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 Protection and Competition Act of 1992	)))))	MB Docket No. 05-311

REPLY COMMENTS OF ADVANCE/NEWHOUSE COMMUNICATIONS

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Advance/Newhouse Communications respectfully submits these reply comments in response to the Commission's November 18, 2005, Notice of Proposed Rulemaking in Docket No. 05-311. *See Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Protection & Competition Act of 1992*, Notice of Proposed Rulemaking, MB Docket No. 05-311, FCC 05-189 (rel. Nov. 18, 2005) (*NPRM*). Advance/Newhouse Communications manages Bright House Networks, LLC, which operates cable systems serving over 2.2 million customers in and around Tampa Bay and Central Florida (Orlando), Birmingham, Indianapolis, Bakersfield and Detroit, as well as several smaller systems in Alabama and the Florida panhandle.

<u>INTRODUCTION AND SUMMARY</u>

With this proceeding, the Commission seeks answers to a number of questions concerning the "the current environment in which would-be new entrants [into the video subscription services market] attempt to obtain competitive franchises." *NPRM* ¶ 12. Advance/Newhouse Communications provides answers to two of those questions based on its first hand experience with Verizon's efforts to gain entry into Bright House Networks' Florida franchise areas.

First, the Commission asks whether the local franchising process operates as an inherent barrier to competitive entry into the video services market. *See NPRM* ¶¶ 10-13. As for Verizon's efforts in Florida, the answer to this question is no. Much like its efforts elsewhere, Verizon's efforts to gain entry into areas where Bright House Networks is an incumbent cable operator demonstrate that it is Verizon's tactics – not the local franchising processes – that pose any sort of "inherent" barrier to its competitive entry. Verizon has successfully gained entry into these markets because local franchising authorities are indeed eager for additional wireline video competition. But it would have done so considerably faster had it approached the process in the spirit of cooperation and with respect for the needs of the local communities, rather than with an inflexible desire to impose peculiar uniform and largely unreasonable franchise terms on all of the local franchising authorities that it confronts. Only Verizon's mechanical and persistent refusal to accept terms agreed to by Bright House Networks and rejection of basic franchising obligations has prevented it from securing painless and more timely market entry. Indeed, even the self-imposed delays of which it complains are substantially exaggerated.

Second, the Commission asks whether "the terms being proffered [are] consistent with the requirements of Title VI?" *NPRM* ¶ 13. In Bright House's franchise areas, the answer is again no. Part and parcel of Verizon's winner-take-all negotiating strategy has been its presentation to local franchising authorities of draft franchises that purport to entirely exclude Verizon's fiber-optic network from Title VI regulation on the theory that, because its network is subject to Title II common carrier regulation, it cannot also be subject to Title VI regulation. Verizon's theory and its vigorous implementation of it in Florida is manifestly contrary to federal law. To block Verizon (and other new entrants encouraged by its efforts) from depriving local governments of the power to regulate fundamental matters of local concern, the Commission must reaffirm that telecommunications service providers opting to provide cable services through a cable system are subject to regulation under Title II *and* Title VI.

DISCUSSION

As explained below, the only thing standing between Verizon and its entry into the subscriber video market in Florida has been *Verizon* itself, and the unfortunate approach it has taken towards the local franchising process – an approach not tempered by any appreciation for the different needs of different communities. The good news for Verizon, however, is that if it really wants to compete in the subscriber video service market in Florida in a more timely fashion, it may readily do so by simply changing tack: It can surrender its hardline, mechanical approach, abandon its misguided efforts to evade Title VI regulation of the facilities that it operates as a cable system, and adopt reasonable and cooperative franchise negotiations.

I. VERIZON'S OWN HARDLINE TACTICS HAVE TURNED THE LOCAL FRANCHING PROCESS INTO A NEEDLESS BARRIER TO ENTRY

While the Commission recognizes that new entrants are obtaining franchises from local franchising authorities, *see NPRM* ¶ 8, Verizon vigorously complains that the franchising process "simply takes too long" 1/ and that "delay [is] endemic." Comments of Verizon at p. 31. It attributes "many" of these delays to "disagreements with an LFA over the terms of a franchise agreement." *Id.* at 21. In Bright House Networks' Florida franchise areas, these delays are not "endemic" to the franchising process. They are "endemic" to Verizon's approach – a clear and avoidable by-product of Verizon's demands for unreasonable terms. As it has in New York, 2/ in Florida Verizon has pursued a winner-take-all approach to franchise negotiations – refusing to accept terms agreed to by Bright House Networks and even the most basic franchise commitments touching on local concerns historically accepted by cable operators around the country.

