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March 9, 2006

Ex Parte

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: **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**

Dear Ms. Dortch:

I was unable to locate the attached filing in ECFS. I am re-filing to place it on the record.

Please let me know if you have any questions.

Thank you,

Dee May

Attachment

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Vice President
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February 24, 2006

Ex Parte

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: **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**

Dear Ms. Dortch:

Yesterday, Verizon met with Chairman Martin regarding the above proceeding. Representing Verizon were Mr. William Barr, Ms. Susanne Guyer and Mr. Michael Glover. Attending from the Chairman's office were Mr. Daniel Gonzalez and Mr. Ian Dillner and Mr. Samuel Feder-OGC and Mr. Thomas Navin-WCB. The material attached was reviewed at the meeting.

Please let me know if you have any questions.

Sincerely,

Dee May

Attachment

cc: D. Gonzalez
S. Feder
T. Navin
I. Dillner

ATTACHMENT 1

JURISDICTIONAL OVERREACH

As a condition of granting a cable franchise, some local franchising authorities seek to assert jurisdiction over facilities and services far beyond what is permitted under the Communications Act.

- **Fees on Non-Cable Services**
  - Some LFAs in Pennsylvania demand a 5% fee for all services offered over FTTP, including telecommunications and Internet access services.
- **Direct Regulatory Control over Facilities**
  - LFAs in New York had claimed that they will be able to force Verizon to "entirely re-build" its FTTP network in their communities once video is added (until the New York PSC rejected this position).
- **Direct Regulatory Control over Non-Cable Services**
  - Some LFAs in Maryland assert that they should be able to apply their local customer service standards to Verizon's Internet access services offered over FTTP.
- **Franchise Requirements for Non-Cable Facilities and Services**
  - A large county in Maryland is demanding that Verizon obtain a franchise before it will issue any permits for the company to begin upgrading its facilities to fiber.

DEMANDS FOR PAYMENT OVER STATUTORY LIMITS

The Cable Act strictly limits all payments – whether monetary or in-kind – that a franchising authority may require of a cable operator to five percent of gross revenues. Many LFAs make demands that ignore this express limitation.

- **Funding for Pet Projects**
  - Funds for a town to purchase street lights
  - Fiber to traffic lights
  - Cell phone repeaters at Town Hall
  - Fiber to all houses of worship
  - Parking available at a Verizon facility for library patrons
  - Subsidized cell phone or Internet access services for municipal employees
  - Fiber to all public buildings
  - Fiber services to dozens of communication groups who “work with” a county
  - Free wireless broadband services (EvDO)
  - Free use of Verizon’s manholes, conduits, and utility poles
- **Application and Acceptance Fees**
  - Fees in the tens of thousands of dollars just to file an application and start negotiations (*e.g.*, $50,000 to an LFA in Pennsylvania).
  - $225,000 “acceptance fee” after franchise granted by one Virginia LFA.
- **Attorneys and Consultants Fees**
  - $75,000 in attorneys fees to LFA in Virginia. They now want more.
  - One Maryland LFA demands fees for attorneys at multiple layers of review, and has indicated that Verizon must match the estimated $650,000 the incumbent paid.
- **Fees on Non-Cable Services**
  - 5% fee on telecom and Internet access services
- **I-Nets and PEG Support**
  - Flat 3% “PEG support fee” on top of 5% franchise fee
  - Florida LFA demanded $6 million for to match incumbent’s cumulative PEG payments.
  - California LFA demands $500,000 up-front and $1.7 million in revolving PEG charges to match incumbent’s cumulative PEG support

STATUTORY LIMITATIONS ON PEG AND I-NET DEMANDS

Some local franchising authorities ignore the explicit limitations that the Cable Act places on what may be required of a cable operator – and in particular, a new entrant – in the name of PEG or I-Net.

- **PEG Channel Capacity.** Section 611 states that PEG requirements are only permitted “to the extent provided in [that] section.” The only thing § 611 permits an LFA to “require as part of a franchise” is “that channel capacity be designated for [PEG].” § 611(b).
- **Voluntary PEG Support.** The statute recognizes that LFAs may enforce additional PEG obligations – including for services, fees or equipment – but only when those obligations are “proposed by the cable operator.” § 611(c).
- **No I-NET Construction.** Section 611 also permits an LFA to require “channel capacity on institutional networks for educational or governmental use.” § 611(b). The Commission and courts have recognized that this does not authorize an LFA to require the construction of an I-Net, but instead only to designate channel capacity on an existing one.
- **PEG Support Counts as Franchise Fees.** Under the statute’s broad “franchise fee” provision, any support for PEG that a new entrant provides counts as a “franchise fee” and is subject to the annual 5 percent cap, with the limited exception of certain “capital costs” for PEG facilities. § 611(g)(2)(C).
    - These “capital costs” are limited to those required “to be incurred” on a going-forward basis. § 611(g)(2)(C).
    - These costs are limited to those necessary to actually provide reasonable and “adequate” PEG facilities. The statute requires that these PEG obligations be shared, not doubled.

