2006."[3/]

The telephone companies' actual efforts to secure franchises, however, have been modest. Even though Verizon has "announced" and deployed its FTTP network in scores of communities in New York over the past 18 months, it currently has no cable franchise applications pending anywhere in the state. In New Jersey, Verizon has trumpeted the roll-out of its FTTP network throughout the state, but has only recently filed franchise applications in nine municipalities. In Connecticut, despite a statewide franchise process, neither AT&T nor Verizon has applied for a cable franchise.

Experience shows that it is not the franchise process that takes time, but Verizon's own intransigence about accommodating even the most basic local prerogatives. Verizon has routinely presented municipalities with its own "template" franchise that cedes nothing to

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[3/] Conference Call Transcript, VZ-Q4 2005 Verizon Earnings Conference Call, Jan. 26, 2006.

legitimate local interests, such as rights of way management and safety, indemnity and claim protection, reasonable build-out requirements, and support for public access and local origination programming. Despite this intransigence, at least in New York, in each of the municipalities where Verizon has submitted a franchise application, the Verizon-proposed franchise was approved in barely a month.

Nor is there is support for the proposition that level playing field requirements inhibit video competition.[4/] These rules typically reflect judgments by policymakers that consumers are best served through a regulatory framework that ensures that success is determined by the product rather than by government-granted advantages. These requirements have not been applied inflexibly.

Adopting special rules for telco cable franchises would harm the public interest by undermining franchise commitments by all cable operators. The existing balance in the franchising framework also ensures the sustainability of franchise obligations that are important to the community, by allowing local governments to prescribe the same terms for all providers. Federal regulations that curb authority to seek fair terms from new entrants could make it commercially impracticable for incumbent cable operators to sustain franchise requirements from which their much larger competitors are exempt. A two-tiered franchising regime will lead to a "race to the bottom" in franchising, whereby each operator jockeys to provide less and less community protection and benefit in order to gain a competitive advantage. This will undermine the benefits of localism that are key to the balance embodied in Title VI.

[4/] *See. e.g.,* Verizon Comments in MB Docket No. 05-255 at 9-12 (*cited* in *Notice* para. 5).

I. THE FRANCHISING SCHEME ESTABLISHED BY CONGRESS PROMOTES COMPETITION AND NEW ENTRY WHILE ENSURING THAT CABLE SERVICE MEETS LOCAL NEEDS AND COMMUNITY INTERESTS

In the Cable Act of 1984, Congress enacted "national standards which clarify the authority of Federal, State and local government to regulate cable through the franchise process"[5/] and "provide for uniform federal, state, and local regulation of such systems."[6/] National standards were deemed necessary to provide the "cable industry with the stability and certainty that are essential to its growth and development."[7/]

As the legislative history of that Act explained:

> [N]ational standards . . . are the heart of the [1984 Cable Act]. . . . [I]f that [franchise] process is to further the purposes of this legislation, the provisions of these franchises and the authority of the municipal governments to enforce these provisions, must be based on certain important uniform Federal standards that are not continually altered by Federal, state, or local regulation.[8/]

In establishing these uniform standards, Congress ensured that local municipalities would retain a limited role in regulating cable operators but that franchising would not serve as a barrier

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5/ H.R. No. 98-934, reprinted in 1984 U.S.C.C.A.N. 4655 ("1984 House Report") at 4660; *see* 47 U.S.C. §§ 521(1), (3) ("The purposes of this title are to ... establish a national policy concerning cable communications" and "establish guidelines for the exercise of Federal, State, and local authority with respect to the regulation of cable systems.").

6/ *Warner Cable Communications v. Niceville*, 911 F.2d 634, n.2 (6th Cir. 1990). *See also Santellana v. Nucentrix Broadband Networks, Inc.,* 211 F. Supp. 2d 848, 852 (S.D. Tex. 2002) ("Congress passed [the Cable Act] to provide comprehensive federal regulation of the previous locally and inconsistently governed cable industry."); *American Television & Communications Corp. v. City of Montevideo, Minnesota*, 603 F. Supp. 1376 (D. Minn. 1985) ("The Cable Act established a uniform federal policy for the provision and regulation of cable television services, and preempted inconsistent state and local regulations"); *Town of Barnstable v. TCI-Taft Cablevision Assoc.*, 1986 U.S. Dist. LEXIS 25558 (1986) ("The Cable Act establishes a uniform federal policy for the provision and regulation of cable television services, and preempted inconsistent state and local regulations"). Even before enactment of the Federal Cable Act, the Supreme Court affirmed the FCC's authority to impose uniformity on the regulation of cable television. *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 699 (1984) ("uniform national communications policy with respect to cable systems would be undermined if state and local governments were permitted to regulate in piecemeal fashion").