The consequences of Verizon's approach, moreover, should not come as any sort of surprise to it, for it is not really a "new" entrant into the subscription video marketplace. After acquiring GTE, Verizon operated multiple franchised cable systems in the Tampa area (principally Pinellas County) pursuant to the sort of franchise terms that it now doggedly rebuffs. Although it divested itself of those assets in 2004, it surely has not forgotten that experience.

1/ *NPRM* ¶ 5.

2/ *See* Comments of Cablevision at pp. 14-17.

But Verizon apparently learned the wrong lesson from it – work *against* not *with* local communities and their needs. That mistake is one that Verizon – not the Commission – can and should correct. Because it is Verizon's unreasonable intransigence, not the local franchising authorities efforts to safeguard the public weal, that is the root cause of the delays it seeks Commission action to address, Verizon must alleviate the problem on its own.

1. For any new entrant seeking access to the subscriber video services market in Florida, the local franchising process is transparent and straightforward and should not be time-consuming or unduly burdensome. In view of the state's level-playing-field statute, 3/ any new entrant serious about obtaining a franchise may simply come to the local franchising authority with a draft franchise that incorporates the publicly available terms agreed to by the existing operator to meet the particular community's needs – needs embodied in the pre-existing franchise. 4/ Taking advantage of the entry roadmap necessarily created by the incumbent cable operator by committing to abide by the terms that it secured allows a new entrant to save considerable time and expense. Given

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3/ *See* FLA. STAT. § 166.046(3) ("No municipality or county shall grant any overlapping franchises for cable service within its jurisdiction on terms or conditions more favorable or less burdensome than those in any existing franchise within such municipality or county.").

4/ For example, the terms of Bright House Networks' franchise in Tampa are available for all to see on the Internet. Tampa Office of Cable Communications, *Franchise Agreement To Provide Cable Services Between City Of Tampa, Florida & Time Warner Entertainment - Advance/Newhouse Partnership*, *available at* http://www.tampagov.net/dept_Cable_Communications/time_warner_cable_franchise.asp (last visited Mar. 20, 2006).

franchising authorities' eagerness for additional competition in the video services market, this approach provides new entrants with the promise of expedited and efficient market entry.

But Verizon has rejected such a direct course in favor of one that is inherently more cumbersome and fraught with delay. It has selected a course built on the twin stumbling blocks of refusal to accept the same terms that Bright House Networks has accepted and insistence on terms that deprive local franchising authorities of control over core municipal prerogatives. At even the most basic level, Verizon – in its determined pursuit of national uniformity – has guaranteed that its franchise negotiations are more involved and time-consuming than necessary by requiring local franchising authorities to negotiate from its own "model" franchise template rather than the incumbent cable operator's franchise agreement. One Florida County to which Verizon has put its "model" franchise template has noted in this very proceeding the delay that that approach engendered. *See* Comments of Manatee County, Florida at p. 6 (stating Verizon's use of its own draft franchise "caused the process to be somewhat longer than [it] otherwise would have needed [to be]" to support proposition that "LFAs are not always the sole cause for the need for longer franchise negotiations").

Verizon's insistence on use of its draft franchise template produces increased delay in two obvious ways. First, this approach immediately puts local franchising authorities on the defensive by taking them off of their home turf and putting them on Verizon's peculiar playing field. Because Verizon's franchise template contains idiosyncratic terms and conditions, the local franchising authority must scrutinize those terms and conditions much more closely than terms and conditions similar to those contained in a pre-existing franchise previously negotiated by that local franchising authority. Rather than negotiating over modifications to familiar terms and conditions, Verizon essentially demands that the local franchising authority start negotiating from ground zero, as if it has never before franchised the operation of a cable system. Verizon's cannot honestly complain about the delays caused by its requiring local franchising authorities to reinvent the franchising wheel in this way.