ATTACHMENT 2

SECTION 621 FRANCHISE PROCEEDING
SUMMARY OF ARGUMENTS

I. FCC Authority to Adopt Binding and Preemptive Rules to Enforce the Cable Act.

- **Authority to Adopt Rules.** The Commission has authority to promulgate rules that interpret and give effect to the provisions of the Communications Act. *See AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 378 (1999). The Commission's authority previously has been upheld in the specific context of interpreting Section 621's franchising requirements. *See City of Chicago v. FCC*, 199 F.3d 424, 428 (7th Cir. 1999).
- **Preemptive Effect.** As the Commission recognized in the *Franchise NPRM*, when it adopts rules to interpret, construe and enforce the provisions of the Cable Act – including Section 621(a) – those rules are binding and preemptive. *Franchise NPRM* ¶ 15. There are several bases for this preemptive authority:
  - **Express Preemption.** Section 636 provides that "any provision of law of any State, political subdivision, or agency thereof, or franchising authority, or any provision of any franchise granted by such authority, which is inconsistent with this Act shall be deemed to be preempted and superseded."
  - **Delegated Authority.** The Supreme Court has long recognized that the Commission may, when acting within its delegated authority, preempt state and local laws addressing the regulation of cable services. *See Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 700 (1984). This includes the authority to give effect to the express terms of the Act, as well as to construe the meaning of any provisions when a statute is ambiguous or silent. *See, e.g., Chevron*, 467 U.S. 837 (1984).
  - **Impractical to Separate Interstate/Intrastate.** The Commission may preempt state or local law where it is "impractical" to separate a matter into interstate and intrastate aspects and "FCC preemption is necessary to protect a valid federal regulatory objective, . . . [because] state regulation would 'negate[] the exercise by the FCC of its own lawful authority.'" *PSC of Maryland v. FCC*, 909 F.2d 1510, 1515-16 (D.C. Cir. 1990).
  - **Obstacle to Federal Objectives.** The FCC may preempt State or local regulation that is "an obstacle to the accomplishment and execution of the full objectives of Congress." *See Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 369 (1986); *Hines v. Davidowitz*, 312 U.S. 52 (1941).
  - **Section 706.** Section 706 of the 1996 Act instructs the Commission to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capabilities to all Americans" by, among other things, "remov[ing] barriers to infrastructure investment." Because the local franchising regime jeopardizes investment in broadband networks by making it more difficult for a provider to realize an additional revenue stream from the network, Section 706's directive requires the Commission address and remove any illegitimate barriers created by the process, including by preempting State or local actions that

would constitute an unreasonable refusal to award a competitive franchise or that otherwise would violate the federal Act.

II. Congress Intended for Section 621(a) to Encourage Video Competition and Cabin LFA Discretion.

- **Congress Pro-Competitive Purpose.** In the 1992 Cable Competition Act, Congress sought to encourage video competition by:
    - Prohibiting LFAs from granting "exclusive franchises" or "unreasonably refus[ing] to award" competitive franchises. § 621(a)(1).
    - Providing LFAs with a limited set of factors that they are permitted to consider in reviewing a franchise application, thus delimiting the grounds on which an LFA may refuse to grant a franchise. § 621(a)(4).
- **Unreasonable Refusal.** Congress clearly recognized that delay short of a denial would inhibit competition. On its face, Section 621(a) was intended to reach further, as illustrated by Congress' careful choice of words prohibiting the "unreasonabl[e] refus[al] to award" a competitive franchise. This choice of language makes clear that § 621(a) extends to LFA actions, short of an outright denial, that have the effect of imposing unreasonable delay or erecting other barriers to competitive entry.
- **Limited List of Permissible Franchising Considerations.** Congress also adopted a new statutory provision in Section 621(a)(4) to expressly delimit the factors an LFA may consider in deciding whether to grant a competitive franchise.
    - Those specific factors are:
        - An LFA may "require adequate assurance" that the new entrant will "provide adequate [PEG] access channel capacity, facilities, or financial support." § 621(a)(4)(B).
        - An LFA may "require adequate assurance" that the new entrant "has the financial, technical, or legal qualifications to provide cable service." § 621(a)(4)(C).
    - Section 621(a)(4) also imposes an additional *limitation* on LFA authority, instructing *LFAs* that they *must* permit a new entrant "a reasonable period of time to become capable of providing cable service" within the new entrant's chosen franchise area.
    - While the Cable Act may require a cable provider to do certain other delimited things, such as pay franchise fees, those obligations exist apart from the franchise process and are not a permissible basis for denying a competitive franchise so that the provider may enter the market.
    - This reading of Section 621(a) is supported by both standard cannons of statutory construction and by the legislative history of Section 621(a).
- **The First Amendment Limits Discretion.** The First Amendment independently requires strict limits on the discretion afforded to LFAs, and it too requires giving effect to the express limits in Section 621(a)(4) on LFA discretion.