7/ 1984 House Report, 1984 U.S.C.C.A.N. at 4657.

8/ 1984 House Report at 23-24, 1984 U.S.C.C.A.N. at 4661. *See also* S. Rep. No. 102-92 at 47 ("The 1984 Act imposed national, uniform procedures for initial franchising and renewal decisions").

to entry or result in the imposition of unreasonable conditions that might deter industry growth. The current franchising scheme balances a limited array of local interests (such as public, educational and governmental access, safe construction, and aesthetics) with the need for a streamlined process with defined parameters on local authority.

Title VI encourages new investment and competitive entry by constraining the franchise process to a narrow set of core local interests. Thus, for example, cable operators may negotiate for PEG channels and require safe construction practices,[9/] but franchising authorities are precluded from demanding a specific system design, regulating non-cable services, imposing rate regulation requirements that contravene Federal law, or imposing franchise fees that exceed the maximum threshold established under Federal law.[10/] A locality can require free service to support limited governmental and community needs, but cannot dictate what channels the operator must offer.[11/] These boundaries limit the scope, burdens and duration of the franchising process.[12/]

New entrants enjoy both procedural and substantive advantages in obtaining franchises not enjoyed by original cable franchisees in a community. By law, franchises are non-exclusive. A new entrant cannot be denied a franchise to provide service in a community, whereas the original franchisor had no such protection. While the original franchising process sometimes took the form of complex requests for proposals ("RFPs"), bids, and extensive negotiations

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9/ *See* 47 U.S.C. §§ 521 and 532.

10/ *See* 47 U.S.C. §§ 544(e), 541(b)(3)(B)-(C), 543(a), and 522(b).

11/ *See* 47 U.S.C. §§ 544(b)(1) and (f)(1).

12/ *See* 47 U.S.C. §§ 544(a); *City of New York v. FCC*, 814 F.2d 720, 725 (D.C. Cir. 1987), *aff'd,* 486 U.S. 57 (1988) ("section 624(a) . . . clearly limit[s] a franchisor's freedom of action"); 1984 House Report at 4655 (The Cable Act "defin[es] and limit[s] the authority that a franchising authority may exercise through the franchise process").

outside the context of the restraints imposed by Title VI, new entrants are both *entitled* to a franchise and subject to a much narrower set of local issues.

New entrants benefit from the work done by existing operators in securing franchises that meet local needs. Franchise agreements are public documents, providing any new entrant with a roadmap for entry and eliminating any risk that it might agree to terms or conditions more onerous than its competitor. Because it negotiates its own franchise with the competitors' franchise in hand, the new entrant has an exact measure of the standards that will assure entry. Because it knows the terms of its competitors' franchise, too, there is no risk that it will agree to terms that might make its offering less competitive. The availability of the competitor's franchise thus reduces risk and enhances the investment climate for new entrants.

There is already a remedy for an unreasonable refusal to grant a franchise. If a municipality asks for patently unreasonable terms or makes demands unrelated to the provision of video service, the Act provides for a specific remedy in section 635,[13/] which authorizes private rights of action for providers adversely affected by franchising decisions made under section 621. This judicial remedy provides effective protection against unreasonable franchise demands as well as outright denials of the right to serve. As a result, there is no need for "specific rules, guidance or best practices . . . to ensure that the local cable franchising process does not unreasonably impede competitive cable entry."[14/] Existing law already ensures this result.[15/]

13/ 47 U.S.C. § 555.

14/ *Notice* ¶ 21.

15/ Cablevision concurs and incorporates by reference the National Cable & Telecommunications Association ("NCTA")'s discussion of the scope of the Commission's authority to take action pursuant to section 621 of the Act.

