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 HAWAIIAN TELCOM COMMUNICATIONS, INC.

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SUMMARY

The Commission has requested comment on how to implement the directive that "a franchising authority . . . may not unreasonably refuse to award an additional competitive franchise" found in Section 621(a)(1) of the Communications Act. Hawaiian Telcom supports the Commission's goal of ensuring that local franchising requirements do not unreasonably interfere with competitive entry into the multichannel video programming distribution ("MVPD") market. As Hawaiian Telcom is planning to enter the MVPD market by providing Internet-protocol television services ("IPTV"), it faces barriers to entry associated with the local franchising process and accessing reasonably priced programming. Hawaiian Telcom believes that the local franchising requirements do not apply to and are unnecessary for IPTV providers affiliated with LECs. Hawaiian Telcom urges the Commission to treat IPTV providers—which are new entrants into the MVPD market with no market power, little market share and high start-up costs—in a minimally regulated environment, as it historically has treated other new entrants.

To the extent IPTV providers are subject to local franchising requirements, the Commission should and has authority to preempt overly burdensome and delaying requirements that impede competitive entry. Specifically, the Commission should: (1) require local franchising authorities ("LFAs ") to expedite franchising of IPTV providers; (2) establish a process for FCC preemption of LFAs that fail to make a final franchise determination within a reasonable period, *e.g.,* 90 days; (3) preempt state and local build-out requirements for new entrants; and (4) impose a good faith negotiation requirement on programmers subject to

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Section 628 of the Act.

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I. INTRODUCTION

Hawaiian Telcom Communications, Inc. ("Hawaiian Telcom") hereby offers its Comments in response to the Commission's Notice of Proposed Rulemaking in the above-captioned proceeding.[1] Through its operating subsidiaries, Hawaiian Telcom provides local exchange, long-distance, wireless, broadband and information services to customers in Hawaii. Hawaiian Telcom plans to offer customers within its service area Internet-protocol ("IP") based television services using existing digital subscriber line ("DSL") facilities ("IPTV"). In preparation, Hawaiian Telcom currently is negotiating agreements with vendors, programming providers and the State of Hawaii with an anticipated launch of IPTV services of August 2006.

IPTV uses standard IP technology so the end-user can request video images and the programming provider can send them over its existing DSL network.

[1] *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, MB Docket No. 05-311, Notice of Proposed Rulemaking, FCC 05-189 (rel. Nov. 18, 2005) ("*NPRM*").

This is the same basic IP technology used to transmit traffic to and from the Internet and in private enterprise networks.[2] IPTV provided by local exchange carriers ("LECs") over DSL will give subscribers dedicated, high-speed access to enhanced video and information services using specialized customer premises equipment.

In these Comments, Hawaiian Telcom supports the Commission's goal of ensuring that local franchising requirements do not unreasonably interfere with competitive entry in multichannel video programming services. Specifically, Hawaiian Telcom comments on the obstacles it faces as a LEC-affiliated IPTV provider entering the multichannel video programming distribution ("MVPD") marketplace, including the delays, costs and obligations associated with local franchising, including possible build-out requirements; and the difficulty of obtaining video programming on competitive terms, without which alternative MVPD systems would not be commercially viable. To ensure local franchising authorities ("LFAs") are not impeding competitive entry, the Commission should: (1) require LFAs to expedite franchising of IPTV providers; (2) establish a process for FCC preemption of LFAs that fail to make a final franchise determination within a reasonable period, *e.g.,* 90 days; (3) preempt state and local build-out requirements for new entrants; and (4) ensure that new entrants may obtain access to reasonably priced programming by imposing a good faith negotiation requirement on programmers subject to Section 628 of the Act.

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[2] Each time an IPTV subscriber selects a different program, he or she accesses the network similar to the way that customers currently access content on the Internet. Video content resides on the service provider's network, rather than downloaded *en masse* to subscriber set-top boxes.