- The First Amendment protects cable companies' right to offer video programming services. *Turner I*, 512 U.S. 622, 636 (1994).
- Like many other licensing or permitting schemes, the cable franchise system is a prior restraint that requires speakers to obtain permission from local authorities *before* engaging in protected speech, and imposes conditions on such permission. This presents several First Amendment concerns:
  - **Objective Standards.** Laws subjecting the exercise of First Amendment freedoms to the prior restraint of a license must spell out narrow, objective standards related to the proper regulation of public places to limit the licensor's discretion. *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, at 150-51 (1969).
  - **Prompt Decision.** Any licensing scheme must provide for a prompt administrative decision in order to prevent a long delay from serving as an effective denial of the ability to speak. *See City of Littleton v. Z-J Gifts D-4, L.L.C.*, 541 U.S. 774 (2004).
  - **No Charge to Speak.** A locality may not charge speakers for the privilege of exercising their First Amendment rights, except to the limited extent necessary to compensate for the locality's necessary incidental expenses. *Cox v. New Hampshire*, 312 U.S. 569, 577 (1941).
  - **Incidental Burdens.** Even in the case of content-neutral regulations, the First Amendment does not permit governments to impose overly broad incidental burdens on speech, and such regulations must satisfy intermediate scrutiny. *Turner I*, 512 U.S. at 662; *O'Brien*, 391 U.S. 367, 377 (1968).
- Thus, the First Amendment imposes independent constraints on the power of LFAs to subject applicants to arbitrary processes, to withhold decisions, to exact fees unrelated to actual costs, or to impose onerous conditions on entry.
- In the case of a provider who has independent authority to use the public rights-of-way, the concerns are even greater because the First Amendment demands that any permitting requirement be justified by legitimate governmental interests. *See Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150, 163 (2002). Because the franchise process historically has been justified as a way to control use of the public rights-of-way, such an interest is lacking in this context.

• **Framework for Rules to Implement Section 621(a).** In light of these statutory and constitutional limitations on LFA discretion, the Commission must recognize that:

- Section 621(a)'s prohibition against "unreasonably refus[ing]" to award a competitive franchise is tantamount to an affirmative requirement that an LFA grant a competitive franchise application unless it has some "reasonable" basis for refusing, and any such basis must be grounded in the limited list of factors that may be considered under § 621(a)(4).

- The statute prohibits LFAs from conditioning a franchise on requirements that are otherwise impermissible under the Cable Act or the First Amendment.
- Any determination of what an LFA "reasonably" may require as a condition of a franchise must be informed by the underlying primary purpose of the franchising requirement – managing the public rights-of-way. *See Franchise NPRM.* ¶ 22. Where those purposes are weak or absent, LFA authority is at its lowest ebb.
- Section 706 requires the Commission to take into account the effects of common franchising practices on investment in broadband infrastructure, and to remove such barriers to investment. The additional revenue stream from video services is an essential component of the business case justifying investment in broadband networks like FTTP.

III. The Commission Should Adopt Rules to Prevent Unreasonable Delay.

- **Section 621(a) Prohibits Delay.** Section 621(a), by its very terms, was intended to prohibit unreasonable delay in the franchising process. Yet the process routinely takes many months, and can take more than a year. Delay results from:
  - Inertia, procedural hurdles, bureaucracy or inattentiveness by some LFAs.
  - LFAs who use delay as a negotiating tactic in an effort to force new entrants to agree to unreasonable or unlawful terms.
  - Incumbents who interfere with the franchising process to delay competition.
- **Examples of Delay**.
  - Negotiations with one town in Virginia began in July 2004. By November 2004, Verizon thought it had negotiated a final franchise agreement with the town attorney, establishing a timeline for notice, commission and council review, with a final vote slated for February 2005. But then the town council referred the agreement to the town cable commission, which demanded significant changes to the negotiated agreement and hired an outside attorney to re-start negotiations. Verizon is now dealing with a third attorney who has said that the town is not sure it is "interested" in having a second franchise.
  - The county staff for one county in Florida required Verizon to file several versions of its applications, demanding additional information and concessions each time before they would submit Verizon's application to the Board for approval *to initiate* negotiations. Verizon's original application was filed in November 2004, and the Board did not authorize negotiations for a year.
  - Incumbents also contribute to delay by bringing or threatening litigation and raising 11th hour objections to franchise terms.
- **Legal Basis for Preventing Delay.** Both Section 621(a) – which by its terms requires that the franchising process move forward at a reasonable pace – and the First Amendment prohibit unreasonable delay:
- **Requested Relief.**

- **Four Month Deadline.** The Commission should adopt a binding, national deadline of four months for acting on a competitive franchise application.
    - Several other Cable Act provisions recognize that four months is a reasonable time for LFA action. These include § 626 (franchise renewals), § 625 (franchise modifications), and § 617 (sale or transfer of a franchise).
        - If anything, shorter period of time would be appropriate for a competitive provider in order to prevent restraints on competition and speech.
        - Shorter time especially appropriate if provider already has authority to use public rights-of-way.
- **Guidelines for LFA Action.** The Commission should adopt guidelines concerning what should happen during the four month period.
    - LFAs should initiate negotiations within 30 days of request.
    - If no agreement within 90 days, provider should be permitted to submit proposal to governing body for action.
    - Governing body should be required to vote on proposal within 30 days, and failure to do so should constitute a grant of the franchise.