The Congressional preference for case-by-case judicial relief militates against Commission elaboration of additional remedies, absent express statutory language to the contrary.[16/] Moreover, the legislative history of the Cable Act shows that Congress rejected statutory language that would have specified reasonable bases for rejecting competitive franchises, thereby evidencing a Congressional aversion toward the adoption of broad and undifferentiated standards for what might be reasonable in a community.[17/] By contrast, the express embrace of a case-by-case judicial remedy more readily accommodates the balance of Federal interests and local concerns and circumstances embodied throughout Title VI.

Congress also has long been aware of the telephone companies' existing authorizations and that they might use their networks for video. It could have specified that such companies did not need a cable franchise, or should be subject to a special franchising process. That it did not do so undermines any finding of Commission authority to impose a different franchising scheme for them.

Nor does Congress' and the Commission's goal of encouraging the deployment of broadband services[18/] provide any policy rationale for making changes to cable franchising. The *Notice* hypothesizes a relationship between broadband investment and video deployment, but the laudable goal of increased broadband services justifies no more favorable treatment in cable

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16/ *See, e.g., Bowen v. Georgetown University Hosp.*, 488 U.S. 204, 211 (1988) (had Congress intended to confer authority to establish by rule remedies broader than the plain statutory directive, it would have granted that authority explicitly); *Bell Atlantic Maryland v. MFS Intelenet*, 1999 U.S. Dist. LEXIS 16477 *14, 18 Comm. Reg. (P&F) 464 (D. Md. 1999) (where Congress provides a specific avenue of relief, it is likely that it did not intend other forms of relief to be had); *Maniktahla v. VA Medical Center*, 967 F. Supp. 379, 382 (E.D. Mo. 1997) (enactment of a remedial scheme by Congress precludes additional forms of relief even where the congressional scheme is imperfect).

17/ *See, e.g., Bowen*, 488 U.S. at 211; *Broz v. Heckler*, 721 F.2d 1297, 1299-1300 (11th Cir. 1983) (deducing from legislative history that Congress intended for age discrimination determinations to be made on a case-by-case basis rather than by rulemaking).

18/ *Notice* ¶¶ 1, 18.

franchising for competitors than for incumbent cable operators. Cablevision assumed the risk of a multi-billion dollar upgrade to its fiber network and continues to enhance its broadband offerings to its subscribers.[19/] It did so in reliance on the scheme in Title VI under which all cable operators would be required to obtain cable franchises before offering cable service. The much larger Bell companies can and are making investments in fiber initiatives. Any suggestion that preferential treatment in cable franchising is required to continue this investment is not supported.[20/] These theories simply reflect an attempt by the Bell companies to avoid extending the same kind of benefits and protections in limited, core franchising areas given to municipalities by cable operators.

II. THERE IS NO EVIDENCE THAT FRANCHISING IS UNREASONABLY DETERRING NEW ENTRY INTO CABLE

A. States and Localities Already Promote Competitive Franchising.

Franchising authorities are eager to embrace new entrants into cable and issue competitive franchises. They have an incentive to quickly award cable franchises to telephone companies in order to enhance competitive video options for their constituents. The facts about telephone companies' franchising efforts in Cablevision's service territory demonstrates that franchising authorities are far more likely to forego basic franchising prerogatives reflected in their agreements with incumbents in order to accommodate new entry.

19/ *See* "Cablevision Boosts Broadband Speed to Record Levels, available at <http://www. cabledatacomnews.com/jan06/jan06-4.html> (Jan. 1, 2006) (noting Cablevision's investment in and deployment of new broadband products and faster modem speeds, "making it possibly the fastest standard cable modem service in North America . . . when the MSO already offered one of the fastest cable modem services on the continent.").

20/ Indeed, the Bell companies have a long history of demanding regulatory relief as a condition of deploying advanced facilities and services and then failing to follow through on that deployment once they receive the regulatory benefit. *See, e.g.*, "How The Bells Stole America's Digital Future," available at http://www.netaction.org/broadband/bells/deals.html (describing how the Bells lobbied for and obtained regulatory change in various states based on the promise of additional investment but never delivered).