Second, by insisting that negotiations proceed from its franchise template, Verizon seriously complicates the level-playing-field analysis that Florida law requires every local franchising authority to perform. *See* FLA. STAT. § 166.046(3). While this statutorily-mandated level-playing-field analysis typically requires a local franchising authority only to weigh proposed franchise benefits and burdens in the context of modifications to the incumbent cable operator's pre-existing franchise, Verizon's approach requires a local franchising authority to undertake a much more difficult comparison: It must compare Verizon's idiosyncratic terms and conditions with those contained in the incumbent cable operator's agreement. While such an apples to oranges comparative exercise not surprisingly takes far longer than an apples to apples one, the local franchising authority cannot be faulted for this delay.

2. Verizon's entry has not simply been slowed by the form of its approach, however, but by its substance too. Many of the terms and conditions

contained in Verizon's franchise template are simply foreign to local franchising authorities because they purport to divest those authorities of power over core municipal concerns that is secured in typical cable franchises. The franchise template presented by Verizon to Florida local franchising authorities indeed contains the same limitations previously noted by Cablevision with respect to Verizon's New York franchising efforts. 5/ Verizon's template prevents municipalities from exercising traditional control over facilities constructed and operated in public rights-of-way by defining its cable system only as "spectrum" on its Title II telecommunications facilities. 6/ This definition, as discussed more fully in the following Section, *see* Discussion *infra* at 13-22, operates to remove Verizon's facilities entirely from Title VI regulation. This limited definition of "cable system" additionally operates to deprive local communities of legal protections provided by the standard indemnity clauses typically contained in cable franchises, including Bright House Networks' agreements in its Florida franchise areas. 7/

Verizon's template also fails to include any provision – common in cable franchise agreements – requiring it to repair damage to municipal property

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5/ *See* Comments of Cablevision Systems Corporation at pp. 14-17.

6/ *See* Tampa Verizon Franchise (Draft 9/1/05) § 1.6; Pasco County Verizon Franchise (Draft 9/6/05) § 1.6; Hillsborough County Verizon Franchise (Draft 7/01/05) § 1.6; Temple Terrace Verizon Franchise § 1.6.

7/ *See* Pasco County Verizon Franchise (Draft 9/6/05) § 10.2.1; Manatee County Verizon Franchise 11.2.1; Hillsborough County Verizon Franchise (Draft 12/21/05) § 20.4(a); Temple Terrace Verizon Franchise § 9.2.1.

occasioned by its construction and operation of its cable system. 8/ Nor does Verizon's template include any provision requiring it to serve all residents within a franchise territory. 9/ To the contrary, unlike the obligations undertaken by Bright House Networks to serve *all residents*, Verizon agrees only to serve all *residential areas* (not *residents*). 10/ And even this undertaking is subject to significant exceptions. 11/ The complete absence of these various traditional franchise requirements from Verizon's template has predictably stalled Verizon's competitive entry into Bright House Networks' franchise areas. *See* Comments of Manatee County at pp. 6-7 (noting that Verizon's "concept that its phone assets were not being subject to local regulation" and "resist[ance] [to] a required build out requirement" caused delay).

In addition to these idiosyncratic provisions, Verizon's template contains another one that has given local franchising authorities great pause. In Bright House Networks' Florida franchise areas, Verizon has sought to include a franchise term that effectively allows it to unilaterally "opt out" of providing cable

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8/ *See* Pasco County Verizon Franchise (Draft 9/6/05); Manatee County Verizon Franchise; Hillsborough County Verizon Franchise (Draft 12/21/05); Temple Terrace Verizon Franchise.

9/ *See, e.g.*, Pasco County Verizon Franchise (Draft 9/6/05) § 3.1.1; Manatee County Verizon Franchise § 4.1.1; Temple Terrace Verizon Franchise § 3.1.

10/ *See, e.g.*, Pasco County Verizon Franchise (Draft 9/6/05) § 3.1.1; Manatee County Verizon Franchise § 4.1.1; Temple Terrace Verizon Franchise § 3.1.

11/ *See, e.g.*, Pasco County Verizon Franchise (Draft 9/6/05) § 3.1.1; Manatee County Verizon Franchise § 4.1.1; Temple Terrace Verizon Franchise § 3.1.

service in areas that are unprofitable after a period of time. 12/ Naturally, this provision has caused additional concerns.