IV. <u>Demands for Unreasonable and Unlawful Fees, Concessions, or Requirements Should Be Prohibited.</u>

- **Impermissible Demands Are Common.** Another common problem that delays and prevents the awarding of competitive franchises are LFA demands for things that the Cable Act or other provisions of federal law expressly prohibit. These demands are limited by, among other provisions, Section 621(a)(4) and the statute's franchise fee limitations and PEG provisions.
    - **Section 621(a)(4) Factors.** With the limited exception of certain PEG funding discussed below, the list of permissible factors set out in Section 621(a)(4) provides no basis for an LFA to condition competitive entry on demands for payments – whether monetary or in-kind – beyond those authorized in § 622.
    - **Franchise Fee Limitations.** Section 622 requires that most demands for items of value qualify as "franchise fees" and expressly caps the assessments that LFAs may impose.
        - Section 622 provides that a "cable operator may be required under the terms of any franchise to pay a franchise fee," but states that such fee "*shall not exceed 5 percent* of such cable operator's gross revenues derived . . . from the operation of the cable system to provide cable services." The provision then defines "franchise fee" broadly to include "any tax, fee, or assessment *of any kind* imposed by a franchising authority . . . on a cable operator . . . because of [its] status as such," subject to certain, narrow exceptions. § 622(g)(1).

        - By using this expansive language ("of any kind"), Congress intended for the franchise fee definition to cover any exaction of value, whether monetary or in-kind.
        - The Cable Act then subjects all such contributions to the annual 5 percent cap on fees, unless they fall within one of the statutory exceptions to the "franchise fee" definition.
    - **The First Amendment.** The First Amendment also prohibits many demands made by LFAs. The prior restraint doctrine requires licensing officials to rely on explicit and objective standards that relate to the purposes of the permitting requirement when deciding whether to grant or deny a permit and how much to charge. Moreover, licensing officials may not impose fees as a condition of granting permission to engage in protected speech beyond those needed to meet the LFA's incidental expenses.

- **Funding For Pet Projects Unrelated to Video.** Verizon frequently receives an LFA wish list that includes demands designed to have Verizon subsidize a pet municipal project or policy initiative as a condition of gaining a franchise. Incumbents encourage these demands, arguing that they are required by so-called "level playing field" requirements.
    - **Example.** One town in Massachusetts which initially demanded, among other things, that Verizon provide funds for the town to purchase street lights from a third party owner; install cell phone repeaters at Town Hall; wire all churches; and make parking available at a Verizon facility for library patrons.
    - **Requested Relief.** The Commission should confirm that the statute classifies these items as "franchise fees" and prohibits them to the extent they exceed the 5 percent annual fee cap. LFA demands for such items of value outside of the context of a permissible franchise fee are per se unreasonable.

- **Application and Acceptance Fees.** LFAs frequently demand excessive application or processing fees over and above the 5-percent franchise fees they are authorized to collect.
    - **Examples.**
        - In Virginia, many LFAs demand "acceptance fees" at the time Verizon is awarded a franchise. Examples include a county that required Verizon to pay $225,000 and one town that required $100,000.
        - Some LFAs have demanded that Verizon pay for the consultants or attorneys hired by the LFA. For example, one county in Maryland is demanding that Verizon pay its expenses and attorneys fees, and has passed an ordinance to that effect. The county would have Verizon pay for different attorney hired at each stage of the franchising process.
    - **Legal Basis for Addressing.** These types of fees and costs demanded of a new entrant qualify as franchise fees under Section 622, and are subject to the cap.
        - These types of fees do not fall with the exception to the "franchise fee definition for "requirements or charges *incidental* to the awarding or enforcing of the franchise, including payments for bonds, security funds,

letters of credit, insurance, indemnification, penalties or liquidated damages." § 622(g)(2)(D).

- Courts have found that the exception for "incidental" fees is limited and does not permit LFAs to circumvent the 5 percent cap on franchise fees. *See, e.g., Robin Cable Systems, L.P. v. City of Sierra Vista*, 842 F. Supp 380, 381 (D. Ariz. 1993) ($30,000 fee for "processing costs" was void and unenforceable because it was "more than incidental.").
- Likewise, courts have consistently held that consultant and attorneys fees are not "incidental charges" that can be recovered by an LFA outside of the franchise fee cap. *See, e.g., Charter Communications, Inc. v. County of Santa Cruz,* 133 F. Supp. 2d 1184, 1212-14 (N.D. Cal. 2001).
- Basic canons of statutory construction also show that these fees are impermissible. Any general words in a statute – like "incidental" – must be interpreted in a manner consistent with other associated specific words provided in the same provision. *See, e.g., Gutierrez v. Ada*, 528 U.S. 250, 255 (2000) ("Words . . . are known by their companions."). Likewise, Congress' enumeration of specific, permissible incidental charges suggests the exclusion of charges that are dissimilar to those specifically enumerated, such as application or attorneys fees. *See, e.g., Circuit City Stores v. Adams*, 532 U.S. 105, 114-15 (2001).

  - **Relief Requested.** The Commission should confirm that the express terms of the Cable Act prohibit any fees – whether denominated as "application fees," "acceptance fees," "consultants fees" or otherwise – except to the extent those fees are chargeable against the 5 percent annual cap on franchise fees.