In New York, Verizon already has received cable franchises everywhere it has applied, and has done so quickly. Verizon hailed the decision to award its first New York franchise (in the Village of Massapequa Park) as a "framework ... that should help expedite … future franchises."[21/] The specific time frames governing each of Verizon's New York franchise applications are below.

VERIZON FRANCHISE APPLICATIONS IN NEW YORK STATE

Municipality	*Local Application Filed*	*Local Approval*	***Time to Local Approval***	*State Approval*	***Total Time to Franchise***
Massapequa Park	August 29, 2005	September 26, 2005	**Less than 1 month**	December 15, 2005	**3.5 months**
Nyack	October 27, 2005	November 28, 2005	**1 month, 1 day**	February 8, 2006	**3.5 months**
South Nyack	October 25, 2005	November 29, 2005	**1 month, 4 days**	February 8, 2006	**3.5 months**

Each state franchising authority in Cablevision's footprint provides a streamlined franchising process under the existing federal franchise regulations.

New York. In 2005, the New York State Public Service Commission ("PSC") amended its cable rules to provide a specific mechanism to help new entrants enter the market very quickly. Any new entrant that agrees to the franchise terms of an existing provider may bypass franchise negotiations entirely in that area and obtain a local franchise hearing in 30 days, and the municipality may grant the franchise at the conclusion of that hearing.[22/] The PSC also took other steps in its cable rules to advance competitive franchising, including:

21/ *See* News Release, Verizon Statement on PSC Confirming Company's First Video Franchise in New York (issued Dec. 14, 2005).

22/ 16 NYCRR § 894.7(e)(4).

- Elimination of the requirement that municipalities establish a cable television advisory committee charged with determining the cable television needs and desires of the community;

- Elimination of the requirement that municipalities issue a "request for proposals" to solicit cable television system franchise applications;[23/] and

- Extension of the maximum term (to 15 years) that can be granted, reducing transaction costs associated with franchising.

New Jersey. In New Jersey, State law limits the range of issues that can be negotiated in a franchise. Cable operators obtain municipal consents from local governments and then seek certificates of approval of those consents from the State Board of Public Utilities ("BPU") through its Office of Cable Television ("OCTV"). Many regulations are set by the state and are not the subject of local negotiations, including: construction and maintenance of facilities, franchise fees, customer service requirements (including credits, late fees and refunds), recordkeeping, reporting requirements, insurance and other liability coverage requirements.[24/] State regulations prohibit municipalities from negotiating requirements "within the responsibility or authority of the OCTV or the Federal Communications Commission to regulate."[25/]

OCTV regulations also require speedy municipal action on requests for franchises. A municipality must hold a hearing on the application between 60 and 90 days after its receipt, and complete any additional hearing within 30 days of the first hearing.[26/] The final decision, in the form of a written report, must follow within 30 days of the last hearing.[27/] Thus, municipal action on an application must come, by law, within 150 days of its receipt, and could come in significantly less. If the municipality consents to the franchise, State law similarly requires

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23/ *See* 9 NYCRR § 594.2(a)(2) (repealed).

24/ N.J.A.C. 14:18-11.1 *et seq.*

25/ N.J.A.C. 124:18-11.17.

26/ N.J.A.C. 14:18-11.4, 11.12.

27/ N.J.A.C. 14:18-11.13.

prompt action to approve that decision at the State agency level, including a requirement that the BPU issue a Certificate of Approval within 30 days of the cable operator consenting to the franchise.[28/] Franchises can be and often are negotiated for terms that exceed 10 years.

Connecticut. Connecticut has established a statewide franchising scheme, administered by the state Department of Public Utility Control ("DPUC"). Video providers bypass municipalities, receive limited input on community needs from local advisory councils, and then deal with the DPUC as the sole franchising authority. Franchise renewals generally take a matter of months. Connecticut allows the award of franchises for 15 years, lowering transaction costs.