II. BACKGROUND: IPTV IS NOT CABLE SERVICE

As an initial matter, Hawaiian Telcom believes that local franchising requirements do not apply to and are unnecessary for IPTV providers affiliated with LECs. Title VI of the Communications Act of 1934, as amended ("Act") and local franchising laws apply only to "cable operators" providing "cable services" over "cable systems."[3] If a facility services subscribers without using public rights-of-way, it is not a "cable system."[4] Cable systems involve substantial construction and use of public rights-of-way; IPTV does not. IPTV is delivered over a LEC's existing DSL network for which the provider already has obtained authority to gain access. Therefore, a LFA has no legal basis to exert jurisdiction over IPTV.

Moreover, LEC-affiliated IPTV providers are new entrants into the MVPD marketplace, with no market power and strong market-driven incentives to widely, quickly and economically deploy services in the market. As discussed in more detail below, franchising requirements that unreasonably delay or interfere with competitive entry are unnecessary and create a barrier to entry for these new entrants.

III. THE COMMISSION SHOULD PREVENT STATE AND LOCAL FRANCHISING FROM UNREASONABLY INTERFERING WITH

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[3] 47 U.S.C. § 522.

[4] 47 U.S.C. § 522(7). A cable system is defined as "a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community." Local franchising is appropriate for cable operators "because cable makes use of streets and ways." *Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to Community Antenna Television Systems*, Cable Television Report and Order, 36 FCC 2d 143 at ¶ 177 (1972).

COMPETITIVE ENTRY

In its *NPRM* the Commission seeks comment on the steps it should take to ensure that the local franchising process does not unreasonably interfere with competitive cable entry.[5] In response, Hawaiian Telcom proposes that the Commission: (1) require LFAs to expedite the franchising process for new market entrants; (2) establish a Commission complaint process for MVPD providers against franchising authorities that fail to make a final determination within a reasonable period, *e.g.,* 90 days; and (3) preempt state and local build-out requirements for new entrants.

The above measures are appropriate because new entrants into the MVPD market with no market power, little market share and high start-up costs should not face overly burdensome regulations. The Commission historically has treated other new entrants with a minimally regulated environment, recognizing that regulations designed for monopolistic companies will hinder entry by new providers in a competitive market. For example, as described in more detail below, competitive local exchange carriers ("CLECs") enjoy substantially lower regulatory burdens than their incumbent counterparts, and no build-out requirements. Moreover, in the MVPD arena the Commission did not impose certain cable-related obligations on other video service providers—direct broadcast satellite ("DBS"), satellite master antenna television systems ("SMATV") and multipoint distribution

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[5] *NPRM* at ¶¶ 19-24.

services ("MDS")—when these providers were new entrants and competing with "an established, financially stable cable industry."[6]

A. The Commission Has Authority To Preempt State And Local Franchising Requirements That Unreasonably Interfere With Competitive Entry

Hawaiian Telcom agrees with the Commission's conclusion that it has the authority pursuant to Sections 621(a), 636(c) and the Supremacy Clause "to ensure that the local franchising process does not unreasonably interfere with the ability of any potential new entrant to provide video programming to consumers."[7] As the Commission recognizes, Section 636(c) of the Act authorizes the Commission to preempt the law of a franchising authority which conflicts with the Act.[8] Section 621(a) of the Act prohibits a franchising authority from "unreasonably refus[ing] to award an additional competitive franchise" and generally establishes the federal authority to regulate conditions under which franchises are awarded.[9] Together, these provisions affirmatively give the Commission authority to preempt any state or local law or regulation that "causes an unreasonable refusal to award a competitive franchise."

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[6] *Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order, 13 FCC Rcd 23254, ¶¶ 56-61 (1998) (DBS); *Earth Satellite Communications, Inc. Petition for Expedited Special Relief and Declaratory Ruling*, Memorandum Opinion, Declaratory Ruling and Order, 95 FCC 2d 1223, ¶¶ 17-19 (1983) (SMATV); *Orth-O-Vision, Inc. Petition for a Declaratory Ruling*, Memorandum Opinion, Declaratory Ruling, and Order, 69 FCC 2d 657, ¶¶ 23, 24 (MDS).