- **Fees on Non-Cable Services.** Some jurisdictions have demanded that Verizon agree to pay cable franchise fees based on revenues from non-cable services, such as telephone and Internet access services, as a condition of receiving a competitive video franchise.
  - **Example.** Several communities in Pennsylvania claim that they are entitled to 5 percent of Verizon's future voice and data revenues from FTTP, in addition to their 5 percent fee for cable services.
  - **Legal Basis for Addressing.** Both Section 621 and 622 prohibit these demands.
    - The franchise fee provisions of Section 622 clearly specify that a municipality may only charge a franchise fee on the provision of "cable services," not telecommunications or data services. The Commission and the courts have confirmed this limitation. *See, e.g., Cable Modem Declaratory Ruling*, ¶ 105; *Liberty Cablevision*, 417 F.3d at 216.
    - Section 621(b)(3)(B) prohibits a franchise authority from imposing "any requirement under this title that has the purpose or effect of prohibiting, limiting, restricting, or conditioning the provision of a telecommunications

service by a cable operator." 47 U.S.C. § 541(b)(3)(B). Demanding that a cable operator pay fees based on such services as a condition of obtaining a cable franchise would necessarily have such an effect.

  - **Relief Requested.** The Commission should confirm that these demands are per se unreasonable, and that State or local laws to the contrary are preempted.

- **Unlawful PEG Demands.** LFAs frequently demand excessive fees or other concessions from a new entrant that the LFAs say will be used to support PEG channels or facilities, in violation of Sections 611, 621, and 622.

  - **Examples.**

    - One franchising authority in Florida demanded that Verizon meet the incumbent cable operator's cumulative payments for PEG, which would exceed $6 million over 15 years of Verizon's proposed franchise term. When Verizon rejected this demand, the LFA doubled its request, asking for a fee in excess of $13 million that it said would be used for both PEG support and the construction of a redundant institutional network.

    - One California community initially demanded that Verizon match the cumulative PEG support that the incumbent had made over time. This included up-front charges of more than $500,000 for PEG access equipment and facilities, and revolving charges that bring the total up to approximately $1.7 million over the course of the franchise.

  - **Legal Bases for Addressing.**

    - The Act contemplates four forms of PEG contributions – channel capacity, facilities, equipment, and financial support – and prescribes different limits on each form of PEG support.

    - Sections 611 and 621 deprive LFAs of authority to require operators to provide any PEG support beyond a reasonable amount of channel capacity.

      - Section 611(a) authorizes LFAs to establish requirements "with respect to the designation or use of channel capacity for [PEG] *only to the extent provided in this section*." Section 611(b), in turn, allows a franchising authority to request only "that channel capacity be designated for [PEG] use."

        - Section 611(c) also states that LFAs may enforce "any requirement in a franchise regarding the providing or use of such channel capacity," including "any provisions of the franchise for services, facilities, or equipment" – but only if they are "proposed by the cable operator."

      - Section 621(a) allows LFAs to require no more than an "adequate" number of channels, which legislative history suggests is three.

        - This provision, which allows LFAs to require "adequate assurance that the cable operator will provide adequate

[PEG] access channel capacity, facilities, or financial support," does not alter Section 611's limitations. Instead, it only authorizes an LFA to require *assurances* that an operator will live up to its PEG commitments – which would include any reasonable PEG channel capacity requirements or any promises of facilities or support that the operator voluntarily proposed in negotiations with the LFA.

- The Act's "franchise fee" provision further limits the PEG support that may be demanded. Section 622 provides that any such support counts against the 5 percent franchise fee cap, with the one exception of "capital costs which are required by the franchise to be incurred by the cable operator". § 622(g)(2)(C).
  - Although "capital costs" for facilities are exempted from the 5 percent franchise fee ceiling, Section 621(a) provides that an LFA may require only "adequate assurances" of "adequate" PEG facilities. The term "adequate" precludes LFAs from imposing onerous or excessive demands for facilities.
  - The term "capital costs" limits the LFA to those costs incurred in the construction of PEG access facilities, and does *not* include "payments for, or in support of the use of, PEG access facilities," such as equipment costs, salaries, and training. *See Cable TV Fund 14-A, Ltd. v. City of Naperville*, No. 96C5962, 1997 WL 433628, at *12 (N.D. Ill. July 29, 1997). These costs should be limited in the case of a new entrant.
  - Sections 622 also distinguishes between new entrants and incumbents for purposes of PEG, and recognizes that incumbent providers whose franchises were in effect at the time of the 1984 Act may be required to pay a wider range of PEG expenses above and beyond the 5 percent fee cap. §622(g)(2)(B).
- The First Amendment also independently limits PEG demands.

o **Relief Requested.** The Commission should confirm that the Cable Act prohibits excessive municipal PEG demands, including demands that go beyond the carriage of a reasonable number of PEG channels and legitimate and reasonable capital costs. In addition, to give effect to the statute's limits on PEG support, the Commission should require LFAs to document and track PEG payments properly.