B. Any Problems or Delay from Cable Franchising Experienced by Verizon and AT&T Are Largely of Their Own Making.

Verizon and AT&T cannot blame local government for the few authorizations they have secured to date. Connecticut requires just a single, statewide authorization in order to serve every resident in the State. Nonetheless, even though AT&T and Verizon announced their plan to re-enter the video marketplace approximately 18 months ago, and even though the chief source of the telcos' objection to cable franchising -- town-by-town authorization -- is absent in Connecticut, neither has applied for a cable franchise there. A telco predecessor that provided television service, SNET, obtained a statewide franchise in eight months, and much of that period was taken up with assessing the legality and implications of granting a statewide franchise -- issues that have now been resolved.[29/]

In New York, even as it complains about the allegedly slow pace of local government franchising, Verizon has submitted only three applications in the entire State -- each of which

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28/ N.J.A.C. 14:18-12.1-12.3.

29/ SNET Personal Vision filed its application for a Certificate of Public Convenience and Necessity to provide community antenna television service on January 25, 1996. The Department approved SPV's application on September 25, 1996.

was expeditiously granted. Presently, Verizon has no franchise applications pending in the entire State. And it continues to ignore the specific option it has under State law to gain 30 day entry by agreeing to adhere to the same franchise obligations already in place in that municipality.

In New Jersey, while announcing its plans and commencing its construction of a fiber to the premises network over a year ago, Verizon has only recently filed franchise applications in five New Jersey communities in Cablevision's service area. These applications show that, as in New York, Verizon proposes to provide video services without adhering to basic franchise obligations, setting up another unfounded claim that municipalities are unreasonably delaying Verizon getting a franchise. In its application to serve Passaic, New Jersey, for example, Verizon has proposed to carry no local origination channels, no more than two PEG channels, and to provide no support for PEG facilities, equipment and operations.[30/] Verizon also declined to provide any of the requisite information requested in the application form that would enable local authorities to ascertain whether and when it intends to make cable service available to all residents of a municipality.[31/]

Tellingly, Verizon has also refused to seek cable franchises in several localities that have expressly invited it to submit franchise applications. In New Jersey, where Verizon has been building video facilities for over a year, a number of local mayors have been calling for Verizon to come get new franchises quickly.[32/] Yet Verizon spent most of last year trying to get State

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30/ *See, e.g.,* Verizon New Jersey Inc., Application for Municipal Consent for the Operation of a Cable Television System for the Borough of Park Ridge, Dec. 8, 2005, at 9-10 ("Verizon New Jersey Application"). *Contrast Notice* ¶ 20 (tentatively concluding that it is not unreasonable for an LFA to require PEG channel capacity, facilities, or financial support).

31/ *See* Verizon New Jersey Application at 13-14; *Contrast Notice* ¶ 20.

32/ *See, e.g.,* "Phone Company Dials Cable TV's Number," *Home News Tribune,* November 20, 2005 (quoting Northvale mayor John Rooney, "We have told [Verizon], 'all you have to do is to come to our municipalities and apply. We want competition.'"); Letter to the Editor from Franklin Lakes Mayor Thomas Donch, *Bergen Record*, July 17, 2005 ("Rather than accept repeated invitations to my office, legislation to eliminate local franchising in New Jersey. Similarly, Verizon has ignored municipalities in New York that have indicated an interest in starting discussions with Verizon about its franchise in order not to slow down the timely delivery of new video services.[33/]

C. The Evidence Suggests that it is Verizon, and not Local Governments, That is Unwilling to Abide by Reasonable Franchise Terms.

Verizon has complained to the Commission about "outrageous demands" purportedly sought by local governments.[34/] However, the facts show that it is Verizon -- not the municipalities -- that is unwilling to offer and abide by reasonable franchise terms. In the three New York localities where it has applied for and obtained a cable franchise, Verizon has resisted requests from municipalities for straightforward commitments in areas of core municipal concern, including:

Rights-of-way management. Cable franchises typically give local governments authority to ensure that facilities used to provide cable service are constructed and operated in conformity with local requirements designed to protect community welfare and promote safe and efficient use of public rights-of-way. In its franchise proposals, Verizon seeks to avoid such franchise commitments through various means, including defining its "cable system" as a "band of spectrum" -- and not the physical facilities used to provide service -- thereby undermining local

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Verizon has been in Trenton pushing for special legislation that would exempt them from local cable franchise requirements. . . . Like me, I think most mayors around the state want to negotiate a franchise with Verizon.").