[7] *NPRM* at ¶ 16.

[8] 47 U.S.C. § 556; *NPRM* at ¶ 17.

[9] 47 U.S.C. § 541(a)(1).

Utilizing this authority, the Commission should preempt a LFA that uses the franchising process to impose unlimited and overly burdensome conditions on an IPTV applicant. In the telecommunications context, a number of courts have preempted such overly burdensome local ordinances for prohibiting telecommunications services.[10] For example, the Ninth Circuit preempted a franchising ordinance that required an overly detailed application process because together the regulations "create[d] a substantial and unlawful barrier to entry."[11] Another example involves a LFA's authority to require provision of "institutional networks" by cable franchisees.[12] Section 621(b)(3)(D) of the Act gives LFAs the right to require any cable operator to provide "institutional networks" as a condition of the initial grant of a franchise, a franchise renewal, or a franchise transfer.[13] Requiring construction of an institutional network by a second franchisee, however, may be unreasonable and overly burdensome. The Commission should encourage LFAs not to make such unreasonable demands where the IPTV provider is entering an already competitive market with no market share. As the Commission has

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[10] *City of Auburn v. Qwest Corp.*, 247 F.3d 966, 980-81 (9th Cir. 2001) (*citations omitted*).

[11] *Id.* at 981-82.

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

[13] 47 U.S.C. § 541(b)(3)(D).

explained, "right-of-way management means control over the right-of-way itself, not control over companies with facilities in the right-of-way."[14]

B. The Commission Should Preempt State And Local Franchising Requirements That Unreasonably Delay Competitive Entry

In advancing its goal of preempting franchising rules that unreasonably impede the "interrelated federal goals of enhanced cable competition and accelerated broadband deployment,"[15] the Commission should preempt any state and local franchising requirements that unreasonably delay new providers from entering the MVPD marketplace. As the Commission determined, "an unreasonable refusal to award an additional competitive franchise" prohibits franchising authorities from creating unreasonable delays in the franchising process.[16] Accordingly, the Commission should establish a complaint process so the Commission can step in when a LFA fails to make a "final determination" on a franchise application within 90 days from the filing of the application, and preempt LFAs that do not expedite applications by new entrants in the video services market.

Requiring LFAs to establish an expedited franchising process makes sense for IPTV providers who are utilizing existing DSL facilities to offer video services. IPTV providers have submitted already to state or local authorities the information normally needed in the franchising process. Additionally, in most cases an established cable company already is providing video services. In Hawaiian

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[14] *Id.* at 982 (*citing In re TCI Cablevision of Oakland County, Inc.*, 12 F.C.C.R. 21396, ¶ 103 (F.C.C. 1997)).

[15] *NPRM* at ¶ 1.

[16] *Id.* at ¶19.

Telcom's market, the incumbent cable programming provider is firmly established statewide, with the highest household penetration in the nation.[17] Hawaiian Telcom already obtained authority for deployment of its DSL network. A franchising process in excess of 90 days would unreasonably delay the launch of IPTV in Hawaii and leave consumers with only one choice of MVPD providers.

To the extent IPTV providers are subject to unreasonable delays in obtaining franchising, they should be able to file a complaint with the Commission and seek preemption. The existing law only allows a franchising applicant to seek review in district court of a final local franchising decision.[18] However, it does not provide protection for applicants who have not received a final franchise determination.[19] Hawaiian Telcom agrees with the Commission's tentative conclusion that "Section 621(a)(1) authorizes the Commission to take actions, consistent with Section 637(a), to ensure that the local franchising process does not undermine the well-established policy goal of increased MVPD competition and, in particular, greater cable competition within a given franchise territory."[20] The Commission should establish an expedited complaint process for applicants seeking preemption in the case of unreasonable delay in awarding a competitive franchise.