- **Invalid I-Net Facilities and Support Requirements.** Many LFAs demand broadband networks and services under their I-Net authority that go far beyond what the Act permits.

o **Examples.**

- One LFA in Virginia initially demanded that Verizon connect 220 traffic signals in the county with fiber; provide fiber services to "approximately 60" organizations who "work with" the county's "Department of Human

        - Services to provide medical, psychological, educational, nutritional, employment and housing assistance to at risk segments of the community"; provide cell phones for "approximately 1000 employees"; and provide discounted broadband access in public housing.
        - Several other LFAs have asked Verizon to construct or provide fiber networks for all of the public buildings in the community.
    - **Legal Basis for Addressing.** These demands are unlawful for two reasons:
        - These demands far exceed the limited authority that § 611 gives an LFA with respect to an I-Net. Section 611 does not permit an LFA to require the *construction* of an I-Net. Instead, it limits an LFA's authority to requiring channel capacity on such a network if it already exists. Both the Commission and courts have recognized this limitation. *See City of Dallas v. FCC*, 165 F.3d 341, 350 (5th Cir. 1999) ("§ 611 does not permit localities to require cable operators to build institutional networks, but instead, by its terms, merely states that" an LFA may require channel capacity on an existing network that qualifies as an I-Net.).
        - These demands interpret the term I-Net more expansively than the statute permits. Section 611(f) defines an I-Net as "a communications network . . . which is generally available only to subscribers who are not residential subscribers."
            - None of the in-kind services typically sought by LFAs – such as broadband Internet access services – qualify under this definition because these services generally are sold to residential subscribers.
            - Given the references to "channel capacity" and "subscribers" in Section 611, this definition cannot reasonably be read to include the types of broadband services or special access services that Verizon sells to business customers.
    - **Relief Requested.** The Commission should confirm that the express terms of the Cable Act prohibit an LFA from demanding the construction of any networks or facilities or seeking for free the types of broadband services that Verizon is in the business of selling to both residential and business customers.
- **Regulatory Control Over Non-Cable Services.** Some LFAs have demanded that Verizon permit them to exercise regulatory control over non-cable services.
    - **Examples.**
        - Some counties in Maryland have demanded that Verizon submit its data services to local customer service regulation.
        - One city in that Maryland has gone so far as to insist that Verizon obtain a separate franchise prior to deploying FTTP in its jurisdiction.
    - **Legal Basis for Addressing.**
        - Nothing in Section 621(a)(4)'s list of factors authorizes LFAs to leverage their video franchising authority in this manner.

        - In the context of franchise fees, the Commission has already decided that LFAs lack authority over non-cable services, including Internet access services. *See Cable Modem Order* ¶ 105.
        - Section 621(b) specifically provides that a "cable operator or affiliate shall not be required to obtain a franchise under this title for the provision of telecommunications services," and prohibits an LFA from "impos[ing] any requirement … that has the purpose or effect of prohibiting, limiting, restricting, or conditioning the provision of a telecommunications service by a cable operator or an affiliate thereof."
    - **Relief Requested.** The Commission should confirm that LFA demands to this effect are patently unlawful and are preempted.

- **So-Called "Level Playing Field" Requirements.** Another common impediment to competitive entry comes from so-called "level playing field" requirements that many incumbent cable operators have convinced various jurisdictions to adopt. These protectionist requirements are often cited as a basis for imposing all manner of additional costs and obligations on a would-be new entrant into the market – including many of the unreasonable demands for build-out, unlawful PEG support, to other extraneous demands discussed above.
    - These requirements cannot be applied to justify an otherwise unlawful demand or to require more than is permitted under the Act.
    - These requirements – at least when interpreted to impose on a new entrant all of the costs previously incurred by an incumbent – create an unreasonable barrier to competitive entry and should be preempted.
    - At a minimum, the Commission must recognize that these requirements create an impermissible barrier to entry if they fail to take into account all relevant differences between providers.
        - New entrants are, by definition, differently situated from incumbents, and imposing identical obligations on new competitors as a price of entering the market would unreasonably deter entry. And, both in Section 621(a) and in other provisions of the Cable Act, Congress fully intended to diminish the burdens associated with competitive entry.
        - Any permissible application of these requirements would require consideration of the overall regulatory burdens of different providers as a result of all of the services that they offer.
    - **Relief Requested.** The Commission should preempt any so-called "level playing field" requirements that seek to impose unreasonable and unlawful cost on a new entrant, as such requirements violate Section 621(a)'s pro-competitive mandate. And even in the case of less extreme requirements, the Commission must require that all relevant facts and circumstances of different providers be considered.

V. <u>Unreasonable Build-Out Requirements Must Be Prohibited.</u>

- Unreasonable and anti-competitive build-out requirements – often at the urging of incumbent providers – are another significant barrier to competitive entry. Many incumbents even maintain that a new entrant must build out and provide cable service to all households within the *incumbent's* service area or the LFA's jurisdiction rather than its own service area. These demands are particularly problematic for a provider like Verizon whose network architecture does not correspond to those areas. When Verizon upgrades its network to FTTP, it does so throughout the area served by a particular wire center. That area may not include an entire community, or it may include parts of several communities.