33/ *See* Comments of Village of Malverne, New York, MB Docket No. 05-311, at 1 ("Our community was approached in 2005 by Verizon, but the provider chose not to enter into any formal discussions."). Trade press articles suggest that Verizon is delaying discussions with municipalities outside Cablevision's service area as well. *See*, *e.g.*, Letter to the Editor of *Multichannel News* from Eric Johnson, Director, Management and Budget Department, Hillsborough County, Florida, June 13, 2005. (explaining that Hillsborough County is eager for competition and held a meeting to negotiate the franchise within a month of receiving Verizon's application, but Verizon caused extensive delays in the process). Hillsborough County voted February 1, 2006 to grant Verizon a franchise.

34/ *See Notice* ¶ 5.

franchisor authority to protect public safety and manage rights-of-way. As a result, local franchisors may lack the necessary authority, in response to a safety hazard, network malfunction or other unanticipated event, to ensure that Verizon takes all steps necessary to ensure that its facilities do not harm public safety or community interests.

Verizon contends that the Fiber hub (at left) built as part of its new FiOS TV and broadband network is not part of the cable system or subject to the cable franchise agreement. This box – about five feet tall and two feet deep – has been placed just inches above the ground in a footpath. Verizon's deployment and operation of plant used to provide cable service raises important local and right-of-way management issues, as well as concerns regarding sightlines, safety rules, aesthetics and other public welfare matters, but Verizon resists local efforts to address those issues in the franchise agreement.

Indemnity. Local governments typically obtain unambiguous commitments from cable operators to indemnify them for damage caused by the operator's physical facilities. Verizon's attempts to exclude all of its tangible network facilities from the franchise deprive local governments of this protection. For example, the indemnity provision in Verizon's template franchise proposal is triggered only if injury or damage arises from negligent, construction, operation or maintenance of the "optical spectrum" used to deliver video (Verizon's unique definition of the "cable system" that the franchise governs). Because Verizon excludes the cables, boxes, poles, wires and fiber hubs from the scope of local right-of-way authority, if a fiber splitter box, such as Verizon splitter pictured above, causes damage there can be no recourse under Verizon's franchise.[35/] One village requested that Verizon provide franchise language clarifying that it would indemnify the Village if sued for injury or damage caused by its network facilities, but Verizon refused to modify its franchise proposal to address that concern.

Serving Everyone in the Franchise Area Within A Reasonable Time Period. Verizon also has vigorously resisted local government efforts to secure a franchise commitment that its cable service will be made available to all residents of a municipality within a reasonable period of time. For example, the Village of Massapequa Park wrote to Verizon just days before Verizon submitted its franchise application. The Village stated that "as part of ascertaining the needs and interests of the Village and its residents we have determined" that "a franchise provision stating Verizon will provide service to all Village residents" is necessary.[36/] Verizon refused to accommodate this request for an franchise commitment to serve everyone who wanted service (within 5 years) — in a Village of about 8,000 households.

A clear, enforceable commitment to serve everyone who wants service is not an unreasonable request on the part of a small, relatively homogenous village in affluent Long Island, New York. (Indeed, Verizon has repeatedly claimed that it has a strong business interest in serving the entire community.) The *Notice* itself acknowledges that it is not unreasonable for franchising authorities to seek assurances that a franchisee within "a reasonable period of time . . . become[s] capable of provide cable service to all households in a franchise areas."[37/]

[35/] The Verizon indemnity proposal also contravened New York cable law because it was unduly narrow and triggered only in the event of injury or damage caused by Verizon's negligence. *See* 16 N.Y.C.R.R. § 895.1(i)(1). The provision was modified by the PSC to conform to the requirements of New York law.

[36/] Letter of August 26, 2005 from Peggy Caltabiano, Village Administrator, Village of Massapequa Park, to Paul Trane, Telecommunications Insight Group.

[37/] *Notice* at ¶ 19, *citing* 47 U.S.C. § 541(a)(4)(a).

In Nyack, a Village Board member requested franchise language that would memorialize Verizon's stated commitment at the public hearing proceeding to make service available to multiple dwelling units (apartments and condominiums) in the Village within a reasonable period of time. Verizon refused.