C. Build-Out Requirements Are Creating Unreasonable Barriers To Entry

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[17] http://www.ncta.com/Docs/PageContent.cfm?pageID=302 (visited Feb. 9, 2006). Ninety percent of households in Hawaii have cable. Time Warner Cable is the only cable franchisee in the State of Hawaii, with franchises to serve every county in Hawaii.

[18] 47 U.S.C. § 541.

[19] 47 U.S.C. § 555a.

[20] *NPRM* at ¶ 17.

In ensuring the local franchising process does not unreasonably interfere with competitive cable entry, the Commission also should preempt state and local build-out requirements. Build-out requirements imposed by many LFAs require monopoly cable operators to build facilities to reach all households in the community as a condition to grant of a franchise. Such requirements serve to prevent possible discrimination by a monopoly cable operator against communities that may be less profitable to serve. Build-out requirements that may have been appropriate for monopolists, however, are inappropriate and unnecessary for IPTV providers who are entering an already competitive market, without any market power or market share.

The Commission has found that there is ample competition in the MVPD market and the market for broadband Internet access; cable operators have the largest market share and LEC-affiliated IPTV providers have no market power.[21] Thus, intense competition in the MVPD market provides adequate economic incentives for new entrants to offer service as quickly as possible to as many customers as economically feasible.

The Commission has declined to impose build-out requirements for other new entrants. For example, when the rules of engagement were framed for CLECs in 1996, these new entrants were not required to meet a prescribed build-out schedule, nor provide access to their networks in the same manner that was found appropriate for ILECs. Congress and the Commission recognized that new entrants

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[21] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eleventh Annual Report, 20 FCC Rcd 2755, ¶ 4 (2005).

would be challenged to make substantial investment, with uncertain prospects of earning a reasonable return on that investment, and no customer base on which to build. The Act therefore did not burden CLECs with the same obligations that were found appropriate for ILECs. The Commission should treat IPTV providers similarly and preempt state and local franchising build-out requirements at this early stage.

Hawaiian Telcom believes LECs should not be required to deploy IPTV to any geographic area until it is economically feasible to do so, in the business judgment of the service provider. The IPTV provider is a new entrant in a market where the cable system operator is an established incumbent with monopoly stature. Build-out requirements would disproportionately impact the cost structure of IPTV and effectively prevent pricing the fledgling services at rates affordable to customers. Indeed, in Hawaiian Telcom's case, a review of the franchising conditions indicates that the initial cable providers on the Island of Oahu were allowed to build out their networks and establish a significant customer base before build-out requirements were imposed.[22]

If the Commission determines that build-out requirements do not create an unreasonable barrier to entry *per se*, Hawaiian Telcom urges the Commission to clarify that new IPTV entrants should be allowed to establish a market presence before being required to meet such requirements. Build-out requirements imposed

[22] *See, e.g., In the Matter of the Application of Oceanic Cablevision, Inc. for a Cable Television Permit*, Order No. 9 (DCCA 1970).

as a condition of award of a franchise unreasonably impede competitive entry and should be preempted.

IV. THE COMMISSION SHOULD IMPOSE GOOD FAITH NEGOTIATION REQUIREMENTS ON PROGRAMMERS

Another barrier to entry faced by LECs, such as Hawaiian Telcom, seeking to offer IPTV services is difficulty in obtaining access to reasonably priced programming. As a result, the Commission should impose on programmers good faith negotiation requirements, described more fully below. As the Commission has recognized, access to popular programming is essential for an MVPD to compete with an incumbent cable operator.[23] Section 628 of the Act and Commission rules prohibit a cable programming provider affiliated with an MVPD from discriminating against a non-affiliated MVPD.[24] However, both apply only to vertically integrated providers and address only non-discrimination in access to programming, not cost. With regard to programming cost, Congress and the Commission expressly allow large volume discounts based on the number of subscribers.[25] As a result, small and regional providers are unable to acquire programming at a reasonable per subscriber cost, thereby creating a *de facto* barrier to entry into the video services market.[26] As

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[23] *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order, 17 FCC Rcd 12124, ¶ 32 (2002).