3. While the delays in obtaining competitive franchises in Florida of which Verizon complains are its own doing, they are also significantly exaggerated. In most communities in Florida, Verizon has first approached local franchising authorities only to inform them of upgrades to its facilities that enable it to provide subscriber video services – not to apply for a franchise to actually provide those services. Its position before these authorities has been the same as it is before the Commission now: It need not secure a franchise to upgrade its facilities to provide subscriber video services before providing the services themselves. *See* Verizon Comments at p. 81 n.49. This build-first, franchise-later approach is a significant, time-saving advantage enjoyed by no other cable system operator, including Bright House Networks – all of whose systems were constructed long after it received its franchises to provide video services. Unlike any other operator, once Verizon obtains a franchise to provide video service it may do so without any further delay.

Verizon apparently does not appreciate (or does not want the Commission to appreciate) the benefit of its ability to successfully put its subscriber video cart before the franchising horse. But, having made the conscious choice to forego obtaining competitive franchises before it upgraded its infrastructure in Bright House Networks' franchise areas, Verizon cannot

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12/ *See, e.g.*, Pasco County Verizon Franchise (Draft 9/6/05) § 2.7.3; Manatee County Verizon Franchise § 3.7.4; Temple Terrace Verizon Franchise § 2.8.3; Hillsborough County Verizon Franchise (Draft 7/01/05) § 2.10(b).

possibly count the time it took to upgrade its system towards the time it took to subsequently obtain a franchise once it completed its upgrade. Verizon indeed allowed many months to elapse between when it notified a local authority in Bright House Networks' franchise areas of its planned upgrade and when it started negotiating a franchise with that authority. In Bradenton, Verizon started upgrading its facilities in mid-2004 but did not apply for a franchise until January 11, 2006. Its application was granted less than one month later on February 8, 2006. Similarly, in Temple Terrace, Verizon began upgrading its facilities in July 2005 but did not apply for a franchise until months later on November 30, 2005. 13/

Moreover, when Verizon finally did return to apply for a franchise in these communities, many more months again elapsed between when it presented its franchise template to a local franchising authority and when it initiated actual franchise negotiations with that authority. For example, Verizon first submitted its franchise agreement to the City of Tampa (where it has yet to receive a franchise) in mid-2004, but made little serious effort to negotiate with the City until later the next year. While Verizon counts self-imposed postponements like this against the local franchising authorities in Temple Terrace and Manatee, 14/ no local franchising authority – including these ones – can make Verizon undertake prompt negotiations with it.

13/ Similar lags also occurred in the Counties of Manatee and Hillsborough.

14/ *Compare* Comments of Verizon at O'Connell Decl. Exh. 1, *with* Comments of National Cable & Telecommunications Ass'n at Attch. A. Verizon

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Verizon's dogged insistence on use of its peculiar franchise template has slowed its competitive entry into Florida markets as the terms contained in it have predictably but needlessly required local franchising authorities to undertake rigorous examinations not typically associated with competitive entry. Verizon's efforts have additionally been significantly hindered by its own unlawful attempt to exclude its facilities from Title VI regulation as a cable system, as discussed below.

II. NEW ENTRANTS PROVIDING CABLE SERVICE AS CABLE OPERATORS – INCLUDING VERIZON – ARE SUBJECT TO TITLE VI REGULATION

In Bright House Networks' Florida franchise areas, Verizon has launched a programmatic – and so far somewhat successful – effort to convince local franchising authorities that the infrastructure it uses to provide *cable service as a cable operator* is not subject to Title VI regulation. The business end of this tactic is immediately evident in the definition of "Cable System" or "System" contained in the draft franchise template that it presents to local franchising authorities. Each of the draft franchises that Verizon submitted to Hillsborough and Pasco Counties and the Cities of Tampa and Temple Terrace contained the following definition:

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notes with an asterisk that the franchise "[p]rocess [s]tarted" in Temple Terrace and Manatee when it "initiated franchise discussions" in September 2004 and October 2004, respectively. But, as the Comments of the National Cable & Telecommunications Association make clear, the "[p]rocess" actually "[s]tarted" in November 30, 2004, in Temple Terrance and December 17, 2004, in Manatee. *See* Comments of National Cable & Telecommunications Ass'n at Attch. A. Thus Verizon overestimates the time it took it to obtain franchises in each of these two communities by approximately two months.