Damage to Municipal Property. Cable franchises typically state that the cable operator will repair municipal property that it damages during construction. Verizon declined to squarely address a Nyack Village Board member's request that franchise language be added that would ensure that Village property damaged or displaced by Verizon's cable network would be restored within a reasonable period of time. New York PSC regulations expressly require that all cable franchise agreements contain such a provision,[38/] but all of Verizon's public franchise proposals fail to include such a requirement. The examples cited above are hardly "outrageous demands" by local governments that unreasonably and unnecessarily burden franchise negotiations. To the contrary, they are basic cable franchise obligations well within the right and responsibility of local governments to demand and that Cablevision and other incumbent cable operators have fulfilled for decades.

In spite of Verizon's resistance in its New York franchise negotiations to making clear, enforceable commitments to indemnify the villages, serve everyone on request within a reasonable time period, and repair municipal property, Verizon received municipal approval in 30-35 days on each of its applications. The facts relating to Verizon's franchising in New York illustrate that there is no need for the Commission to grant Verizon special favors to help it get franchises on still more favorable terms.

[38/] 16 N.Y.C.R.R. § 895.1(j)

D. There Is No Evidence that State Level Playing Field Requirements Deter Competitive Entry.

While Verizon and AT&T have complained about state level playing field requirements, there is no evidence that such provisions hinder competition. To the contrary, level playing field requirements ensure that success in the marketplace is driven by the quality of a provider's product and service, rather than by its ability to obtain favorable treatment from the government.

Level playing field requirements do not compel franchising authorities to impose identical franchise obligations upon new entrants and competitors. They are typically designed to ensure that there is no material disparity between the regulatory burdens and costs imposed upon franchisees competing in the same geographic area. Thus, franchising authorities have the flexibility to devise different means for competing franchisees to satisfy the same basic franchise items, so long as the end result does not yield an overall competitive advantage for one provider.[39/] Indeed, notwithstanding New York's level playing field requirement, the three Verizon franchises approved by the PSC for Nyack, South Nyack and Massapequa Park are markedly different from the Cablevision franchises in those communities.

While there is no evidence that level playing field requirements have deterred competitive entry, they clearly help to promote the objectives of Title VI. Such provisions ensure that local needs and interests will continue to be addressed in a competitive environment. It is simply not feasible for cable operators to continue to devote capital and resources toward adhering to obligations such as the provision of public, educational and government (PEG) access programming, facilities and support, the offering of service to all households, meaningful indemnification, local oversight of cable facilities in the rights-of-way and local programming if

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[39/] *See*, *e.g.*, *New England Cable Television Association v. Department of Public Utility Control*, 717 A.2d 1276, 1283 (1998).

their largest and most ubiquitous broadband competitors are exempt from these requirements. Level playing field requirements mean that consumers will continue to have the benefits of localism and non-discriminatory access to service typically embodied in cable franchise agreements, regardless of their provider.

III. ADOPTING SPECIAL RULES FOR TELCO CABLE FRANCHISES WOULD HARM THE PUBLIC INTEREST BY UNDERMINING FRANCHISE COMMITMENTS BY ALL CABLE OPERATORS

The uniform framework established by the Cable Act applies to all cable operators providing cable service over a cable system and makes no distinction between new entrant cable operators and "incumbent" cable operators, or between cable operators that are telephone companies and those that are not.[40/] This lack of favoritism does not represent a barrier to entry, but rather is a reflection of Congress's determination that uniformity was the best means of streamlining entry and promoting healthy and sustainable competition. Indeed, Cablevision could not continue the pace of investment and innovation exhibited over the last decade under a regulatory framework in which its largest competitors are exempt from the costs associated with locally-oriented franchise obligations, or automatically entitled to compete under more favorable or less burdensome franchise terms.