- **Example.** In California, some LFAs have taken the position that California's "wire and serve" statute requires Verizon to build out to the incumbent's entire franchise area, despite the fact that Verizon's telephone service area does not cover much of the same area.
- **New Entrants Should Be Permitted to Define Own Franchise Area.** If a provider were forced to build out to serve the *incumbent's* franchise area, an LFA's jurisdictional boundaries, or any other arbitrary area, in many cases it may be uneconomical for the provider to enter the cable market at all. This result is directly contrary to the pro-competitive purposes of the Cable Act.
    - The Act does not expressly define "franchise area," although it does indicate that a franchise area does not have to be the same for each provider or be coextensive with an LFA's jurisdiction.
    - Courts have recognized that the Act does not require universal service by a cable operator. *See ACLU v. FCC*, 823 F.2d 1554, 1580 (D.C. Cir. 1987).
    - As long as the new entrant's definition of its franchise area is reasonable and otherwise consistent with the Act, then LFAs should be required accept that definition. Where an entrant builds out the entirety of a wire center (or group of wire centers), that approach should be considered presumptively reasonable.
        - Even when the areas served by a wire center that has been upgraded to FTTP do not neatly correspond to the incumbent's franchise area or to the boundaries of the one or more LFAs served by the wire center, it is surely "reasonable" for an entrant to define its franchise area with reference to the locations served by that wire center.
        - It would be *unreasonable* and in violation of Section 621(a) for an LFA to instead impose other artificial boundaries that make no sense in light of this network architecture.
    - The arguments sometimes made for requiring build-out beyond a new entrant's proposed franchise area cannot stand up to Section 621(a).
        - Section 621(a)(3) allows an LFA 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." 47 U.S.C. § 541(a)(3). This provision, however, does not require universal build-out within a jurisdiction. *See ACLU*, 823 F.2d at 1580 ("The statute on its face prohibits discrimination on the basis of income; it manifestly does not require universal service."). Nor does it require competitive entrants to provide services everywhere the incumbent does.

        - Both legislative history and Commission precedent confirm this distinction between the redlining prohibition and a build-out mandate. *See, e.g., Franchise NPRM* ¶ 23.

    - Section 621(a)(4)(A) likewise does not define "franchise area" and does not authorize an LFA to require a competitive entrant to build out beyond the franchise area that it selects. Section 621(a)(4)(A)'s operative language – "a franchising authority . . . shall allow the applicant's cable system a reasonable period of time to become capable of providing cable service to all households in the franchise area" – does not speak to what an *operator* must do with respect to its territorial boundaries but rather to what an *LFA may not do* (that is, insist on unreasonably short time deadlines).

        - Again, legislative history confirms this reading of the statute. Congress explicitly rejected an approach that would have imposed affirmative build-out obligations on cable providers.

    - Section 621(a)(4)(A)'s reference to "all households in the franchise area" does not permit an LFA to demand build-out throughout its jurisdiction. Past Commission precedent and textual indicators demonstrate that the phrase "franchise area" does not refer to the entire LFA jurisdiction.

        - The Commission has long recognized the distinction between an LFA's jurisdictional boundaries and the boundaries of franchise areas within that jurisdiction. *See 1972 Cable Order*, 36 FCC 2d. 143 at ¶ 177 (1972).

        - Congress too recognized this distinction. While Section 621(a)(4)(A) speaks of a "franchise area," other provisions of the Act refer to a local franchising authority's "jurisdiction." *See, e.g.,* 47 U.S.C. § 543(a). In other words, when Congress wanted to refer to an LFA's territorial jurisdiction, it knew how to do so.

- **The First Amendment Limits Build-Out.** Three separate First Amendment doctrines circumscribe build-out requirements.

    - **Incidental Burdens.** When interpreting and applying the term "franchise area," the Commission must consider that the First Amendment does not permit governments to impose overly broad burdens on speech, even if such burdens are content-neutral. Requiring build-out beyond a new entrant's chosen service area cannot satisfy intermediate scrutiny.

    - **Compelled Speech.** Build-out requirements run afoul of the First Amendment by dictating the audience to whom a cable operator must speak. Part and parcel of the First Amendment right to speak is the would-be speaker's right *not* to speak or publish certain content. *See Century Federal, Inc. v. City of Palo Alto*, 710 F. Supp. 1552 (N.D. Cal. 1987).

    - **Prior Restraint.** The prior restraints doctrine requires that well-defined, objective standards that confine franchisors' discretion. In the context of build-out requirements, this means that federal law should be read as prescribing clear and objective criteria to constrain LFAs' authority.

- **Relevant Differences Between Incumbents and New Entrants Must Be Considered.** At a minimum, the Commission should confirm that LFAs may not overly burden competitive entrants when considering the boundaries of their service region. This means requiring LFAs to take into account: (1) the fact that the new entrant will face ubiquitous competition, and (2) relevant differences in network architecture between the new entrant and the incumbent, including the new entrant's service area for non-cable services.
    - For example, application of the same build-out density limitations to a new entrant that were used in the case of a incumbent provider would impermissibly fail to take into account significant competitive differences between the two and might require uneconomic deployment by a new entrant.
    - LFAs must take into account differences in network architecture.
        - Verizon's FTTP network is not built to correspond to the boundaries of LFA jurisdictions, and when Verizon converts a wire center to FTTP, those facilities might not reach the entirety of a community or could serve parts of several different LFAs.
        - LFAs should not be able to dictate the timing and scope of that deployment unreasonably.
        - At a minimum, LFAs should not be permitted to require a new entrant to build out in areas outside of its service area for non-cable services where it has no network facilities.