[24] 47 U.S.C. § 548; 47 C.F.R. §§ 76.1001-1002.

[25] 47 U.S.C. § 548(c)(2)(B)(iii); *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992,* First Report and Order, 8 FCC Rcd 3359, ¶ 108 (1993).

[26] Theoretically, small MVPD providers could obtain access to volume pricing by joining buying consortia. However, historically these associations have been

a new entrant serving only Hawaii, Hawaiian Telcom's geographic service area is too small to obtain programming at prices economically feasible to compete with the large volume discounts that the incumbent, a national MVPD, enjoys. Moreover, small and regional IPTV providers, such as Hawaiian Telcom, have had difficulty getting programmers to negotiate at all, or in a timely manner.

Section 628 of the Act generally is designed to allow competitors access to customers;[27] where the effect is to deny programming, the Commission has the basis for imposing good faith negotiation requirements on vertically integrated programmers. Congress and the Commission have imposed a similar good faith bargaining obligation in the broadcast arena, in order to "place satellite carriers on equal footing with local cable operators . . . [for] availability of broadcast programming."[28] Broadcasters and MVPDs must comply with the Commission's *per se* standards and "refrain from insisting on rates, terms and conditions that are inconsistent with competitive marketplace considerations" when negotiating retransmission consent agreements.[29]

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structured for cable operators. The status of their applicability to IPTV is unclear, and the degree of volume discount is questionable.

[27] 47 U.S.C. § 548.

[28] *Implementation of the Satellite Home Viewer Improvement Act of 1999; Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, First Report and Order, 15 FCC Rcd 5445, ¶ 1 (2000). *See also* 47 U.S.C. § 325(b)(iii)(c); 47 C.F.R. § 76.65.

[29] *Implementation of Section 207 for the Satellite Home Viewer Extension and Reauthorization Act of 2004*, Report and Order, 20 FCC Rcd 10339, ¶ 14 (rel. Jun. 7, 2005); 47 C.F.R. § 76.65.

Because access to and cost of programming may serve as a barrier to entry into the MVPD market by small IPTV providers, Hawaiian Telcom proposes that the Commission require vertically-integrated programmers to negotiate with IPTV providers in good faith and on competitive terms, within a reasonable period. Specifically, programmers should be required to begin negotiations within 30 days of receiving a request from an IPTV provider and conclude within 60 days of commencing the negotiations. A programmer must negotiate with the IPTV provider regardless of the IPTV provider's franchising status. The good faith negotiation requirement will help small and regional IPTV providers gain leverage in negotiating with large programmers, negotiate competitive terms and ultimately enter the MVPD market.

Finally, unless the statute reaches non-integrated providers, barriers to entry remain for IPTV providers. Small and regional IPTV providers have difficulty negotiating with large non-vertically integrated programmers because of the substantial size difference. The Commission should recommend to Congress extending Section 628 of the Act to prohibit all cable programmers from discriminating against MVPDs, whether vertically integrated or independent.

V. CONCLUSION

The Commission has the authority to preempt state and local franchising requirements that unreasonably interfere with competitive entry into the MVPD market by IPTV providers. To advance the federal goals of enhanced cable competition and accelerated broadband deployment, the Commission should preempt any state and local franchising requirements that cause an unreasonable delay, cost or burden on new IPTV entrants. The Commission should require expedited franchising processes for new service providers, establish a Commission complaint process, and preempt state and local build-out requirements. Additionally, the Commission should impose a good faith negotiation requirement on programmers covered by Section 628 of the Act.

Respectfully submitted,

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