A Federally-prescribed two-tiered franchising regime for incumbents and new entrants would harm the public interest by imperiling the continued viability of traditional cable franchise provisions that are responsive to local concerns and community interests. As demonstrated by the economic analysis attached to NCTA's comments, exempting new entrants from build-out obligations effectively raises the costs to incumbents of serving the high-cost, low-margin areas bypassed by the new entrant, resulting in higher prices or reduced service innovation in those

[40/] Indeed, the definition of "cable system" in Title VI specifically includes facilities of common carriers offering cable service. 47 U.S.C. § 522(7).

areas.[41/] Similarly, allowing new entrants to avoid support for PEG facilities, equipment and services would diminish the ability of incumbents to continue to commit capital and resources to supporting a broad and vibrant PEG access operation. Rather than unleash such a "race to the bottom," the Commission should decline telephone company entreaties for a two-tiered cable franchising regime -- particularly in light of the absence of any compelling evidence to suggest that franchising is deterring new entry into cable.

Further, there is no guarantee that fashioning special rules for telephone company cable franchises would actually succeed in fostering new competition. The Bells have a proven track record of deserting the video marketplace for reasons that have nothing to do with cable franchising. The highly-touted Tele-TV video service announced by Bell Atlantic, NYNEX and Pacific Telesis in the mid-1990s lasted little more than two years before the telcos began to pull back from, and ultimately abandon, the joint venture.[42/] SBC discarded cable systems in the mid-Atlantic, Midwest and Connecticut *long after* its predecessor had obtained cable franchises and thousands of subscribers,[43/] thereby belying assertions that it is the franchising process that inhibits competition.[44/]

[41/] *See* NCTA Comments at pp. 16-19.

[42/] *Compare* "Bells Leave a Message for Cablers: Beware of Tele-TV," *Hollywood Reporter*, May 10, 1995 (Promising to become cable TV's "worst nightmare," executives from the three Baby Bells . . . announced Tuesday that their high-profile new venture will be called Tele-TV") *with* "Bell Atlantic Group to Trim Project; Interactive TV Effort Takes Back Seat to Partners Other Interests," *Washington Post*, December 7, 1996; "US Telephone Companies Kill Off Video Venture," *Screen Finance*, February 19, 1998 ("Bell Atlantic says that 'Tele-TV has effectively been shut down over the course of the last year' although it still exists as a legal entity'").

[43/] "SBC Sheds Cable Overbuilds," *Television Digest,* May 28, 2001 (noting sale of 115 Ameritech cable franchises in Midwest); "SNET Wants Out of Cable In Connecticut," *Multichannel News*, August 14, 2000 (noting SBC/SNET's decision to leave Connecticut); "For SBC, Cable Business No Longer Its Cup of Tea," *Electronic Media*, October 6, 1997 (noting sale of systems in mid-Atlantic).

[44/] *See* Testimony of Lori Panzino-Tillery, National Association of Telecommunications Officers and Advisers, National League of Cities, U.S. Conference of Mayors, National Association of Counties, Annual Assessment of Status of Competition for the Delivery of Video Programming, MB Docket No.

Today, Verizon is insisting on franchise provisions in many markets around the country that provide it with a unilateral right to exit the cable business after three years.[45/] There is, in short, no reasonable basis for assuming that that incurring the risks to the public interest associated with undertaking the drastic -- and legally problematic -- step of giving the telephone companies their own special cable regulatory regime will yield the desired result of producing new competition.

05-255, Federal Communications Commission, February 10, 2006 at 1-2 ("[M]any cable franchises which were held by [the Bells] were abandoned or sold off as being an unattractive nuisance. And while that decision was theirs to make, they should not then turn around and blame the local franchising process for the slow pace of competition").

45/ *See* "Verizon Hedges Its Bets," *Broadcasting and Cable*, January 16, 2005 at 39 (Noting that "Verizon negotiated a three year out clause" for its Howard County franchise and quoting county official as saying that "Verizon insisted on the ability to walk away from cable within three years"). *See id.* ("Verizon spokesman Brian Blevins confirms that the clause has been included in all but its Fairfax, Va., and New York State franchises").

CONCLUSION

Franchising has proven a durable, predictable and effective means of ensuring competition occurs on a level playing field. A streamlined scheme is in place that balances the localism in the Cable Act with national standards to promote entry. State franchising laws have further promoted competitive entry. Facts illustrate that telephone companies can and are getting franchises where they apply for them and meet basic franchising prerogatives. In addition to these reasons, the express jurisdictional limitations suggest any Commission attempt to ease franchising only for one class of cable providers is unwarranted and impermissible.

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