> Cable System or System: Shall be defined herein as it is defined under Section 602 of the Communications Act [sic], 47 U.S.C. § 522(7), meaning Franchisee's 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 the Franchise Area. *The Cable System shall be limited to the optical spectrum wavelength(s), bandwidth or future technological capacity that is used for the transmission of Cable Services directly to multiple Subscribers within the Franchise Area and shall not include the tangible network facilities of a common carrier subject in whole or in part to Title II of the Communications Act or of an Information Service Provider.*

Tampa Verizon Franchise (Draft 9/1/05) § 1.6 (emphasis added). 15/ This exemption from Title VI regulation under the franchise is reinforced by a further provision providing that Verizon's "FTTP network is being constructed and will be operated and maintained as an upgrade to and/or extension of its existing Telecommunications Facilities." *See, e.g.*, Verizon Tampa Franchise § 4 (Draft 09/01/05). Verizon's attempt to exclude its facilities from Title VI regulation has proven successful in two Florida Counties – Hillsborough and Manatee – and one City – Temple Terrace. It has contributed to stalled negotiations in another City: Tampa.

Verizon defends this approach in this proceeding, 16/ claiming that regulating its "mixed-use broadband network" facilities under Title VI "once subscribers start receiving video programming" is "bad policy" and otherwise unlawful. Verizon Comments at pp. 83, 86. But Verizon's approach is no less

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15/ *See also* Pasco County Verizon Franchise (Draft 9/6/05) § 1.6; Hillsborough County Verizon Franchise (Draft 7/01/05) § 1.6; Temple Terrace Verizon Franchise § 1.6.

16/ *See* Verizon Comments at pp. 80-87.

misguided for its measured success in the field than for the pages of rhetoric it offers the Commission in this proceeding. *See id.* As the Commission itself recognized in its *NPRM*, "*[a]ny new entrant* opting to offer 'cable service' as a 'cable operator' *becomes subject to the requirements of Title VI*." *NPRM* ¶ 2 (quoting 47 U.S.C. § 542(5)-(6)) (emphasis added). While Verizon may think it "bad policy" to subject a new entrant into the video services market that – like Verizon – has been historically subject to Title II common carrier regulation to Title VI regulation as well, this conclusion is one that is entirely self-evident in view of the text, structure, purpose and legislative history of the Communications Act. It is, in short, a conclusion that Congress undoubtedly intended in order to advance the express policy goal of regulatory parity – *i.e.*, subjecting all those who provide cable services as cable operators to the same regulatory burdens. To stop Verizon (and other likeminded new entrants) from seeking to persuade local franching authorities to relinquish authority over significant local public health, safety and welfare matters, the Commission must nevertheless strongly reaffirm this conclusion in this proceeding.

1. Regulation under Title VI is founded upon Congress's definition of the term "cable system" in Section 622 of the Communications Act. As the Supreme Court has explained, "the definition of 'cable system' . . . delineates the bounds of the regulatory field." *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 309-310 (1993); *see also, e.g., Liberty Cable Co. v. City of New York*, 60 F.3d 961, 963 (2d Cir. 1995) (holding if a communications system "fall[s] within the definition of a 'cable system,' " it is "subject to all the requirements that [Title

VI] imposes on cable operators."). And its definition of this critical term makes clear that, when used to provide video service to subscribers, common carrier facilities subject to Title II regulation are *additionally* subject to regulation under Title VI. While Congress excluded from its definition "a facility of a common carrier which is subject * * * to the provisions of Title II," that exception is conditional. 47 U.S.C. § 522(7)(C). For, "such a facility *shall be considered a cable system* * * * to the extent such facility is used in the transmission of video programming directly to subscribers." *Id.* (emphasis added). In other words, "[a] facility [is] a cable system if it [is] designed to include the provision of cable services (including video programming) along with communications services other than cable services." H.R. Rep. No. 98-934, 98th Cong., 2d sess. 44 (1984).

The statutory definition of "cable system" thus sets up a self-executing, bright line test triggering regulation of common carrier facilities under Title VI. A common carrier's facilities that are *not* used to provide "video programming directly to subscribers" do not constitute a "cable system" and – consequently – are outside the purview of Title VI. *See id.* But, conversely, a common carrier's facilities that *are* used to provide "video programming directly to subscribers" "fall within the definition of a 'cable system' " and – therefore – are "*subject to all the requirements that [Title VI] imposes on cable operators.*" *Liberty Cable Co.*, 60 F.3d at 963 (emphasis added).