VI. The Commission Should Construe the "Cable System" Definition In the Context of Mixed-Use Broadband Networks.

- **Broad, New Local Regulation over Broadband Networks Would Frustrate Federal Policy.** Some LFAs and cable companies have said that once Verizon begins to offer video over its FTTP network, the entirety of the network should be regulated as a "cable system" for all purposes. According to these parties, addition of video to the network gives broad new authority to municipalities over the entire physical network, including authority to regulate aspects of the construction, operation or placement of these networks.
- **Examples.**
    - In a filing before the New York PSC, the towns of Larchmont and Mamaroneck asserted that once Verizon has a cable franchise in their communities, they will have regulatory authority to require Verizon to "entirely rebuild" its system (*e.g.*, bury the entire fiber plant underground), "regardless of the impact on Verizon."
    - One town in Virginia has refused even to give Verizon permits to upgrade its network to FTTP (before the cable franchise process has even begun), demanding that Verizon bury the fiber at a cost of $3-4 million.
- **Uncertainty Deters Competition.** This puts a would-be competitive provider to a Hobson's choice: resist unreasonable demands, in which case franchise authorities simply withhold

action resulting in costly delays and litigation; or accede and suffer the death of a thousand cuts as individual municipalities impose conflicting and costly new requirements.

- **These Claims Are Inconsistent with the Act's "Cable System" Definition.** The Cable Act's definition of "cable system" is explicit that a common carrier's network that is subject in whole or in part to federal Title II regulation – such as Verizon's FTTP network – is a cable system only "*to the extent*" it is used to transmit video programming directly to subscribers. 47 U.S.C. § 522(7)(C) (emphasis added). This language shows that the entirety of a telecommunications/data network is not automatically converted to a "cable system" once subscribers start receiving video programming.
    - If Congress had intended an automatic and total conversion, it would have said that a common carrier's network becomes a cable system "if" or "whenever" it is used to offer video programming, not "to the extent" it is so used.
- **Other Federal Laws Also Preclude These Claims.** Several additional provisions of federal law bolster this interpretation of the "cable system" definition and preclude an expansive view of LFA jurisdiction over a mixed-use broadband network.
    - **Section 621(a).** When an LFA demands something of a franchise applicant that it is not permitted to require under the Cable Act – as is true of these demands that a provider cede additional authority to a municipality over its physical FTTP network as a condition of receiving a video franchise – such demands unreasonably obstruct competitive entry in violation of § 621(a).
    - **Limitations on LFA Authority Over Telecommunications Services.** Section 621(b)(3)(B) prohibits a franchise authority from imposing "any requirement under this title that has the purpose *or effect* of prohibiting, limiting, restricting, or conditioning the provision of a telecommunications service by a cable operator." 47 U.S.C. § 541(b)(3)(B) (emphasis added). Such an effect would be inevitable if LFAs were granted greatly expanded power over the physical FTTP facilities.
    - **Section 253 Limitations.** Section 253(a) prohibits state or local regulation that "may prohibit *or have the effect of prohibiting* the ability of any entity to provide any interstate or intrastate telecommunications service." Burdensome or inconsistent requirements imposed on FTTP facilities used for the delivery of multiple services would have precisely such a prohibitory effect.
        - In applying Section 253, the Commission has stated that it "considers whether the ordinance *materially inhibits or limits* the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment." *California Payphone Association Petition for Preemption*, 12 FCC Rcd 14191, ¶ 31 (1997).
        - Courts have preempted all manner of local laws that placed burdensome or discriminatory obligations on a provider of telecommunications services. *See, e.g., Qwest Communications Inc. v. City of Berkeley*, Docket No. 03-15852, slip op., at 623 (9th Cir. Jan. 12, 2006) (various requirements, "when considered together, are patently onerous and have the effect of

prohibiting Qwest and other telecommunications companies from providing telecommunications services”).

  - Subjecting a national broadband network to the varied and conflicting demands of thousands of different municipalities would undoubtedly “have the effect of prohibiting the ability of any entity” to provide telecommunications services over these networks. Section 253 requires preemption of efforts to regulate as a “cable system” the construction, placement and operation of a multi-use national, broadband network deployed pursuant to generally applicable telecommunications laws.

- **Choice of Technology.** Section 624(e) also prohibits LFAs from conditioning or restricting Verizon’s choice of transmission technology.
- **Section 706 Limitations.** The result urged by these LFAs and cable incumbents also would be flatly inconsistent with federal policies promoting broadband deployment. Section 706(a) says “[t]he Commission . . . *shall* encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . [by] remov[ing] barriers to infrastructure investment.” To the extent LFAs make it more difficult for a provider to realize an additional revenue stream from video services, they also make it much less likely that the provider will invest in these networks in the first place.