2. Section 651 of the Communications Act reinforces Congress's intent to subject common carrier facilities used to provide video programming to

subscribers to Title II and Title VI regulation as expressed in the definition of "cable system." Entitled "Regulatory Treatment of Video Programming Services" and contained within a Part entitled "Video Programming Services Provided By Telephone Companies," 17 / Section 651 provides new entrants, including telecommunications common carriers, four – and only four – modes of providing video programming service. *See* 47 U.S.C. § 571(a)(1)-(3). As the Commission noted in its *NPRM*, "[t]hey can provide video programming to subscribers via radio communication, a cable system or an open video system, or they can provide transmission of video programming on a common carrier basis." *NPRM* ¶ 2 (footnotes omitted). Each of these video programming opportunities carries with it a different regulatory burden.

The full panoply of Title VI regulation is attendant on only one of the four video programming options Congress provided in lifting the longstanding ban on the provision of video services by telephone companies. If a new entrant opts to deliver video-programming services through radio communications, it falls under Title III regulation. *See* 47 U.S.C. § 571(a)(1). If a new entrant opts to transmit video programming as a common carrier, it is subject only to Title II common carrier regulation. *See id.* § 571(a)(2). If a common carrier chooses to provide video programming through an open video systems, it is subject to limited Title VI regulation. *See id.* § 571(a)(3)-(4). If a new entrant decides to provide "cable service" as a "cable operator," however, it "*shall be subject to the*

17/ *Cf. Almendarez-Torres v. United States,* 523 U.S. 224, 234 (1998) ("[T]he title of a statute and the heading of a section are tools available for the resolution of a doubt about the meaning of a statute.").

requirements of this title [i.e., Title VI]." *See id.* § 571(a)(3)(A). These are the only statutory options (and tied to distinct regulatory burdens) and none of them permit an entrant to provide cable service as a cable operator subject only to Title II common carrier regulation as Verizon would have it. And in tying a distinct regulatory burden to each of these discrete options, Congress forbade new entrants like Verizon from mixing and matching video delivery services and regulatory burdens as they may see fit.

3. While the text alone is enough to compel the conclusion that a telecommunications carrier opting to provide video services to subscribers through a cable system is subject to regulation under Title II *and* Title VI, there are other statutory clues pointing to the same conclusion. One clue is purely structural. While Congress is quite competent at attaching regulatory burdens to communications services, it is also quite adept at removing them. In Title VI of the Cable Act, Congress expressly exempted a cable operator or its affiliate "engaged in the provision of telecommunications services" from Title VI regulation, 47 U.S.C. § 541(b)(3)(A)(i)-(ii), but it did not relieve a cable company providing telecommunications service from Title II regulation. That Congress declined similarly to relieve a telecommunications carrier providing video services to subscribers through a cable system from Title VI regulation reinforces what Section 651's text says – they are not so relieved. *See United States v. Gonzales,* 520 U.S. 1, 5 (1997) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the

disparate inclusion or exclusion"). But the structure of Title VI is not the only clue that backs up the commitment in the statute's text.

Another – and important – clue is the legislative history of the Communications Act, which not only confirms that facilities used for combined cable and telephone services are subject to Title VI in addition to Title II but also highlights the policy of regulatory parity underlying this legislative judgment. With section 651 of the 1996 Telecommunications Act, Congress "specifically addressed the regulatory treatment of video programming services by telephone companies." H.R. Rep. No. 104-458, at 171-72. It concluded that, "[t]o the extent that a carrier or its affiliate provides video programming directly to subscribers through a cable system, *the carrier or its affiliate shall be deemed a cable operator providing cable service and shall be subject to the provisions of Title VI of the 1934 Act.*" S. Rep. No. 104-23, 104th Cong. 1st sess. 37 (1995) (emphasis added). "This provision," it explained, "*promotes parity by ensuring that telephone companies are regulated in the same way as other service providers.*" *Id.* (emphasis added). Accordingly, the text, structure, purpose and history of the Communications Act all confirm what the Commission has itself already concluded – "*Any new entrant* opting to offer 'cable service' as a 'cable operator' *becomes* subject to the requirements of Title VI." NPRM ¶ 2 (quoting 47 U.S.C. § 542(5)-(6)) (emphasis added).

4. Verizon's attempt to circumvent Title VI regulation is not inconsequential regulatory gamesmanship. On the one hand, Verizon's escape from Title VI regulation would rob local franchising authorities of authority over

core municipal concerns presently safeguarded by Title VI. If those authorities only retain power to regulate Verizon's "spectrum" used to provide subscriber video services, how will they regulate maintenance and control permitting, installation and operation of Verizon's physical facilities or provide for the public safety, convenience and welfare as it relates those facilities in the public rights-of-way? Moreover, without Title VI authority, how would local governments enforce technical performance and testing requirements and ensure the quality of the services delivered by Verizon? Or enforce interconnection? Or require correction of outages or other repairs within specified time periods? One Public Service Commission has indeed already rebuffed *Verizon's* attempt to evade Title VI regulation for just these sorts of reasons. *See Petition of Verizon New York Inc. for a Certification of Confirmation for its Franchise with the Village of Massapequa Park, Nassau County*, Order & Certificate of Confirmation, 05-V-1263, Slip Op. (N.Y.P.S.C. Dec 14, 2005), *available at* 2005 WL 3465509 (striking from proposed franchise any reference to exclusive regulation of mixed-use facilities under Title II because "allowing [Verizon's] FTTP network to continue to be subject only to Title II * * *, even after Verizon begins to offer cable service, would nullify significant aspects of the Public Service law" that "provide a municipality and the Commission with explicit minimum authority to regulate certain aspects of Verizon's FTTP system.").

On the other hand, even as Verizon attempts to dodge Title VI regulation as it enters the subscriber video market on the theory that its facilities are already satisfactorily regulated under Title II, it also seeks to escape regulation under Title II by migrating to IP-based services. As have many other communications providers, Verizon has "begun the evolution of our switching network to a packet [Voice over Internet Protocol (VoIP)] network." 18/ And in the docket the Commission opened to address the regulatory treatment of the packet-switched networks to which Verizon and many communications providers are moving, 19/ Verizon has maintained that VoIP communications should be considered to be unregulated information services. 20/ Thus, if Verizon is allowed to convince local franchising authorities to cede their Title VI authority, and convinces this Commission that IP-enabled services should not be regulated, its telephone services no longer will be regulated under Title II once it replaces its traditional circuit switched services with VoIP service. Accordingly, Verizon will have successfully blazed a trail to a regulatory no-mans land, in which its telecommunications facilities are not subject to state or federal regulation and no franchising authority that previously exempted Verizon from Title VI regulation will be able revisit that issue until the end of Verizon's franchise term – some many years hence.

18/ Final Transcript, Verizon Third Quarter Earnings Conference Call, Thomson StreetEvents, Oct. 28, 2004, at 11-12.

19/ *See In re IP-Enabled Services*, Notice of Proposed Rulemaking, 19 FCC Rcd 4863, 4868, ¶ 5 (2004) (proceeding "designed to seek public comment on future decisions that would start from the premise that IP-enabled services are minimally regulated.").

20/ *See Comments of the Verizon Telephone Companies, In re IP-Enabled Services*, WC Docket No. 04-36, May 28, 2004, at 3, 29-31, 63; *see also Reply Comments of the Verizon Telephone Companies, In the Matter of IP-Enabled Services*, WC Docket No. 04-36, July 14, 2004, at 3, 20, 42.

CONCLUSION

Because the delays Verizon has experienced in gaining entry to the subscriber video services market in Florida are of its own making, Commission action is unnecessary to alleviate them – self-help, not governmental relief, is Verizon's best remedy. As Advance/Newhouse Communications has witnessed, local authorities in Bright House Networks' Florida franchise areas welcome additional competition but, as stewards of the public welfare, are unwilling to reflexively cede authority over core municipal concerns in the name of video competition – even though some have ultimately done so. While Verizon would simply have them do so with less protest, it can readily speed its own entry into the market by easing the burden that its current approach places on local franchising authorities. To do so, it should agree to abide by the same basic franchise terms to which Bright House Networks has for many years. Along these same lines, it can also expedite entry by giving up its effort to unilaterally relieve itself of Title VI regulation. And the Commission should help it do so by reaffirming in this proceeding that, pursuant to Section 651 of the Communications Act, any telecommunications service provider opting to provide cable service as a cable operator is subject to Title II *and* Title VI regulation – without exception.

Respectfully submitted,

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